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

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This is a Key-Numbered Volume

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OF THE

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[1] Appointment confirmed July 1, 1919.

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[2] Died May 8, 1919.
[3] Appointed July 22, 1919, to succeed Joseph T. Johnson.
[4] Resigned August, 1919.
[5] Appointed August 5, 1919.
[6] Retired pursuant to the statute.

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CASES REPORTED

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

KEITH LUMBER CO. v. HOUSTON OIL CO. OF TEXAS et al.

(Circuit Court of Appeals, Fifth Circuit. April 2, 1919.)

No. 3220.

1. RECEIVERS ⟸204—RECEIVERSHIP SUIT—DISCHARGE—ANCILLARY SUIT.
   Decree discharging receivers of lumber company and an oil company, and turning their properties over to the companies under recited terms, did not destroy the jurisdiction of the court, which had previously attached, over an ancillary suit by the receiver of the oil company against a second lumber company, which had been made a party to the receivership suit by an amended bill.
2. RECEIVERS ⟸178—ACTIONS—PARTIES—SUIT FOR TIMBER.
   Lumber company *held* not a necessary party to suit ancillary to receivership proceedings by receiver of oil company against a second lumber company for the timber on certain land as to which the first lumber company had a stumpage contract, which did not place ownership of the timber in it.
3. APPEAL AND ERROR ⟸684(4)—REVIEW—MOTION TO DISMISS—ABSENCE OF EVIDENCE.
   Where testimony, on which the action of the District Judge in denying motion to dismiss suit on ground its subject-matter had been destroyed was based, is not in the record, the Circuit Court of Appeals cannot determine that the action taken was erroneous.
4. ACKNOWLEDGMENT ⟸52—SIGNING AND DELIVERY—INFERENCE FROM ACKNOWLEDGMENT.
   The acknowledgment of a deed, as recited in the record, carries with it the necessary inference of signing, and delivery also may be inferred from acknowledgment, though it is not a necessary inference.
5. DEEDS ⟸208(1)—DELIVERY—SUFFICIENCY OF EVIDENCE.
   In suit by a receiver for an oil company and a lumber company against another lumber company for the timber on certain lands, evidence consisting of the fact of payment, of the signing of the deed, of the fact of acknowledgment, and the duty and obligation under which the grantor was at the time to hold the deed for the plaintiff lumber company, *held* sufficient to support finding of delivery.
6. ESTOPPEL ⟸37—AFTER-ACQUIRED TITLE.
   A deed using the words "grant, sell, and convey," not "quitclaim," and conveying property by specific description, not merely the "interest" owned by the grantor, was effective to pass an after-acquired title.

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7. PROPERTY ⊂⊃9—TITLE—SUFFICIENCY OF EVIDENCE.
In suit by receiver of an oil company and a lumber company against another lumber company for the timber on certain lands, evidence *held* sufficient to authorize finding that title at the time of institution of the suit was in plaintiff lumber company and the oil company.

8. ESTOPPEL ⊂⊃3(1)—EVIDENCE ⊂⊃272—ESTOPPEL BY RECORD—DECLARATIONS AGAINST INTEREST.
Excerpts from a pleading introduced by defendant in an equity suit are to be taken as evidence of the efforts of the several parties to procure advantage over their adversaries, rather than as matter in estoppel, or as declarations against interest, to be taken advantage of by one not a party to the suit.

9. APPEAL AND ERROR ⊂⊃1051(1)—HARMLESS ERROR—EVIDENCE.
The erroneous introduction in evidence of a decree was harmless, where there was ample evidence outside of the record to show the fact of title for which the decree was used.

10. VENDOR AND PURCHASER ⊂⊃242—DEEDS—REGISTRATION—PROTECTED CLASS—BURDEN OF PROOF.
In view of Rev. St. Tex. 1911, art. 6824, requiring registration, but declaring a deed valid, though unrecorded, as to all subsequent purchasers with notice or without valuable consideration, so making it void only as to purchasers for value without notice, a person undertaking to establish the invalidity of a deed has the burden to prove he is within the protected class.

11. VENDOR AND PURCHASER ⊂⊃244—INNOCENT PURCHASER FOR VALUE—SUFFICIENCY OF EVIDENCE.
In suit by receiver of an oil company and a lumber company for the timber on certain land, evidence *held* to justify finding that defendant lumber company was not an innocent purchaser for value.

12. LIS PENDENS ⊂⊃24(1)—RECEIVERSHIP SUITS—INVENTORY AND POSSESSION BY RECEIVERS.
Where the timber on certain land had been inventoried as part of the estates of a lumber company and an oil company, involving which receivership suits were pending, and the timber was in the custody of the receiver, it could not be purchased from third person without notice on account of the lis pendens.

13. APPEAL AND ERROR ⊂⊃931(6)—PRESUMPTIONS FAVORING COURT BELOW—IMPROPER EVIDENCE.
Where the trial was by the court, it will be assumed that no improper evidence was considered.

14. COVENANTS ⊂⊃2—WARRANTY OF TITLE NOT OWNED—RIGHT OF GRANTEE.
There is nothing to prevent a person from warranting title to land that he neither owns nor claims, and the grantee had a right to stand on the terms of his deed.

Appeal from the District Court of the United States for the Southern District of Texas; Walter T. Burns, Judge.

Suit by the Houston Oil Company of Texas and its receiver against the Keith Lumber Company and others. From judgment for plaintiffs, defendant company appeals. Judgment modified, and, as modified, affirmed.

C. L. Carter, of Houston, Tex. (Geo. D. Anderson, of Beaumont, Tex., W. A. Parish, of Houston, Tex., Anderson & Masterson, of Beaumont, Tex., and Baker, Botts, Parker & Garwood, of Houston, Tex., on the brief), for appellant.

H. O. Head, of Sherman, Tex., and T. M. Kennerly and E. E. Townes, both of Houston, Tex. (Fred L. Williams and Kennerly,

Williams, Lee & Hill, all of Houston, Tex., and Head, Dillard, Smith, Maxey & Head, of Sherman, Tex., on the brief), for appellees.

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

BATTS, Circuit Judge. Suit was by the Houston Oil Company of Texas and its receiver against Keith Lumber Company and others, for the timber on section 102, certificate 120, T. & N. O. Ry. Co., in Hardin and Jefferson counties, Tex. C. M. Votaw, patentee, is the common source of the respective claims to title. After the timber deed from Votaw (acknowledged in 1902), under which complainants claim, but prior to its registration in 1906, Votaw made a conveyance of the land in 1905, under which Keith Lumber Company asserts title, questioning the execution and validity of the prior deed, and the acquisition of rights under it by complainant, and claiming to be an innocent purchaser for value, without notice.

Matters for consideration are:

I.—Jurisdiction.
II.—Parties.
III.—Dismissal.
IV.—Title of Houston Oil Company.
(1) Deed from Votaw to Kirby Lumber Company.
(2) Sale before acquisition.
(3) Validity of deed.
(4) Passage of title from Kirby Lumber Company to Houston Oil Company.
(a) Contract with Kirby.
(b) Trust relation of Kirby Lumber Company.
(c) Pleadings and decree in equity No. 54.
V.—Title of Keith Lumber Company.
VI.—Defendant as innocent purchaser for value.
(1) Burden of proof.
(2) The evidence.
(a) Testimony of Kirby and Keith.
(b) Contract of Keith Lumber Company with J. N. Votaw and Turner.
(c) Lis pendens.
VII.—Errors assigned as to admission of evidence.
VIII.—Liability on warranty.
IX.—Modification of judgment.

[1] I.—*Jurisdiction.*—This suit, instituted in the Southern district of Texas, involves title to real property situate in the Eastern district of that state. None of the defendants resides in the Southern district. On January 28, 1904, the Maryland Trust Company filed suit in the Southern district against the Kirby Lumber Company and the Houston Oil Company of Texas for debt and foreclosure, and prayed for appointment of receivers for the companies. On March 17, 1904, permanent receivers were appointed for each company. This instant suit is ancillary to the main receivership case. The statement of appellant that it was not made a party until after the prop-

erty had been withdrawn from the custody of the court and ordered returned to its owners is not sustained by the record. It appears that the Keith Lumber Company was impleaded by an amended bill, filed on December 29, 1908. On July 28, 1908, a decree was entered fixing the rights of the parties in the receivership suit, but the receivers were not discharged and the properties were not redelivered. On the 15th of April, 1909, an order was made for the delivery of the property. The decree specifically provided that the Houston Oil Company should receive the property subject to all claims, etc., then existing under the decree of July 28, 1908, or which might thereafter be made against the receiver, arising out of the receivership, and the court retained jurisdiction over all of the properties and the parties for the purpose of determining the demands, etc., against the receivers arising out of the receivership. It was also provided that nothing in the decree should affect the status of any pending or undetermined litigation, but that such litigation might continue to final determination in the name of the receiver. That the court had jurisdiction at the time of the institution of the suit is determined by Gordon v. Dillingham, 158 Fed. 1019, 86 C. C. A. 672, White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67, and Jenkins v. Dillingham, 220 U. S. 620, 31 Sup. Ct. 723, 55 L. Ed. 613. The decree discharging the receivers and turning the property over to the owners under the recited terms must be held not to have destroyed the jurisdiction which theretofore attached.

[2] II.—*Parties.*—Appellant contends that the Kirby Lumber Company is a necessary party. The allegation of the complaint is to the effect that, at the time of the appointment of receivers, the Oil Company owned and was in possession of the property involved, and that it passed into the control of the receivers. It is also alleged that there is growing and standing yellow pine timber, covered by a "stumpage contract" between the Houston Oil Company and the Kirby Lumber Company, under which the latter has the right to cut the timber growing upon the land and convert it into lumber, etc. Such an allegation is not equivalent to an allegation of ownership, nor does the stumpage contract referred to place the ownership of the timber in the Kirby Lumber Company. The contract gives the Kirby Lumber Company the right to cut 8,000,000,000 feet of timber from the very extensive land holdings of the Oil Company, upon payment of the price and compliance with other conditions set forth. At most the contract is an executory one, under the terms of which the Lumber Company has the right to acquire timber, but the contract may be fulfilled without taking timber from this land. The right with reference to the land is not such as to make the Lumber Company a necessary party.

[3] III.—*Dismissal.*—The appellant contends that the subject-matter of the suit has been destroyed, and that therefore the suit should be dismissed. This motion was tried by the District Judge and determined adversely to appellant. The testimony upon which this action was based is not in the record, and it is impossible to determine that the action taken was erroneous. The record shows that timber has been cut, but does not show that all of it has been removed, nor

that it will be impossible to remove additional timber during the period given by the deed.

[4, 5] IV.—*Title of Houston Oil Company.*—(1) While it is contended that plaintiff did not meet the requirement of proof of the deed from Votaw to Kirby Lumber Company, there seems to be no serious contention that Votaw did not sign the instrument offered as a deed. It was acknowledged, according to the recitations of the record, on January 9, 1902. The acknowledgment carries with it the necessary inference of the signing. The testimony of Kirby would be inconsistent with any other hypothesis. Delivery may also be inferred from acknowledgment, though it is not a necessary inference. Certain statements in the pleadings of the parties in the receivership cases have been introduced to negative delivery. These, however, were evidently not regarded by the trial judge as of sufficient weight to destroy the force of the evidence of Mr. Kirby, who, according to the record, was familiar with the formation of the corporations and with the acquisition of all of the land claimed by the Houston Oil Company. From his testimony it appears that Votaw, the grantor in the deed, was at the time of the acknowledgment the land agent of the Kirby Lumber Company, and entitled to possession, and in actual custody, of the deeds and other muniments of title of the Lumber Company. The circumstances were such that physical delivery from Votaw to another person would not have been necessary. The testimony is to the further effect that Votaw received pay for the land from the Houston Oil Company. Considering the fact of payment, the fact of the signing of the deed, the fact of the acknowledgment, and the duty and obligation under which he was at the time to hold the deed for the Kirby Lumber Company, the evidence is ample to support a finding of the necessary delivery.

[6] (2) Appellant insists that the deed from Votaw to the Kirby Lumber Company, not being a warranty deed, did not pass the title after acquired by Votaw when the patent was issued to him by the state. The deed cannot be regarded as merely a quitclaim. It uses the words "grant, sell, and convey," not "quitclaim." That which is conveyed is not described as the "interest" owned by Votaw. There is a specific description of the property. The deed would have been effective to pass an after-acquired title. Votaw was, in fact, not without rights in the land acquired prior to the deed. The record shows that the land was purchased from the state by J. M. Carpenter, as additional to a purchase from the state occupied as his home for the period required by the law. There is nothing in the law which prevented him from contracting with reference to his interest after purchase, and such a contract was made with Votaw prior to the execution of the deed by Votaw.

(3) The legality of the sale is also questioned upon the ground that the land was bought by Carpenter under an act which forbade sale to a corporation. The sale was made under the act of 1895 (Acts 24th Leg. c. 47) and the amendments of 1897 (Acts 25th Leg. c. 129). A prior act (General Laws of 1889, c. 93) had a provision to the effect that no sale should be made to a corporation. From the circumstance that this statute of 1889, as well as the act of 1895, was

incorporated into a revision or codification of the laws of the state, it was insisted that the act of 1889 was effective. The act of 1895 was a complete system within itself, and was very evidently intended to supersede the prior land sales acts. The proposition upon which appellant depends is adversely determined by the case of State of Texas v. Houston Oil Co. (Tex. Civ. App.) 194 S. W. 424.

[7] (4) *Passage of Title from the Kirby Lumber Company to the Houston Oil Company.*—(a and b) The formation of the Houston Oil Company and the Kirby Lumber Company was due to the activities of John H. Kirby. He and his associates, among whom was C. M. Votaw, had acquired title and inchoate and other rights to large bodies of timber lands. The Houston Oil Company was organized to pay for and take the title to these lands, and the Kirby Lumber Company was formed to mill the timber. One of the initial steps in the organization of the enterprises was a proposition by Kirby to turn over to the Houston Oil Company the lands which he owned and controlled. Included in the lands described in general terms by the proposition made were the lands of "Kirby and Votaw." Kirby testified that, among the Kirby and Votaw lands to be conveyed to the Houston Oil Company, was the timber in controversy. He further testifies that, at the time, the right of an oil corporation formed under the laws of Texas to hold timber was questioned, and it was concluded to place the legal title to this timber in the Kirby Lumber Company, to be held in trust for the Houston Oil Company. He testifies that the price of the timber was paid to Votaw by the Houston Oil Company, that Votaw was directed to make a deed to the Kirby Lumber Company, and that this was done. This testimony would, within itself, be sufficient to authorize the court to hold that title, at the time of the institution of this suit, was in complainants.

[8] (c) The pleadings in the equity cases heretofore referred to show that the Houston Oil Company, the Kirby Lumber Company, and John H. Kirby all regarded the timber in controversy as a part of the subject-matter of the contract, under the terms of which title to the lands was to be placed in the Houston Oil Company, and the right to mill the timber in the Kirby Lumber Company. The controversies of the parties were with reference to the character of payment to Kirby and associates for the lands by the Houston Oil Company, and with regard to the terms upon which the timber was to be cut and paid for by the Kirby Lumber Company. Excerpts from the pleading introduced by defendants are rather to be taken as evidence of the efforts of the several parties to the litigation to procure advantage over their respective adversaries than as matter in estoppel, or as declarations against interest, to be taken advantage of by one not a party to the suit. There was payment by the Houston Oil Company to Votaw for the timber in question; there is recognition of the fact of payment by, and ownership in, the Oil Company by the Kirby Lumber Company and John H. Kirby. The controversies between the parties in no way affected the title to the advantage of strangers to the suit.

[9] Objections were made to the introduction of the decree of July 28, 1908, in equity causes 54, 71, 75, and 84, consolidated, in which title to the timber in controversy is decreed in Houston Oil Company. The Keith Lumber Company was not a party to the suit and is not bound by the decree. The decree was subsequent to the institution of this suit, but prior to the filing of the amended bill by which the Keith Lumber Company was made a party. The Houston Oil Company, however, in any event, does not have to depend on the decree for title. Its rights existed at the time the main suit was instituted. In so far as this title is concerned, the decree merely declares rights which had been theretofore acquired.

If the introduction of the decree was erroneous, the error was of a character not to require reversal, because there is ample evidence outside of the decree to show that whatever interest in the timber C. M. Votaw owned passed before the institution of this suit, either directly to the Houston Oil Company, or from the patentee to the Kirby Lumber Company, and thence to the Houston Oil Company.

V.—*Title of the Keith Lumber Company.*—After the date of the deed to the Kirby Lumber Company, Votaw, on October 16, 1902, conveyed the land to John J. Gannon. Subsequently Gannon conveyed to J. R. Davenport all but 67 acres. On May 25, 1903, Gannon conveyed to William Weiss the 67 acres excepted from the conveyance to Davenport. Gannon also conveyed on November 14, 1905, the 67 acres to J. R. Davenport. On the same day Wm. Weiss and T. H. Bass conveyed the timber on the 67 acres to Davenport, and Votaw executed a deed of confirmation to Davenport to all of the land and timber on the entire section. Contemporaneously, Davenport conveyed to W. C. Tyrrell, who purchased for the Keith Lumber Company 312 acres of section 102 and the timber on the 67 acres and other land.

[10] VI.—*Defendant as an Innocent Purchaser for Value.*—(1) *Burden of Proof.*—Defendant insists that the burden of proof is upon complainants. The validity of the deed is not dependent upon its registration. Registration is authorized for the protection of the purchaser, and required for the protection of other persons against the grantor. One buying land from the owner of land acquires ownership thereof. The statute of Texas (article 6824, R. S. 1911) requiring registration declares a deed valid, though unrecorded, as to all subsequent purchasers with notice thereof or without valuable consideration. It is only as to purchasers for valuable consideration without notice that the unrecorded deed is void. The person undertaking to establish the invalidity of the deed has the burden of proving that he is within the protected class. Nothing in this case suggests an exception to, or modification of, the general rule.

[11] (2) *The Evidence.*—(a) *Testimony of Kirby and Keith.*—The testimony of John H. Kirby is unequivocal to the effect that, prior to the purchase by the Keith Lumber Company, he had told Keith, the president of the Lumber Company, that title was in the Houston Oil Company, and that he especially warned Keith against J. R. Davenport, who at the time held a claim under the second deed from Votaw. These statements are denied by Keith, but he acknowledges

that Kirby told him that he (Kirby) claimed no right under a contract that will be hereinafter referred tc between J. N. Votaw and Turner, on the one side, and the Keith Lumber Company, on the other, but that he did not know what would be done by the Houston Oil Company, which had acquired the right of Keith Lumber Company. It is apparent that the District Judge accepted the statements of Mr. Kirby. No sufficient reason appears why this finding should be disturbed.

Keith knew of the relation of Kirby to the Houston Oil Company and of Kirby's knowledge of its affairs. He made no further investigation. The receivership was pending in Houston, where the conversation was had. The receivers and the papers in the case were accessible. If Kirby's statement be accepted, Keith, notwithstanding an unequivocal statement that the ownership was not in Davenport, without any further investigation, paid Davenport for the land.

(b) On August 30, 1899, J. N. Votaw and W. H. Turner executed to appellant a contract by which they agreed to sell to appellant all the merchantable timber on a large body of land in Jefferson and Hardin counties, Tex., including section 102 in controversy. This contract was to run for 20 years. There is nothing in the record to indicate that Turner and Votaw at the time owned any interest in the lands. The terms of the contract, and other evidence, suggest that it was the expectation of the contractors to thereafter acquire the lands. The Keith Lumber Company was to pay for the timber as cut, except that an initial payment was made, which was to be used by the contractors as working capital. Turner transferred his interest in this contract to John H. Kirby. Upon the formation of the Kirby Lumber Company, this contract was by the Keith Lumber Company transferred to the Kirby Lumber Company, and passed to the Houston Oil Company. The contract cannot be said to pass any title to the Houston Oil Company, nor is it clear that it estops the Keith Lumber Company from acquiring title to any of the land or timber covered by its terms. It may be that it could have been considered in passing upon the question of notice to the Lumber Company, but it could not be effective to disturb the court's finding upon that issue.

[12] (c) *Lis Pendens.*—At the time of the purchase of the land by the Keith Lumber Company the receivership suits were pending. There is evidence that would sustain a finding that the timber in controversy had been inventoried as a part of the estate, and that it was in the custody of the receivers, precluding purchase without notice.

[13] VII.—*Errors in Admitting Evidence.*—A number of errors are assigned as to the introduction of evidence. Most of these are disposed of by the foregoing discussion. It is believed that, in some instances, abstract errors have been committed, but the trial was before the court, and it is assumed that no improper evidence has been considered. Every finding essential to the judgment is supported by ample evidence, properly admitted. Each assignment has received careful consideration, but no reversible error is disclosed.

[14] VIII.—*Liability on Warranty.*—The deed from William Weiss

and T. H. Bass to J. R. Davenport to the 67 acres is one of general warranty. By the terms of the deed, both of the grantors became warrantors of title of all the land; and the judgment, which limits the liability of the executors of Weiss to the interest claimed by Weiss, is erroneous. There is nothing to prevent a person from warranting title to land that he neither owns nor claims, and that is what was done by Weiss under the terms of the deed. As between the grantors, an equitable adjustment may be had; but the grantee has a right to stand on the terms of his deed, no reason for the application of a different principle appearing.

IX.—*Modification of Judgment.*—The judgment perpetually enjoins the Keith Lumber Company from going upon or taking timber from the land. The deed of C. M. Votaw to the Kirby Lumber Company limits the right of the grantee to take the timber to a period of 20 years from January 9, 1902. All rights of Votaw in 312 acres except that specifically deeded to the Kirby Lumber Company, subsequently passed to the Keith Lumber Company. The judgment should be so modified as to enjoin the Keith Lumber Company from taking timber until January 9, 1922.

The judgment is modified to conform to the foregoing holdings, and, so modified, is affirmed.

STARK et al. v. STARK BROS. NURSERIES & ORCHARDS CO.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1919. Rehearing Denied June 6, 1919.)

No. 5181.

1. TRADE-MARKS AND TRADE-NAMES ⟸59(4)—INFRINGEMENT—COLORABLE IMITATION.

   Plaintiff's trade-mark, consisting of the word "Stark" above the word "Trees," the former in letters successively decreasing in size, the latter in letters successively increasing in size, *held* infringed by defendants' device, different in shape, and bearing a number of words, but having the word "Stark" in the center, in the largest letters, in white on the dark background of a tree; exact similitude not being necessary, but it being enough that an ordinary purchaser is likely to be deceived when they are not placed side by side.

2. TRADE-MARKS AND TRADE-NAMES ⟸59(4)—INFRINGEMENT—USE OF SURNAME.

   Right of one to use his surname as a mark, without infringing a registered trade-mark, is subject to the limitation that it be not used in a manner tending to mislead, and that it be clearly made to appear that the articles sold therewith are his, and not those of the registrant.

3. COURTS ⟸292—FEDERAL COURTS—JURISDICTION—TRADE-MARKS—UNFAIR COMPETITION.

   A federal court has no jurisdiction of suit for unfair competition alone, in the absence of diversity of citizenship, and so in a suit, jurisdiction of which depends solely on it being for infringement of registered trade-mark, recovery can be had for only such unfair competition as is a part of the same transaction as the infringement; that is, that subsequent to notice of infringement, necessary under Trade-Mark Act, § 28 (Comp. St. § 9514), for recovery for infringement, where notice of registration is not given on the mark.

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

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit by the Stark Bros. Nurseries & Orchards Company against William P. Stark and others. Decree for plaintiff (248 Fed. 154), and defendants appeal. Modified.

The appellee instituted this action to enjoin the appellants from infringing its registered trade-mark and from unfair competition, with the usual prayer for damages and an accounting of profits. The appellee is a corporation existing under the laws of the state of Missouri, and the appellants, defendants in the court below, are citizens of the same state; the jurisdiction of the court having been invoked upon the sole ground of the registration of the trade-mark under the act of Congress of February 20, 1905, and the amendments thereto (Comp. St. §§ 9485, 9487–9511, 9513–9516).

The complaint charges that the plaintiff now is, and has been since the year 1816, including its predecessors, James Stark, William Stark, Stark & Barnett, Stark & Co., and Stark Bros. Nurseries Company, engaged in the business of propagating, buying, and selling fruit trees and other nursery stock, and ever since 1893 marked them with the words "Stark Trees" as its trade-mark, affixing it to boxes or packages containing its product; that it has incurred great expense in propagating trees and advertising them as "Stark Trees," and that this trade-mark has become widely known in this and many foreign countries, as indicating a superior grade of trees propagated and sold by the plaintiff and its predecessors: that its fruit trees are invariably bought and sold and commonly designated as "Stark Trees"; that on January 9, 1913, it filed in the United States Patent Office an application for registration of its said trade-mark "Stark Trees" in accordance with the act of Congress of February 20, 1905, and its amendments, and on June 24, 1913, it was duly registered in the United States Patent Office as registration No. 92,282; that it claims the exclusive right to the trade-mark "Stark Trees," or the word "Stark," on fruit and ornamental trees, the trade-name which has always been claimed by its predecessors, they being the first to adopt this mark for nursery stock; that in the spring of 1913 they found sales of fruit trees, labeled and marked with the words "William P. Stark Nurseries," said words being printed across the representation of a short, bushy tree, so arranged that the word "Stark" appeared in large prominent letters across the picture of the tree, and the other words in comparatively smaller type, which, upon investigation, it found was marked and sold by the defendants; that defendants well knew of the exclusive use claimed by plaintiff of the trade-mark "Stark Trees," or any simulation thereof, and that they used the trade-mark "Stark," in conjunction with the representation of a tree, with the intent to defraud and deceive, and have caused their stock to be bought as and for the nursery stock of the plaintiff, much to plaintiff's loss and injury to the public, and the infringement of plaintiff's registered trade-mark, and of its trade-mark rights under the law; that defendants were duly notified of their infringement, but continued to do so since then; that William P. Stark, one of the defendants, was for a number of years an employé, officer, and stockholder of plaintiff, during which time he attempted to and did familiarize his personal name to readers of the plaintiff's general advertising; that defendants in 1912 established a nursery business, with the principal office at Louisiana, Mo., the home of plaintiff and its predecessors, causing a confusion of mails, which ceased when, by order of the Postmaster General, all mail addressed to the name of "Stark" should be delivered to the plaintiff, whereupon the defendants moved their nurseries to Chester, Mo., and caused the name of the town and post office of Chester to be changed to "Stark City," in face of the fact that for years prior thereto the plaintiff had extensively advertised its addresses at "Stark," "Starkdale," and "Stark Station," Mo.; that all the offices of the defendants are at Neosho, Mo., about 10 miles from Stark City, while all their advertising prominently bears the address "Stark City," causing much annoyance and confusion to the plaintiff; that defendants in their extensive advertising dwelt upon the fact that the name of "Stark" had for nearly a century been associated with the nursery business of America,

and that for the last quarter of a century the defendant, William P. Stark, has made the name a sort of a trade-mark in big things in nursery work, and that their nursery at Stark City would continue to broaden the "Stark" nursery business; that the business of plaintiff and its reputation and the name of "Stark Trees" had been built up at great labor and expense, employing 5,000 salesmen.

The defendants in their answer deny most of the material allegations, and state that the first notification of the claim of the plaintiff to the trade-mark was in a letter received from it, dated August 26, 1916, many years after they had used the name "Stark" in connection with their business, and deny that they had any knowledge of appellee's claim to the exclusive right to the use of the trade-mark "Stark Trees" until notified by that letter. They deny any intent to defraud, or that appellee has suffered any loss by reason of their acts. They deny that the exclusive right to the trade-mark "Stark Trees," or the word "Stark," on fruit and ornamental trees, has been and is now claimed by plaintiff and its predecessors, or that plaintiff and its predecessors were the first to adopt and use this trade-mark for nursery stock, and, if it did, they had no knowledge of it until they received the letter of August 26, 1916. They deny that, at the time the name of Chester was changed to Stark City, plaintiff was using the address "Stark," "Starkdale," or "Stark Station," Mo.: that for years prior thereto it had not used any of these names, nor had there ever been a post office named "Stark," "Starkdale," or "Stark Station," Mo. They admit that they had advertised the location of their nurseries at Stark City, where they are in fact located, and their offices at Neosho, Mo., and that the defendant William P. Stark had for over a quarter of a century been associated with plaintiff's nursery work. They claim that there can be no confusion, as all their sales are made by catalogues and advertisements, and none by traveling salesmen, while the plaintiff did most, if not all, of its business through traveling salesmen, and emphasized in its advertisements that it was located in Louisiana, Mo., while defendants in all their advertisements and catalogues emphasizzed the location of their nurseries at Stark City; that in all their advertisements, letters, and catalogues they had taken precautions to refrain from disparaging the plaintiff or its products, and that their competition had been fair and open.

Upon final hearing there was a decree in favor of the plaintiff, enjoining defendants from the direct or indirect use of the infringing label, or any colorable imitation of plaintiff's trade-mark, in suit, and from putting the work "Stark" prominently at the top of its label, or elsewhere in connection with the business of producing, advertising, and selling nursery stock, in such manner as will not unmistakably differentiate their goods from those of the complainant, and from using the name or address of "Stark City" upon their labels or tags attached to nursery stock, or packages containing same, or from using the address "Stark City" in advertising their business. The decree also directed a reference to a special master to determine all gains and profits which the defendants have derived by infringing on plaintiff's trademark, beginning with the 11th day of March, 1914, and that the plaintiff also recover from the defendants all damages which it has sustained by reason of the defendants' infringement and unfair competition from and after the 26th day of August, 1916, on which date plaintiff gave notice to defendant of the registration of its said trade-mark. 248 Fed. 154. To reverse this decree, appellants are prosecuting this appeal.

Xenophon P. Wilfley, of St. Louis, Mo., and Eugene Pearson, of Louisiana, Mo. (O. L. Cravens, of Neosho, Mo., Ras Pearson, of Louisiana, Mo., and Wilfley, McIntyre, Nardin & Nelson, of St. Louis, Mo., on the brief), for appellants.

Andrew B. Remick, of St. Louis, Mo. (John W. Matson, of Louisiana, Mo., on the brief), for appellee.

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

TRIEBER, District Judge (after stating the facts as above). [1] It is undisputed that the appellee and its predecessors have used the name "Stark" in their nursery business for a century and that its products have an established reputation for quality. On June 24, 1913, it was granted a registration of the trade-mark "Stark Trees" under the 10-year clause of section 5 of the Trade-Mark Act of Congress of February 20, 1905 (33 Stat. 725, c. 592), as amended by the Act of February 18, 1911 (36 Stat. 918, c. 113; section 9490, U. S. Comp. Stat. 1916). That trade-mark consisted of the two words "Stark Trees," as shown by this photographic copy:

The appellants' device, charged as the infringement, is on a narrow tag of wood, as shown by this photographic copy:

The word "Stark" is in white letters, across the dark bushy tree; the other words are in black, on white ground. It will be noticed that the word "Stark," across the bushy tree, is in larger letters than any of the other words, which are in smaller type. We concur in the finding of the learned trial judge that "in this manner the word "Stark" is given special emphasis, and from its position the term 'Stark Trees' is vividly suggested."

To justify a finding of infringement of a trade-mark, it is not necessary that the similitude should be exact. It is sufficient if, taking into account resemblance and conditions, the former are so marked that an ordinary purchaser is likely to be deceived thereby. McLean v. Fleming, 96 U. S. 245, 251, 24 L. Ed. 828; Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 24, 34, 104 C. C. A. 464, 474; McDonald & Morrison Mfg. Co. v. Mueller Mfg. Co., 183 Fed. 972, 974, 106 C. C. A. 312; Heileman Brewing Co. v. Independent Brewing Co., 191 Fed. 489, 494, 112 C. C. A. 133, 138; De Voe Snuff Co. v. Wolff, 206 Fed. 420, 423, 124 C. C. A. 302, 305; O. & W. Thum Co. v. Dickinson, 245 Fed. 609, 614, 158 C. C. A. 37, 42. In Thaddeus Davids Co. v. Davids, 233 U. S. 461, 469, 34 Sup. Ct. 648, 651 (58 L. Ed. 1046, Ann. Cas. 1915B, 322), it was claimed that "the protection is limited to its use when standing alone * * * and that there can be no infringement unless it is used in this precise manner." The court, in denying this contention, said:

"The statutory right cannot be so narrowly limited. Not only exact reproduction, but a 'colorable imitation,' is within the statute; otherwise, the trademark would be of little avail, as by shrewd simulation it could be appropriated with impunity."

In McDonald & Morrison Mfg. Co. v. Mueller, supra, this court held:

"The test is not whether, when goods are placed side by side, a difference can be recognized in the labels or marks; but the test is, when such goods are not placed side by side, would an ordinarily prudent purchaser be liable to purchase the one, believing that he was purchasing the other."

See, also, Gordon's Dry Gin Co. v. Eddy & Fisher Co. (D. C.) 246 Fed. 954.

There can be no doubt that an ordinarily prudent person, knowing of the reputation of the "Stark Trees," which for many years have been known as superior trees, would easily be induced to purchase the trees of appellants, in view of the advertisements, the statements in their catalogues, and their trade-mark, in the belief that they came from the orchard nurseries of appellee. The catalogues and advertisements of appellants, which do not appear in the printed record, but were by order of the trial court transmitted to this court as a part of the record, and have been carefully examined, indiscriminately describe their trees and nurseries as "Stark Nurseries," "Stark Brothers," "Stark Trees," and use the word "Stark" in connection with their nurseries and alleged location. The representation that the business is located at "Stark City," although they admit that only their nurseries are at Stark City, while the business itself is conducted at Neosho, the change of the name of the place where their nurseries are located from Chester to Stark City, the attempt to establish offices, at first, at Louisiana, Mo., all tend to impress one that there was an intention to add to the confusion and mislead purchasers of trees into the belief that their trees are those of appellee.

[2] Nor does it matter that appellants were using their own surnames as their trade-mark. While it is true that a person has a right to use his surname as a mark, without being guilty of an infringement, there is a limitation to that right. As stated in the Davids Case, "provided that the name was not used in a manner tending to mislead, and it was clearly made to appear that the goods were his own, and not those of the registrant." The decree complained of only enjoined appellants from using labels with their name "Stark" in such a manner "as will not unmistakably differentiate their goods and advertisements from those of complainant." There is nothing in Stix, Baer & Fuller Dry Goods Co. v. American Piano Co., 211 Fed. 271, 127 C. C. A. 639, which in any wise conflicts with this. Although that was not a registered trade-mark case, it was held:

"If, however, the name has previously become well-known in trade, the second comer uses it subject to three important restrictions: (1) He may not affirmatively do anything to cause the public to believe that his article is made by the first manufacturer. (2) He must exercise reasonable care to prevent the public from so believing. (3) He must exercise reasonable care to prevent the public from believing that he is the successor in business of the first manufacturer."

There is nothing in the decree to prevent appellants from using their surnames, nor from publishing in their catalogues and advertisements the training and knowledge of appellant William P. Stark in the nursery business. But the language employed in this part of the decree is in such general terms that appellants may be at a loss how to comply with the terms of the decree in every respect, and thus

may inadvertently violate the injunction. To avoid this we deem it best, following the rule in the Hall Safe Case, 208 U. S. 560, 28 Sup. Ct. 350, 52 L. Ed. 616, and the Knabe Piano Case, 211 Fed. 271, 127 C. C. A. 639, to indicate in this opinion the decree to be entered on this branch of the case.

Nor is it material that appellants do not use appellee's trade-mark in its entirety, if what they do use is misleading and likely to cause confusion, whether the goods offered under this trade-mark are or are not those of the registrant. In Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 33, 21 Sup. Ct. 7, 12 (45 L. Ed. 60), it was held:

"It is not necessary, to constitute an infringement, that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article."

In Ammon & Person v. Narragansett Dairy Co. (D. C.) 252 Fed. 276, 278, the registered trade-mark of plaintiff was "Queen of the West," and that of the defendant "Queen." The court in granting an injunction against the defendant, from using the trade-mark "Queen" said:

"The unnecessary adoption of a part of a plaintiff's trade-mark—a part so substantial as to have become a trade-name or nickname for the goods—is generally regarded as an infringement. The use by a defendant of a trade-mark identical with the name which has been derived from a plaintiff's trade-mark proper, and has become sufficiently descriptive of plaintiff's goods, is the adoption of a mark which will cause its goods to bear the same name in the market. Neither subtractions from nor additions to a trade-mark proper will avoid infringement, when such imitation as is likely to lead to confusion still remains despite the changes"

—and authorities cited. The same principle was announced by this court in Rossman v. Garnier, 211 Fed. 401, 406, 128 C. C. A. 73, 78.

The use of "Stark City" as their address, when their business is conducted at another city, Neosho, Mo., is misleading, and, owing to the name, likely to cause confusion. This is true, not merely owing to the name "Stark" being used, but also for the reason that appellee and its predecessors have frequently advertised their business as at "Stark," "Starkdale," and "Stark Station," Mo., having at some time maintained nurseries at some of these places.

The court committed no error in granting the injunction, but, in order to avoid any misapprehension, there should be added to that part of the decree granting the perpetual injunction the following words:

"That the defendants may use their surnames in circulars, catalogues, or advertisements, but they must be accompanied by information that they are not of the original William Stark Nurseries, nor in any wise connected with the Stark Bros. Nurseries & Orchards Company, or any of its predecessors under whatsoever name their business was conducted, and that their trees are not the product of any of these concerns, nor their successors. It is further ordered and decreed that, for the purpose of distinguishing defendants' trees from those of the complainant, the defendants shall insert in their circulars, catalogues, and advertisements a notice substantially as follows, and in form as conspicuous as the body of such circulars, catalogues, or advertisements:

"Notice.

"The 'Stark Trees' have been the product of the nursery business of the Stark family since the year 1816, and this nursery is still carried on by successors of the original Stark family at Louisiana, Missouri; that William P. Stark, is a member of that family and was connected for over twenty-five years with, and learned the business from, successors of the original Starks; that our business is conducted at Neosho, Missouri, and has no connection whatever with the nursery business of the Stark Bros. Nurseries & Orchards Company, at Louisiana, Missouri.".

[3] But we are of the opinion that there was error in decreeing that appellee recover all gains and profits which appellants have derived or received by reason of the infringement of appellee's trade-mark, beginning March 11, 1914.

Section 28 of the Trade-Mark Act of February 20, 1905, 33 Stat. 730 (section 9514, U. S. Comp. St. 1916), after prescribing that notice of the registration of the mark be given by affixing on the mark or label the words "Reg. U. S. Pat. Off." which was not done by appellee, provides:

"And in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice."

As no notice was given by appellee to appellants of infringement of the registered trade-mark, although the words required by the statute were not printed on its trade-mark labels, until a few days before the institution of this action, no damages under this act can be recovered for an infringement of the registered trade-mark before that time in this action. The trial court in its decree limited the damages for infringing the trade-mark to that time, but as to the gains and profits held that the appellants are chargeable for unfair competition from March 11, 1914, when appellee had first complained that appellants' advertising matter constituted unfair competition.

As the jurisdiction of the court below depended solely on the fact that there was a federal question by reason of the registration of the trade-mark under the act of Congress, there being no diversity of citizenship, there can be no liability on the charge of unfair competition prior to the notice under the Trade-Mark Act. To entitle one to recover in such a case, the unfair competition must be a part of the same transaction, to wit, a violation of the act of Congress, and liability thereunder. It must be an aggravation of the infringement of the registered trade-mark, to give the court jurisdiction to award damages. A. Leschen Co. v. Bascom Co., 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710; Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446, 460, 31 Sup. Ct. 456, 55 L. Ed. 536; T. B. Wood's Sons Co. v. Valley Iron Works (C. C.) 166 Fed. 770; Ross v. H. S. Geer Co. (C. C.) 188 Fed. 731, 734; Electric Boat Co. v. Lake Torpedo Boat Co. (D. C.) 215 Fed. 377; Planten v. Gedney, 224 Fed. 382, 386, 140 C. C. A. 68, 72; U. S. Bolt Co. v. Kroncke Hardware Co., 234 Fed. 868, 148 C. C. A. 466; Mallinson v. Ryan (D. C.) 242 Fed. 951.

In the case at bar the unfair competition only became a part of the same transaction as the infringement of the registered trade-mark, after the notice had been given, as appellee's trade-mark labels had not the words required by the act of Congress on them: "Reg. U. S. Patent Office." Had no notice been given by appellee, it could not have recovered any damages. This was expressly decided by this court in Rossmann v. Garnier, 211 Fed. 401, 407, 128 C. C. A. 73, 79.

None of the authorities relied on by counsel for appellee is in point. In Jacoway v. Young, 228 Fed. 630, 143 C. C. A. 152, the infringed trade-mark label had printed on it the words "Registered U. S. Patent Office," therefore that was notice. Ludwigs v. Payson Mfg. Co., 206 Fed. 60, 124 C. C. A. 194, and Detroit Show Case Co. v. Kawneer Mfg. Co., 250 Fed. 235, 162 C. C. A. 370, were actions for infringement of patents, and it was held that a claim for unfair competition in connection with the sale of the infringing article, may properly be joined. But see Geneva Furniture Co. v. Karpen, 238 U. S. 254, 259, 35 Sup. Ct. 788, 59 L. Ed. 1295. Shrauger & Johnson v. Phillip Bernard Co. (D. C.) 240 Fed. 131, decided by Judge Wade, not only fails to sustain counsel's contention, but is an authority to the contrary. While Judge Wade makes the statement quoted by counsel for appellee, he proceeds:

"In certain cases, where there was combined the charge of infringement and also unfair competition, courts have held that, even though the claim of infringement was decided in favor of the defendant, the court still could retain jurisdiction upon the question of unfair competition; but the large majority of the cases are the other way."

After reviewing a large number of authorities, he holds:

"If a bill presented two separate counts, stating two separate and independent causes of action, one for a patent infringement, and the other for unfair competition, entirely independent of the infringement, I should hold that the cause of action for unfair competition should be stricken out. The court has no such jurisdiction conferred by statute, and the rule contended for relates rather to the practice of a court of equity, than it does to the jurisdiction of the court."

When the case was at a later day finally heard before Judge Reed, he sustained a motion to dismiss the petition as to the claim for infringing the plaintiff's alleged trade-mark, and for unfair competition for want of jurisdiction. 247 Fed. 547, 550.

Gains and profits made before notice was given under the Trade-Mark Act, in the absence of a label bearing the inscription prescribed by the act of Congress, are independent of the act of Congress, and can only be recovered under the rules established by courts of equity in actions for unfair competition. Such an action cannot be maintained in a national court in the absence of a diversity of citizenship. As was held in Standard Paint Co. v. Trinidad Asphalt Co., supra:

"The opposite parties to the suit are citizens of different states, and while this diversity of citizenship was not necessary to give the Circuit Court jurisdiction of the case in so far as it involved the validity of the trade-mark, it was necessary to give the court jurisdiction of the issue of unfair competition."

Other questions have been discussed by counsel, and have received our careful consideration, but we do not deem it necessary to pass on them in this cause.

The decree of the court below will be modified, by adding to the injunction clause the words hereinbefore set forth, and that the appellants be charged with the gains and profits made by them by reason of the unfair competition arising from the infringement of appellee's registered trade-mark, and the damages, if any, which appellee has sustained by reason thereof since the beginning of this action.

The costs of this appeal will be taxed, two-thirds to the appellants and one-third to the appellee.

BALBAS v. UNITED STATES et al.

(Circuit Court of Appeals, First Circuit. April 5, 1919.)

No. 1342.

1. CRIMINAL LAW ⟸1129(1)—APPEAL—ERRORS ON FACE OF RECORD.
The Circuit Court of Appeals, in the exercise of its discretion, may notice a plain error on the face of the record in a criminal case, although not assigned.

2. INDICTMENT AND INFORMATION ⟸125(19)—DUPLICITY—ESPIONAGE ACT.
An indictment under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), alleging in one count that accused had caused and attempted to cause insubordination, etc., was not duplicitous, simply alleging two modes of committing one offense, especially in view of Rev. St. § 1024 (Comp. St. § 1690), relating to joinder of counts.

3. WAR ⟸4—ESPIONAGE ACT—ELEMENTS OF OFFENSE.
An indictment under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), charging the commission of the first offense set out therein, willfully making or conveying "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," must allege that statements made by defendant were false and willfully made.

4. WAR ⟸4—ESPIONAGE ACT—ELEMENTS OF OFFENSE.
An indictment charging a publisher with the commission of the second and third offenses set out in Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), need only allege that publications caused or were an attempt to cause insubordination, etc., or that they obstructed the enlistment or recruiting service of the United States, and that they were willfully made with such intent; it being immaterial whether statements in the articles were false or not.

5. WAR ⟸4—ESPIONAGE ACT—INDICTMENT.
Under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), where articles published by defendant were set forth at length in indictment, it was not necessary to specify particular statements in them by which it was alleged the defendant committed the offense with which he was charged.

6. INDICTMENT AND INFORMATION ⟸140(1), 150—SUFFICIENCY OF INDICTMENT—QUESTION FOR COURT.
In a prosecution under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), whether language used by defendant in newspaper articles was apparently adapted to create an offense became, on demurrer and a motion to quash, a question for the court.

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7. WAR ⟸4—ESPIONAGE ACT.
A newspaper article, disclosing that the defendant, the publisher, as one of 288 residents of Porto Rico who had declined American citizenship, was opposing what he regarded as an unwarranted application of Selective Service Act (Comp. St. 1918. §§ 2019a, 2019b, 2044a–2044k) to them, *held* insufficient to show that defendant by its publication caused or attempted to cause insubordination, mutiny, disloyalty, and refusal of duty, or obstructed the enlistment or recruiting service of the United States, or that he intended so to do, under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c).

8. WAR ⟸4—ESPIONAGE ACT—INDICTMENT—SUFFICIENCY.
A newspaper article, complaining of Selective Service Act (Comp. St. 1918, §§ 2019a, 2019b, 2044a–2044k), or constructions thereof by the provost marshal of the United States, *held* not so apparently free from language adapted or calculated to create insubordination, etc., or to obstruct the enlistment or recruiting service with the intent, etc., that court could have sustained a demurrer to counts of an indictment setting it forth as a violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c).

9. CRIMINAL LAW ⟸371(1)—ESPIONAGE ACT—PUBLICATIONS—EVIDENCE—PRIOR PUBLICATIONS.
In a prosecution under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), where the intent of the defendant by publication to commit the offense of causing or attempting to cause insubordination, etc., was one of the issues submitted to the jury, publications of the defendant in earlier issues of his paper were admissible in evidence to show that defendant had no unlawful intent.

10. WAR ⟸4—ESPIONAGE ACT—PUBLISHING ARTICLES TO CAUSE INSUBORDINATION AND OBSTRUCT ENLISTMENT—ELEMENTS.
In a prosecution under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), it was not only necessary to prove beyond a reasonable doubt that the defendant willfully published newspaper articles with the intent to cause insubordination, etc., or to obstruct the enlistment and recruiting service, but also that this intent had been carried into effect by language adapted to produce these results.

11. WAR ⟸4—ESPIONAGE ACT.
Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), in referring to the influencing and disloyalty, etc., in the military forces of the United States, should not be construed so broadly as to include the influencing of all the able-bodied men in Porto Rico, especially those who had renounced American citizenship, whether they were within the class who were obliged to register or not.

12. WAR ⟸4—ESPIONAGE ACT—SUFFICIENCY OF EVIDENCE.
In a prosecution under Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), evidence *held* insufficient to sustain a finding that defendant published newspaper articles willfully, with the intent to create insubordination, mutiny, etc., or obstruct the recruiting or enlistment service of the United States.

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

Vincente Balbas Capo was convicted of a violation of the Espionage Act, and he brings error. Reversed and remanded.

Boyd B. Jones, of Boston, Mass. (Henry G. Molina, of San Juan, Porto Rico, on the brief), for plaintiff in error.

Thomas J. Boynton, U. S. Atty., of Boston, Mass. (Alonzo H. Garcelon, Sp. Asst. U. S. Atty., of Boston, Mass., on the brief), for defendants in error.

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

JOHNSON, Circuit Judge. This is a writ of error to review a final judgment of the district court of Porto Rico, imposing a fine of $1,000 and imprisonment for the term of two years upon the defendant below, upon each of four counts in an indictment in which the defendant was charged with violation of title 1, § 3, Act of June 15, 1917, c. 30, 40 Stat. 219 (Comp. St. 1918, § 10212c), known as the Espionage Act.

There were six counts in the indictment. In the first and fourth counts the defendant below was charged with having committed the offense created by the first clause in the Espionage Act, viz.: The willfully making or conveying false statements with intent to interfere with the operation and success of the military and naval forces of the United States, to the injury of the United States. The fourth count was quashed upon motion of the defendant, and the jury returned a verdict of not guilty upon the first.

In the remaining four counts he was charged with committing the second and third offenses created by the following clauses in the act:

"And whoever, when the United States is at war, shall willfully cause, or attempt to cause, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service 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."

In the second count he was charged with having committed the offense of causing and attempting to cause insubordination, etc., by "unlawfully, willfully, knowingly and feloniously publishing" in a certain paper or periodical, known as the "Heraldo de las Antillas," in the city of San Juan, Porto Rico, on or about the 27th day of October, 1917, certain false statements in the Spanish language, the English translation of which is as follows:

"Recruiting in Porto Rico.

"According to recent notices, the quota of recruits of Porto Rico which had been fixed at 12,000 men has been increased to 17,000, of which the first ones will be white and the rest colored.

"It is said that the recruiting will begin within the first ten days of November next.

"We understand that Porto Rico contributes to the National Army proportionally a larger number of soldiers than any other state in the Union, and larger than any other territory, as, for instance, Hawaii, which does not contribute any.

"What do the politicians say to that, who attribute to themselves the monopoly of the defense of the people's interests?

"They say nothing.

"They are busy defending some positions that they have paid for."

It was alleged in said count that—

"The object and intent of the said words made, published and conveyed as aforesaid was to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, * * * against the peace and dignity of the United States."

In the third count it was charged that he did—

"willfully, unlawfully, knowingly, and feloniously obstruct the recruiting and enlistment service of the United States, to the injury of said service and to the injury of the United States," by the same publication; and that "the object and intent of said words * * * was to obstruct the registration and enlistment in the service of the United States."

In the fifth count he was charged with having committed the offense with which he was charged in the second count, by the publication in the same paper, on or about the 10th day of November, 1917, of an editorial entitled "The Topic of the Day."

In the sixth count he was charged with having committed the offense with which he was charged in the third count, by publishing the same editorial. This was printed in the English language, and is set out in full in the indictment. It is too long to be quoted at length, and we will therefore quote only the material parts and state the substance of the rest. It began with the following quotation from another newspaper published in Porto Rico:

"The Topic of the Day.

"The Prevost Marshall of the United States has decided that the Porto Ricans who have declined American citizenship are obliged to serve in the Army."

La Democracia.

The writer then discussed this reported decision of the provost marshal:

"Just as it sounds, the above statement is exactly this: 'The Prevost Marshall has decided.' So that had the Prevost Marshall decided, contrarily, those who have not sworn American citizenship would not have been called to the 'colors'—or what has the same effect but in different words—that what one man decided is to be law for 288 men. * * *

"With due deference to La Democracia, the Prevost Marshall has not the power to decide which affects man's conscience. * * *

"The law reads that all citizens of the United States are obliged to active service, to take up arms; but it does not refer to those who are not American citizens. And should that law enact such a step, it would be nothing less than a law without foundation, because may La Democracia know, that Porto Ricans those who have not sworn allegiance to the American flag, we constitute a people of Porto Rico, as an entity about to disappear, may be, but not as yet extinguished. * * *

"The people of Porto Rico has not declared war on any nation whatsoever and is therefore neutral. The above may sound awkward, but let it be known as a fact to all Porto Ricans, those who are now citizens of the United States, that Congress provided you with that citizenship in order that you be obliged to take up arms in defense of the American flag, without which privilege human conscience would have been violated had you been enlisted.

"It is logical, therefore, that in order that Porto Ricans be called to shed their blood for the American flag, they were given American citizenship, it is reasonable that those who have not sworn flag are not compelled to defend another but the flag of Porto Rico; that flag, that flies yet as the moral representation and symbol of the people of Porto Rico, who yet exists as a political body. * * * The flag does not wave lawfully over the castles of Porto Rico; but lives there—in the hearts of every Porto Rican, * * * those who have not sworn American citizenship. * * * No matter how powerful the foe may be, only for that dear flag would the sacrifice be offered.

"How little does it matter that the Prevost Marshall decides that the citizens of Porto Rico have to fight for the American flag—how little does he know that physical strength is not all!!! The flag of a fatherland needs more

for its defense—it needs the spiritual embodiment of heart and soul that there may be strength, true force, to be able to strike the death blow to the enemy and proclaim victory."

The author then discussed the danger of a nation obliging men "as slaves to defend a cause for which they have no ideal," and states that it "sounds impossible that the Prevost Marshall could decide to engross the American army with men whose ideals are not the same as those of Americans," and that the people of Porto Rico, whom he calls "the Pariah," as the legal definition of a citizen of Porto Rico who has not changed his status, is neutral in this terrible war; that the Pariahs form a lawful entity, who have no governing power, and who have been compelled to allow themselves to be governed by others. Fate is appealed to behold them—

"weak and powerless, driven by force!!! That all has been decided by the Prevost Marshall, but he who thus decided, who thus presses on the defenseless and the weak, he who compels, based on might, that man be driven by force to fight for a flag that is not his own, he who thus drives man has no right to claim that man be a true, loyal soldier."

The defendant then stated his position and advice that he had given to those who like himself had declined American citizenship, under the provisions of the Act of Congress of March 2, 1917, c. 145, § 5, 39 Stat. 953 (Comp. St. 1918, § 3803bb):

"As soon as the statement of La Democracia was known, although no explanation of the decision of the Prevost Marshall was given, we, who have been so interested in the affair, have been the object of numerous inquiries on the matter from Pariahs all over the island and to one and all the same answer and information has been given:

"Resistance against the mighty is of no avail—when—ever called to the front—we have to go—but never before solemnly expressing to the Military Commission *that we are not citizens of the United States;* that we are not ready and willing to swear loyalty to the American flag—but if nevertheless we are compelled to defend a flag, to which respect is due, but with which we have no moral ties nor progeny—let the Prevost Marshall's will be done! His and only his will the responsibilities be of human error. And then may be that that decision find a place in the pages of history more due to its effects than to the motives of its existence. * * *

"Oh! Washington, be thou witness of this struggle; behold man's conscience trampled upon by Might; * * * behold the Statue of Liberty and the Right of Man cast to the winds in fragments."

The writer then reasons that, because the Pariah has been called upon to perform the same duties as citizens of the United States, his condition as a citizen "is equally esteemed and appreciated as that of President Wilson, inasmuch as the Pariah has been assigned the same and equal duties as those assigned to the President's fellow citizens," and therefore that the Pariahs are placed upon equal grounds and authorized to discuss as equals.

The defendant attacked the indictment by demurrer and a motion to quash on the following grounds: That the counts were improperly joined; that it did not set forth or allege the specific statements alleged to be false; that it did not set forth in any of its counts an offense known to the law or any violation of section 3 of the Espionage Act.

The demurrer was overruled and the motion to quash was denied.

except as to the fourth count, to which the defendant seasonably excepted. At the close of all the testimony the defendant filed a motion that the court direct a verdict of not guilty, and to the denial of this motion he seasonably excepted. The defendant also seasonably excepted to certain instructions of the presiding judge and the admission and exclusion of certain evidence, and has assigned these instructions and the rulings admitting or excluding this testimony as error. In addition, counsel for the defendant claimed in argument that the second and fifth counts were bad for duplicity, because the offenses of causing insubordination, etc., and attempting to cause insubordination, etc., are alleged in each of them, and that these are separate offenses, as shown by the disjunctive "or" in the statute; that while this objection was not urged at the trial, and is not made a part of the bill of exceptions, the error is apparent on the face of the record, and the court should take notice of it, although not assigned.

[1, 2] It is undoubtedly true that the court, in the exercise of its discretion, may notice a plain error on the face of the record, although not assigned: but we do not think the indictment is open to the charge of duplicity. Only one offense is alleged, which may be committed in two modes, and both of these modes are joined in one count. Either causing insubordination, etc., or the attempt, are different modes of committing one and the same offense and both may be alleged in one count. Crain v. United States, 162 U. S. 625, 634, 16 Sup. Ct. 952, 40 L. Ed. 1097; May v. United States, 199 Fed. 53, 117 C. C. A. 431; United States v. Dembrowski (D. C.) 252 Fed. 894.

The joinder of counts which the defendant assigns as error is authorized by section 1024 of the Revised Statutes (Comp. St. § 1690) and is fully sustained in Pointer v. United States, 151 U. S. 396, 400, 14 Sup. Ct. 410, 38 L. Ed. 208, and Ingraham v. United States, 155 U. S. 434, 15 Sup. Ct. 148, 39 L. Ed. 213.

[3, 4] As the indictment was drawn, there was an attempt to charge, in the first and fourth counts, the commission of the first offense set out in section 3; that of—

"willfully making or conveying 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."

It was necessary to allege in these counts that the statements made by the defendant were false and willfully made. As to the last two offenses in the section, set out in the remaining counts, it is immaterial whether the statements made by the defendant were false or not; it was only necessary to allege that they caused, or were an attempt to cause, insubordination, etc., or that they obstructed the enlistment or recruiting service of the United States, and that they were willfully made with such intent.

[5] The articles published by the defendant were set forth at length, and it was not necessary to specify the particular statements in them by which it was alleged the defendant committed the offenses with which he was charged. Their language requires no expert knowledge for its interpretation, and no explanation was necessary by way of innuendo to make its meaning clear. Lockhart v. United States, 250

Fed. 610, 162 C. C. A. 626; Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162.

[6] We think the offenses were set out in the indictment with such precision and exactness as to fully acquaint the defendant with the crimes with which he was charged. Whether the language which the defendant used was apparently adapted to create these offenses became, on demurrer and a motion to quash, a question for the court.

[7] The article of November 10th discloses that the defendant, as one of 288 residents of Porto Rico who had declined American citizenship, was opposing, as he was justified in doing, what he regarded as an unwarranted application of the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2019a, 2019b, 2044a–2044k) to them. We do not think its language is adapted or calculated to effect the results which it was charged the defendant willfully intended. It is clearly only a justifiable criticism of the reported decision of a subordinate officer of the government by one who was directly affected by it, and we do not think that any inferences could reasonably or fairly be drawn from it which would justify a jury in finding that the defendant, by its publication caused, or attempted to cause, insubordination, mutiny, disloyalty, and refusal of duty, or obstructed the enlistment or recruiting service of the United States, or that he intended so to do, but that it discloses upon its face that his only purpose in publishing it was to oppose a reported decision by which those who had declined American citizenship would be forced to serve in the army of the United States. We think, therefore, the demurrer should have been sustained as to the counts which were based upon this publication.

[8] It is not so apparent from the language of the article of October 27th that it is not adapted or calculated to create the offenses alleged, or that there was an absence of willful intent, that the court could have ruled that there was no possible question for the jury in the determination of both the adaptability of its language to create insubordination, etc., or to obstruct the enlistment or recruiting service and the intent with which it was published, and we think the demurrer was properly overruled as to the counts based on this article.

The defendant assigned as error that the court refused to admit as evidence in his behalf an article under date of April 2, 1917, published by him in his paper, the "Heraldo de las Antillas," entitled "War," the material part of which is as follows:

"If Congress should enact—which would not be strange—compulsory service, which has been adopted in advance already by some states in the Union, then the moral support to be given by Porto Rico to the United States should take the form of soldiers not exempt from service, either by draft or by obligatory recruiting or by voluntary action. It is very natural that this should be so, Porto Rico being as it is already a part of the North American nation, enjoying her citizenship, and with the responsibilities and obligations which go with it. It is not the time to go back before the obligation of honor which has been contracted by all those enjoying American citizenship, and we would not be the persons to counsel disloyalty or treason. Consequently, with our principles of a lifetime, the man who has a flag should defend it with his arm, with everything and all that he is or possesses."

This article was offered by the defendant to show his state of mind and the absence of the intent with which he was charged in publishing the articles of October 27th and November 10th, and was clearly competent for that purpose. The court, however, excluded it, and assigned his reason for its rejection in the following language:

"I have admitted certain articles because they may throw light upon the intention of the defendant in this case. The allegations show that he has acted throughout in a propaganda to secure the independency of Porto Rico, but he gave that up when Congress passed the Jones Act. Now an article is offered which dates after the expiration of that propaganda, and an article—presuming for the moment that it is proper in some respects—that cannot throw any light upon that propaganda, does not come within the scope."

[9] The intent of the defendant to commit the offenses with which he was charged in the indictment was one of the issues submitted to the jury, and, as bearing upon that issue, publications of the defendant in earlier issues of his paper, which, in the exercise of its discretion, the court did not think too remote, were unquestionably competent, and we think the rejection of this article was prejudicial to the defendant.

[10] The defendant has also assigned as error certain instructions to the jury, but we do not find it necessary to consider all of them. The defendant points out the following which he claims is erroneous and which we think is material:

"If you have such a doubt in this case, then the defendant is entitled to it; but if, after considering the facts, you come to the conclusion as a reasonable man that there is one explanation, and one only, for what he did, and that is that he is guilty, that he did this intentionally, then you find him guilty."

We have looked at other parts of the charge to ascertain if the elements of the offenses with which the defendant was charged were clearly set forth, so that the instruction complained of, although erroneous, might be held not to have been prejudicial to him; but throughout the charge the presiding judge nowhere submitted to the jury the question whether the language of the statements was adapted to produce the results with which the defendant was charged. In summing up the elements necessary to constitute the offenses he stated to the jury:

"The principal ones are that he wrote these articles; that the first was false; as to the second, falsity is not necessary; that he published these articles in the way of which we have gone over, and that he did so willfully; that is to say, with an evil intent, not for the purpose of enlightening the public as to their rights and duties, but to interfere with the recruiting and enlistment of the military forces of the United States, and that he did it intentionally, intending to interfere and produce these different results."

In other parts of the charge the following instructions were given, to which the defendant seasonably excepted:

"He is indicted for publishing an article or articles with the intent that these articles would influence the different steps in raising the military forces, so that you do not have to go very far down the line to find out the elements of the case. You do not have to prove that the actual result of these articles was to interfere with the military forces; if the defendant published them with the intent to do that, then everything else follows; and that is what you will have to determine. * * *

"In other words, the freedom of the press is not a defense, if you think the defendant has done these things willfully and with the intent to obstruct the recruiting and enlistment of the military forces of the United States. * * *"

It was not only necessary to prove beyond a reasonable doubt that the defendant willfully published these articles with the intent to cause insubordination, etc., and to obstruct the enlistment and recruiting service, but that this intent had been carried into effect by language adapted to produce these results.

The emphasis which was laid by the court upon the necessity of finding the intent of the defendant and the direction of the inquiry of the jury to the determination of this, to the exclusion of any consideration of whether the language of the articles was calculated or could reasonably be held to be adapted to cause insubordination, etc., or obstruct enlistment or the recruiting service, and failure to instruct the jury that, whatever the intent of the defendant, it was necessary that they should find that it was coupled with some act or words adapted to carry it into effect, removed from their consideration the principal element of the offenses with which the defendant was charged.

[11] The defendant also excepted to this instruction and assigns the same as error:

"The indictment does not mean that it is necessary for you to find that this was intended to affect the troops in Cayey, Panama, or anywhere else. The act refers to the influencing and the disloyalty, etc., in the 'military forces' of the United States, and the military forces of the United States means the able-bodied men of the United States, the people from whom the United States may make up its army. It does not even mean those between the ages of 21 and 31 years; it means all able-bodied men of the United States and its territories, including Porto Rico. So, if you find that these articles were intended and are to be construed as affecting able-bodied men of Porto Rico, whether they are registered or not, or whether they are liable under the call, makes no difference; the military forces are the able-bodied men of this island."

The statute is a penal one, and while the military forces of the United States might be construed to include not only those who had been inducted into the military service, but also those who had been required to register under the Selective Service Act and had not been exempted or excused from service, we do not think it could be construed so broadly as to include all the able-bodied men in Porto Rico —the 288 Porto Ricans who had renounced American citizenship among them if they were able bodied—whether they were within the class who were obliged to register or not.

While we think these instructions cannot be sustained and that they were prejudicial to the defendant, we feel also that there was error in denying the motion, made by him at the close of all the testimony, that the jury be instructed to return a verdict of not guilty.

We have examined with great care both statements which the defendant admits he published in his paper, and also the testimony introduced by the government and by the defendant, and we are unable to discover any evidence upon which the finding of the jury, that he willfully published either article with the intent to create insubordination, disloyalty, mutiny, or refusal of duty in the naval or military

forces of the United States, or to obstruct the enlistment or recruiting service of the United States, can be sustained. The only evidence which the jury had before it beside the two articles was the testimony of two employés in the Post Office Department, who testified in regard to the mailing and circulation of the papers in which the articles were contained, which was admitted by the defendant, and the testimony of the adjutant general of Porto Rico, who testified that the article which appeared in the defendant's paper under date of October 27th, entitled "Recruiting in Porto Rico," was not true; that the quota to be furnished from Porto Rico was 12,833, and that he had not at any time received from his superiors any further orders in regard to the quota of men which was to be supplied in Porto Rico; that at the time of the trial no men had been drafted in Hawaii for service, and while the gross quota of men to be supplied by Hawaii for the National Army was 2,403, it had actually furnished 4,397 men. He was shown a copy of "La Correspondencia," a newspaper published in Porto Rico, and admitted that the figures given by that paper in its issue of July 20, 1917, showing the number of men to be furnished by the different states of the Union, Porto Rico, and Hawaii, were correct in accordance with the official records in his office.

The defendant testified that he was born in Porto Rico; that he served in the Spanish War upon the side of Spain, and that after the treaty of Paris he had opposed compulsory American citizenship for Porto Ricans until the enactment by Congress on March 2, 1917, of legislation conferring citizenship upon residents of that island; that upon March 7th, after the passage of the act, he had declared his intention of not becoming a citizen, in accordance with its provisions that those who did not desire to become American citizens might file a declaration of their rejection of the offer of citizenship in the United States District Court of Porto Rico. In the "Heraldo de las Antillas" of March 20, 1917, he stated his reasons for his action. This article and another in the same paper, under date of March 31, 1917, were admitted in evidence. In these articles the defendant stated that he did not have the attachment for America as a nation to make it proper for him to become an American citizen, and that—

"To make a display of American citizenship without entertaining a proper feeling of loyalty to the American flag would not only create a disagreeable predicament, but would also constitute the most pronounced betrayal of personal convictions and the most utter disregard of personal decorum."

He also stated in the article of March 20, 1917, that those who have accepted American citizenship—

"are under positive obligation to be loyal to that citizenship and to that flag."

A publication of the defendant in his paper, under the heading "Topic of the Day," under date of October 13, 1917, was also admitted in evidence, which contains the following statements:

"According to every indication, the moment is nearing for Porto Rico to begin paying its tribute of blood to the American flag. New instructions have been issued in the daily press—and by the way they are not very clear, thanks to the very poor Spanish in which they are written or translated—

and in such instructions the fact of not being citizens of the United States is also omitted as ground for exemption. * * * There is no doubt, however, that the matter is to be brought very shortly and that it must be solved in one way or another. As for us—we repeat it once and one hundred times—we have no doubt whatever; but it is also known that in these times the least doubtful things seem dark and adulterated. We believe that the citizen of Porto Rico who accepted the citizenship of the United States, inasmuch as he was given six months within which to renounce it, is inevitably bound to take up arms to defend his nation. There was not the least deceit in it, except such difficulties as were interposed by some officials to prevent the renunciation of such citizenship, the period of time fixed by law for the exercise of that right having transpired precisely during the time that the Congress of the United States established compulsory military service and was making preparations to carry the same into practice. * * * Then and now we showed ourselves respectful to the wishes of each and everybody, and now that the time within which to exercise the right of renunciation has more than expired, we must continue to show the same respect; and even from our own standpoint we must acknowledge and proclaim that those Porto Ricans are bound to accept all the consequences of their action as such citizens of the United States. But just as we are of the opinion concerning those who accepted the citizenship of the nation whose flag waves to-day over the castles of our country, we understand, and we shall not tire repeating it until this question shall have been duly determined, that no person who is not a citizen of a nation can be a soldier of that nation unless it is done through an act of force against which it is always lawful to claim as long as such claim is made in a legal way and before the same Congress which provided the right to renounce American citizenship."

These articles show that the defendant had been engaged in a controversy over the desirability of the residents of Porto Rico accepting American citizenship, which was conferred upon them by the Jones Bill, so called, and that after the six months had expired in which citizenship might be renounced under the provisions of the bill, he had been discussing the rights of those who had so renounced the offer of citizenship; that 287 other residents of Porto Rico beside himself had, under the terms of this act, renounced this citizenship; and that, whether he and these 287 associates were subject to the provisions of the Selective Draft Act, was a matter of great interest to him and the subject of discussion through the columns of his paper. The attitude of the defendant toward American citizenship and his published statements in regard to the duty which Porto Ricans owed the American flag who had become American citizens, throw light upon the intent with which the defendant published the articles upon which the indictment against him was found.

The defendant testified that, after the passage of the Jones Bill, he ceased the publication of his paper as a daily on May 17, 1917, and continued its publication as a weekly with the principal object of defending the rights of those who had renounced American citizenship, taking his news from local papers, as his paper had no news service of its own. That, in publishing his article of October 27, 1917, he had before him an article in the issue of October 20, 1917, of the "La Correspondencia," another newspaper published in Porto Rico. This article, entitled "The Draft in Porto Rico," was admitted in evidence. It stated in substance that, according to latest official authorized advices, 17,000 men would be recruited in Porto Rico, instead of 12,000, as had been previously reported, and that it was the purpose of the

government to draft 12,000 white men and 5,000 negroes or colored men; that the latter would be sent immediately to the United States to a suitable cantonment for men of that race, and the 12,000 white men would be trained in Porto Rico; that this had not yet been decided, but that the news in detail would be given soon; and that, if this project was finally adopted, Porto Rico would be contributing many more men than was set at the beginning.

He testified that he had before him, also, in the preparation of his article an article published in the "La Correspondencia" on July 20, 1917, which gave the number of men to be furnished under the draft by each state and territory, and concluded with this statement:

"As may be seen by our readers from the list we are publishing, the quota of Porto Rico, as a blood tax, to be a part of the first National Army, is 12,833 men; that is, it occupies the place designated with No. 22 among all the states and territories, being over 29 states and territories whose quota of men for the defense of the great American nation is much smaller."

While the statements contained in these articles in "La Correspondencia" were incorrect, and that of July 20, 1917, failed to take into consideration that the number of men assigned to the different states was the net number to be drafted after the number who volunteered had been deducted, there was no evidence that the defendant knew such to be the fact or was in any position where it might be said that he should have known the facts. It did appear in this statement that Hawaii would furnish no men, and that Porto Rico would furnish a larger number of men than 29 states and territories, although the population of these states far exceeded that of Porto Rico, on the assumption that Porto Rico would furnish 12,833 men. The article of October 23, 1917, from "La Correspondencia," stated that the draft, from officially authorized advices, would be raised to 17,000 men. These articles were admitted in evidence to meet the charge that the defendant had an evil intent in making the statements with which he was charged. In the light of the evidence afforded by them, we do not think that any construction can be placed upon the article of October 27th that would sustain a finding that it was willfully published with the intent to cause insubordination, etc., or to obstruct the recruiting or enlistment service. It was clearly in the nature of a criticism of the conduct of those who were charged with the duty of protecting the citizens of Porto Rico, and seeing that they were not unfairly discriminated against under the Selective Service Act, because he asks:

"What do the politicians say to that, who attribute to themselves the monopoly of the defense of the people's interests? They say nothing. They are busy defending some positions that they have paid for."

There was no evidence before the jury to show the intent with which the defendant published this article, except the language of the article itself and the testimony of the defendant in regard to the sources of information which he had for it, and this was not only uncontradicted, but was supported by the testimony of the government that the articles in "La Correspondencia" were actually published in that paper, and also the uncontradicted testimony of the defendant in regard to the prior publications in his own paper.

[12] We think there was no evidence to sustain the verdict of the jury that the defendant published either the article of October 27th or that of November 10th willfully, with the intent to create insubordination, mutiny, etc., or to obstruct the recruiting or enlistment service of the United States, and that the defendant's motion to instruct the jury to return a verdict of not guilty should have been granted.

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

FIRST NAT. BANK OF SWEETWATER, TEX., v. RUST et al.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1919. Rehearing Denied May 9, 1919.)

No. 3300.

1. BANKS AND BANKING ⊂⊃117—CERTIFICATE OF DEPOSIT—ISSUANCE FOR INDIVIDUAL DEBT—RISK OF AUTHORITY.
   One to whom a bank's president, in payment of his individual debt, issued its certificate of deposit, accepted with knowledge thereof, took the risk of the president's authority, depending on whether there had been a contemporaneous deposit, as recited in the certificate; the principle that his general powers would give apparent authority not applying, where he is known to be acting in his own interest.

2. BANKS AND BANKING ⊂⊃118—CERTIFICATE OF DEPOSIT—ISSUANCE FOR INDIVIDUAL DEBT—AUTHORITY—BURDEN OF PROOF.
   One to whom a bank's president issued its certificate of deposit in payment of his individual debt, accepted with knowledge thereof, seeking to hold the bank thereon, has the burden of proving the making of the recited contemporaneous deposit, necessary for the authority to issue certificate.

3. BANKS AND BANKING ⊂⊃118—CERTIFICATE OF DEPOSIT—EVIDENCE OF DEPOSIT.
   A bank's certificate of deposit having been issued by its president in payment of his individual debt, and accepted with knowledge thereof, neither recital in certificate nor statement in letter of president to person receiving the certificate is evidence against bank of deposit having been made, necessary for president's authority to issue certificate.

4. EVIDENCE ⊂⊃244(12)—STATEMENT OF BANK PRESIDENT—PAST TRANSACTION.
   Statement of president of bank, to one to whom its certificate of deposit had been issued by its prior president in payment of his individual debt, that its books showed the deposit called for thereby, is not inadmissible against it, in the absence of injury therefrom raising an estoppel; it amounting to an admission that past transactions had occurred and had been evidenced by the bank's books.

Batts, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of Texas; Robert T. Ervin, Judge.

Action by Anna Rust and husband against the First National Bank of Sweetwater, Tex. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

J. H. Beall, of Sweetwater, Tex. (Beall & Douthit, of Sweetwater, Tex., and Kirby & King, of Abilene, Tex., on the brief), for plaintiff in error.

R. W. Haynie, of Abilene, Tex. (Woodruff & Woodruff, of Sweetwater, Tex., and Fred Cockrell, of Abilene, Tex., on the brief), for defendants in error.

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

GRUBB, District Judge. The defendant in error Anna Rust brought suit in the District Court on three certificates of deposit, each for $2,000, purporting to have been issued by the plaintiff in error. The certificates were issued July 5, 1915, and were to mature 11 months after date, with 6 per cent. interest. At their maturity the interest was paid, and the certificates were extended for one year from their maturity. Upon presentation for payment, the plaintiff in error denied liability and refused payment, and this suit on them was instituted.

[1] The evidence developed that J. V. W. Holmes was president of the issuing bank at the time it is charged that the certificates were issued by it; that he owed the defendant in error certain land notes, and, being desirous of disposing of the land by which the notes were secured, induced the defendant in error by letter to accept in part payment of the notes, which were not then due, certificates of deposit of the plaintiff in error maturing at the same time the notes matured. The evidence shows that the husband of the defendant in error acted for her in the transaction with Holmes; that he was familiar with Holmes' handwriting, and knew that the certificates sued on were issued in settlement of an individual debt due by Holmes to his wife, and knew that the certificates were signed by Holmes, as president of the plaintiff in error, and that he had no knowledge of the deposit in the bank of the money, called for by the certificates, other than the recital of that fact in the certificates themselves, and in a letter from Holmes to him. The record, therefore, showed indisputably that the defendants in error received the certificates of deposit, knowing that they had been signed and issued by Holmes, and that he had used them in payment of his individual debt, and not in the business of the bank, for which he assumed to act.

The defendants in error, this being true, took the risk, in accepting the certificates, of the authority of Holmes to sign them in its behalf. It is not disputed that it was within his power as president to sign certificates of deposit, when the money was deposited in the bank, as called for by the certificate. He had no actual authority to issue certificates, in the absence of a contemporaneous deposit of the money. His general powers would give him apparent authority, as to persons dealing with the bank, to act for the bank, in the issue of certificates of deposit, in all cases, whether the money was deposited or not. The principle, however, is confined to cases where he was not known to be acting in his own interest, and not in the interest of the bank. If the party dealing with him knew that he

was acting in his own interest in the matter of the issuance of the certificates, and not in the business of the bank, then the party dealing with him was charged with knowledge of his want of authority, if he had none, and of his failure to deposit the money, as recited, if he so failed. If Holmes issued the certificates sued on, without making a corresponding deposit in the bank, and if the defendants in error knew that he used the certificates, when issued by him, for his own advantage, as distinguished from that of the bank, then they were charged with knowledge of his want of authority to bind the bank by the issuance of the certificates, and could not recover on them.

[2] The record showing without conflict that the defendants in error did know that Holmes, in issuing the certificates, was acting for his own advantage, to pay his individual debt with them, the only question left for decision is whether there was money deposited by Holmes in the bank to cover the issue of the certificates. If none was deposited in fact, the defendants in error were charged with knowledge of that fact, and, from it, with Holmes' want of authority to bind the bank. Ohio Valley Banking & Trust Co. v. Citizens' National Bank, 173 Ky. 640, 191 S. W. 433, 438; American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; Hier v. Miller, 68 Kan. 258, 75 Pac. 77, 63 L. R. A. 952; Claflin v. Farmers' & Citizens' Bank, 25 N. Y. 293; Campbell v. Manufacturers' National Bank, 67 N. J. Law, 301, 51 Atl. 497, 91 Am. St. Rep. 438; Amarillo National Bank v. Harrell (Tex. Civ. App.) 159 S. W. 858; Bank v. American D. & T. Co., 143 N. Y. 559, 38 N. E. 713. The case was tried upon this theory, and the only question submitted to the jury was whether or not the money was, in fact, deposited in the bank, as recited in the certificates, and, on this question, the court below placed the burden upon the defendant bank. We think the District Judge misplaced the burden of proof in this respect. The party who deals with an agent, knowing him to be acting in his own interest, takes the risk of his having authority to so act for his principal, and assumes the burden of establishing his authority when he seeks to hold the principal. The case of Hier v. Miller, 68 Kan. 258, 75 Pac. 77, 63 L. R. A. 952, correctly states the rule, as we understand it to be. In that case the court said:

"The rule of law involved, that an agent may not represent himself and his principal in the same transaction, has been applied in many cases. 'Undoubtedly the general rule is that one who receives from an officer of a corporation the notes or securities of such corporation in payment of or as security for a personal debt of such officer does so at his own peril. Prima facie the act is unlawful and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation.' Wilson v. M. E. R. Co., 120 N. Y. 145, 150, 24 N. E. 384, 385, 17 Am. St. Rep. 625. 'Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of banking * * * But certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers, and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he

can recover. There are no presumptions in favor of such a delegation of power.' West St. L. Sav. Bk. v. Shawnee, etc., Bank, 95 U. S. 557, 559, 24 L. Ed. 490. * * * 'But the test of the transaction is whether it is with the bank and its business, or with the cashier personally and in his business. Claflin v. Farmers' Bank, 25 N. Y. 293; Moores v. Citizens' National Bank, 111 U. S. 156 [4 Sup. Ct. 345, 28 L. Ed. 385]. As to the former, all presumptions are in favor of its regularity and binding force. In the latter no such presumption arises. In fact, upon proof that it was known to the claimant to be an individual transaction, and not one for the bank, the burthen is cast upon the claimant to establish by proof that the act of the cashier thus done for his own individual benefit was authorized or ratified. These are fundamental principles applicable to principal and agent in every transaction arising out of that relation.'"

See, also, Harwood v. Ft. Worth National Bank (Tex. Civ. App.) 205 S. W. 484–488.

[3, 4] The question, then, arises whether the record presents any evidence from which the jury might have legitimately inferred that the deposit had been made as recited. If the transaction had not been an individual one of Holmes, the president, the recital in the certificates would have been prima facie evidence of the receipt of the money by the bank. In view of its having been issued by the president in his individual transaction and accepted by the defendants in error with that knowledge, it has no such effect. The letter of Holmes asserting the deposit, written in his own interest to defendants in error, has no greater effect. The only other evidence relied upon is the declaration of McAdams, who was the successor of Holmes as president of the bank, made to William Rust, defendant in error, and while he was president, to the effect that the bank had received the money called for by the certificates. McAdams claims that he made the declaration through mistake, and afterwards corrected it. If McAdams' declaration was an admission of, and as such binding on, the bank, the question of its correctness was for the jury to decide.

We think, however, that the declarations of McAdams, made many months after the transaction between defendants in error and Holmes, of which he had no personal knowledge, were binding upon the bank only as a reply to the demand of the defendant in error William Rust, and not as an admission as to the bank's receipt of the money from Holmes when he signed the certificates of deposit. Even the president of a bank is without authority to bind his principal by statements merely narrative of past transactions. McAdams' denial of receipt of the money and of liability could be proven as the predicate for the instituting of a suit to recover from the bank. If the defendants in error had been prejudiced by his admission of the receipt of the money by the bank, by having acted or delayed action because of it, the bank would be estopped to dispute its correctness. As no injury resulted, the defendants in error could only offer the statements as admissions of the bank, through its president, as to a past transaction. The president was without authority to bind the bank by such statements, as admissions. In the case of Packet Co. v. Clough, 20 Wall. 528, 540 (22 L. Ed. 406), the Supreme Court said of the authority of the declarations of the master, made two days after the occurrence of the transaction to which they related:

"Declarations of an agent are doubtless, in some cases, admissible against his principal, but only so far as he had authority to make them, and authority to make them is not necessarily to be inferred from power given to do certain acts. A captain of a passenger steamer is empowered to receive passengers on board, but it is not necessary to this power that he be authorized to admit that either his principal, or any servant of his principal, has been guilty of negligence in receiving passengers. There is no necessary connection between the admission and the act. It is not needful the captain should have such power to enable him to conduct the business intrusted to him, to wit, the reception of passengers, and hence his possession of the power to make such admissions affecting his principals is not to be inferred from his employment. It is true that whatever the agent does in the lawful prosecution of the business intrusted to him is the act of the principal, and the rule is well stated by Mr. Justice Story, that 'where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the res gestæ.' A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done or how he had done it, and his declaration is no part of the 'res gestæ.' "

In the case of Goetz v. Bank of Kansas City, 119 U. S. 551, 560, 7 Sup. Ct. 318, 323 (30 L. Ed. 515) the Supreme Court said of similar declarations of a bank president:

"The testimony of one of the plaintiffs and of one of his attorneys was offered as to declarations of the president of the bank, made several days after the last draft had been discounted, to the effect that the bank had become largely involved in certain wool transactions with Du Bois as early as July or August, 1881, and would have broken off its relations with him if it had not been that this wool matter remained unsettled. The testimony was excluded, and rightly so. The declarations had no bearing upon the good faith of the officers of the bank in the transactions in this case; and, if they had, being made some days after those transactions, they were not admissible as part of the res gestæ any more than if made by a stranger. Evidence of declarations of an agent as to past transactions of his principal are inadmissible, as mere hearsay. Luby v. Hudson River Railroad, 17 N. Y. 131, 133; Adams v. Hannibal & St. Joseph Railroad, 74 Mo. 553 [41 Am. Rep. 333]."

The declarations of McAdams were incompetent, within the rule laid down in the cases quoted from. His statement that the books of the bank showed that the certificates sued on were issued was an admission that past transactions had occurred, and had been evidenced by entries on the bank's books. Little efficacy would be left to the rule against a principal being bound by statements of its agents as to past transactions, if such statements could be made binding on the principal by being so made as to disclose that they were based on the agent's inspection of books not shown to have been lost or destroyed. A result would be that an agent of a principal whose transactions are evidenced by books could bind the principal by admissions as to past transactions by merely putting his admissions in the form of statements of the contents of his principal's books. The books of account of the bank were introduced in evidence in the District Court. The record fails to disclose that the books were in-

complete. The register of certificates of deposit did not show the issue of the certificates sued upon. It would seem that the bank's book of account should show conclusively, by the balances, whether the bank ever received the money, which should have been deposited, when the certificates were issued.

Counsel for the plaintiff in error asserted in argument that they do show the money was not received. Counsel for defendants in error stated that they were unable to determine what the books showed as to the receipt of the money. We conclude that there was no legal evidence offered by the defendants in error to support the burden resting upon them to show the deposit of the money called for by the certificates, and this results in the reversal of the judgment, and the remanding of the case for further proceedings conformable to this opinion; and it is so ordered, the costs to be taxed against the defendants in error.

BATTS, Circuit Judge (dissenting). Anna and William Rust sued First National Bank of Sweetwater, Tex., on three certificates of deposit of $2,000 each, issued in the name of the bank by its president, J. V. W. Holmes, July 5, 1915, to mature 11 months after date, with 6 per cent. interest. Interest was paid June 5, 1916, and the certificates extended, by verbal agreement, for one year. Upon the presentation of the certificates for payment, the bank denied liability. Holmes owed plaintiff certain land notes. He wanted to dispose of the land by which the notes were secured, and Rust, to accommodate him, accepted as part payment of the notes, which were not then due, certificates of deposit, payable at the date of the maturity of the notes. The transaction was by correspondence, and a letter from Holmes stated that the deposit for which the certificates were issued had been made.

The bank denies liability upon the certificates, upon the ground that the debt which was discharged was the individual debt of Holmes. The legal proposition is made that a note or other obligation of a bank, given in discharge of a personal debt of the official, in the absence of express authority from the directors, is void. The general principle is well enough established and upon entirely satisfactory grounds. When the creditor of a bank official receives the obligation of the bank in discharge of such debt, he has notice that the credit of the bank is being used for an illegal and an improper purpose. He will know that the officer is acting outside of his general authority. The creditor cannot safely accept the obligation without knowledge of the actual authority of the officer. Even if he should ascertain that the directors have undertaken to authorize the giving of the bank's notes for an individual debt, a question would arise as to whether such authority could be conferred.

The present case presents a situation somewhat different. The certificates of deposit in suit are not negotiable instruments. The liability which such a certificate imports is not created by the instrument itself, but exists as the result or effect of facts which the certificate evidences. The certificate is a receipt for money, but is not conclusive evidence that the deposit has been made. There may

be a denial of the fact of the deposit and evidence to support the denial. If the deposit has not in fact been made, the bank is not liable, notwithstanding a certificate has been issued. The certificate is evidence, but not conclusive evidence, of facts which place liability upon the bank. The certificate does not itself create a liability. The execution of a promissory note may result in a liability, without reference to whether it is based upon a consideration. A certificate of deposit creates nothing, but merely establishes, or prima facie establishes, a fact which may be the basis of a liability.

The question in this case is whether or not a deposit was made for the plaintiff. If it was the bank is liable. If it was not, the bank (under the issues made) is not liable. Holmes, at the time he issued the certificates of deposit, was the president of the bank. In the course of business of the bank, he had a right to speak for it. He had authority to accept deposits and issue certificates of deposit. He exercised this authority. He made a statement in writing to the effect that the deposit had been made. He was authorized to make such statement for the bank. If it was not true, the bank (no issue of estoppel being presented) would not be liable, notwithstanding his statement.

A certificate of deposit, issued in the course of business by a person who was the chief officer of the bank, and who had specific authority to receive money for the bank and issue statements that it had been received, ought to carry the prima facie presumption that the deposit which it recites had been made. The tender to plaintiff of the bank's note would have given notice that Holmes was undertaking to do that which was beyond his authority as bank president. His statement that money had been deposited to the credit of plaintiff was a statement made in the course of business that he had done something which he had a right to do, and the doing of which would place liability on the bank.

Nor would the transaction necessarily be one for his own benefit. By securing deposits and issuing certificates, he was carrying out the policy of the bank. Plaintiff had been given the option of being paid in cash or having the money deposited in the bank. It would have been advantageous to the bank that the deposit be made. She had made deposits before and received certificates from Holmes, and she accepted these certificates without knowledge of anything wrong, and without reason to make any character of inquiry, and without any knowledge, or notice, or intimation that she was doing anything that would be advantageous to Holmes, or other than advantageous to the bank. The bank held out the president as a person worthy of confidence. Plaintiff cannot be charged with any character of fault in assuming that the deposit which he said was made, was in fact made. The president had a right to make such a deposit. He had general authority to issue certificates of deposit. Plaintiff had a right to assume that he had properly exercised his authority.

The certificate on its face was regular. It was issued in the name of the bank, by the president of the bank, who had authority to issue. It imported a consideration, and prima facie evidenced a debt

of the bank. The burden was properly placed on defendant to prove its invalidity.

At the time payment of the certificates of deposit was requested, Holmes was no longer connected with the bank, having prior thereto become a defaulter. Ascertaining that fact, Mr. Rust asked Mr. McAdams, then president, whether the bank books showed the deposit. The latter went into the vault, examined the books, returned, and stated that the books showed the deposit. There is no controversy about this. Mr. Rust testifies that McAdams also stated that the books showed three certificates, of $2,000 each, and promised that they would be paid at maturity on June 5th. McAdams denied these statements, and further testified that he subsequently ascertained that he was mistaken as to the records showing deposits of $6,000 by Mrs. Rust, explaining that he had been misled by entries on the deposit register offered in evidence, which showed four certificates issued to Mrs. Rust, aggregating $1,000, and one immediately under these for $5,000, without either ditto marks or name. He testified that this $5,000 certificate was in fact issued to the Kansas City Life Insurance Company.

The verdict of the jury involved a finding that the deposit had been made. If there was any evidence to that effect, the verdict should be sustained. It is insisted that the statement of McAdams was made by an agent of the bank, long after the transaction, and that the corporation would not, on that account, be bound. The transaction between plaintiff and Holmes was not the subject-matter of the statement by McAdams. His statement had exclusive reference to what was shown by the records of the bank as to the business of the bank. If the bank's books showed that the deposit was made, that fact could be established to show the fact of the deposit. McAdams was president of the bank, in actual control of its affairs. He was in charge of and helped to make its records. In the course of the business of the bank, in response to the question of a customer of the bank with regard to pending bank business, he made a statement of what was shown by the books of the bank. It was not a recital of a past transaction, but a statement of an existing status. It was his duty, under the circumstances, to make the examination and state the facts disclosed. It may be that that which he said was not conclusive, either as to what the books showed, or as to the fact which the books evidenced. It may be that the bank is not estopped from showing that the president was mistaken as to what the bank books showed. It may be that the admissions are not conclusively binding.

Certain bank books were introduced which contained nothing to sustain the statement which Rust says the president made to him. It is entirely possible that the president did, in the first instance, make a mistake. It is entirely possible that the part of the record which he pointed out was that which misled him. It is also possible that there were other records, which he examined at the time, which sustained the statement that Rust said he made at the time. If the books showed what Rust says McAdams told him, they evidenced the deposit which is the basis of the suit. The admission as to the contents

of the books was made in the course of the business of the bank, by the person properly conducting that business, and within the line and scope of his duties as an officer. The matter was before the jury; they were entirely within their province in determining whether they would accept the admission which they had a right to find he had made when first asked about the liability of the bank, or accept the statement which he subsequently made, supported by such bank books as were produced.

It may be that no deposit was ever made in the bank for the benefit of the plaintiff; but a jury was justified in concluding that the books showed the deposit, and that such a deposit had been made. Two presidents of the bank made statements to that effect. In the selection of high officers of the bank, the directors make a peculiar appeal to the public to rely upon their integrity. The relations which result are of the most confidential character. The entire business of the country is based upon the belief of the general public that confident reliance may be placed in the honesty of such officials. If the bank is to be sustained on this appeal, one of its customers is to be deprived of more than $6,000, because she was willing to rely upon the honesty of a bank president, held out by the bank to be worthy of confidence, and accepted the word of his successor, held out by the bank as worthy of confidence.

The jury were authorized to find that the persons selected by the First National Bank of Sweetwater, Tex., to represent it in its financial affairs, did not defraud the plaintiff, but that the deposits for which she holds the bank's certificates were in fact made.

The judgment ought to be affirmed.

RINEHART & DENNIS CO. v. CHILDRESS & TAYLOR.

(Circuit Court of Appeals, Fourth Circuit. February 13, 1919.)

No. 1675.

1. EVIDENCE ⟸96(2)—ACTION ON CONTRACT.
A railroad contractor, sued by subcontractors, *held* to have the burden of proving as an affirmative defense that damage for which it paid a judgment to a landowner was caused by unskillfulness or negligence of plaintiffs, for which they contracted to be responsible.

2. EVIDENCE ⟸332(1)—RECORD IN ANOTHER SUIT.
The record on appeal in an action in a state court, including evidence, *held* not admissible in an action in a federal court between two of the defendants, in which the issues were not the same.

In Error to the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Henry C. McDowell, Judge.

Action by Childress & Taylor against the Rinehart & Dennis Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

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

G. M. McNutt, of Charlottesville, Va. (A. P. Walker, of Charlottesville, Va., on the brief), for plaintiff in error.

S. H. Sutherland, of Clintwood, Va. (Geo. C. Sutherland, of Clintwood, Va., on the brief), for defendants in error.

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

CONNOR, District Judge. The transcript discloses the following case:

The Carolina, Clinchfield & Ohio Railway Company entered into a contract with Rinehart & Dennis Company for the construction of a line of railway between Elkhorn City, Ky., and Dante, Va. Rinehart & Dennis Company, hereafter referred to as plaintiff in error, sublet a portion of the work to Childress & Taylor, hereinafter referred to as defendants in error. It was provided in the contract between these parties that the work was to be done by the subcontractors in all respects in accordance with the plans, specifications, directions, and orders of the chief engineer of the railway company.

The subcontractors assumed all liability and agreed to indemnify the contracting company against all loss or damage "sustained by depositing material to public injury or to the injury of any person or corporation, including cost and expense of defense, provided they be notified of the bringing suit and be permitted to defend." They also assumed responsibility for all damage done by their workmen, during the performance of the work, to property adjacent to said line of railway, in consequence of their unskillfulness or negligence. If any such damage was done, the chief engineer should have the right to settle and pay the same, and to deduct the amount thereof from the payments to be made under the contract. Payments were to be made on account of the work and material upon the estimates certified by the chief engineer, and when he certified that the work was completed and accepted, final payment was to be made—such certificate to be conclusive, the subcontractors executing a release from all claims and demands whatsoever growing in any manner out of the agreement.

On July 31, 1914, the defendants in error received from the engineer the "final estimate" of the work done and material furnished under the contract, showing a balance due them thereon of $8,328.29. On the 28th of May, 1917, defendants in error brought an action in assumpsit against plaintiff in error for the recovery (among other items) of this balance, filing with their declaration a statement of account or bill of particulars of which said amount constituted the first item.

[1] Plaintiff in error pleaded nonassumpsit and filed their "grounds of defense," in which the balance on "final estimate" was included among other items. Among other grounds of defense it set forth that, between February 1, 1915, and October 1, 1916, it paid, in discharge of a judgment, interest, and cost recovered in the state court, by one Hill against the railway company, plaintiffs in error, and defendants in error, jointly, the sum of $2,816.72, which it claimed as a

credit or set-off on account of the balance due plaintiffs on the "final estimate." Upon the trial, for the purpose of establishing this "ground of defense" credit, or offset, plaintiff in error offered in evidence "the pleadings and orders in the Elkanah Hill litigation in the circuit court of Dickerson county, Virginia." Upon objection of defendant in error, the District Judge stated that, in his opinion:

"The defense made in regard to this judgment was an affirmative defense, and therefore the burden was on plaintiff in error. It follows it cannot put in evidence in that trial the pleadings and evidence in the Hill case, unless it avowed that it would introduce evidence tending to show either: (1) That the liability to Hill arose solely from the negligence or other wrongdoing of Childress and Taylor; or (2) evidence that will clearly and satisfactorily show that an ascertainable, definite part of the entire amount was due to the sole wrongdoings of Childress and Taylor."

Counsel, when asked whether they could make the avowal, responded that they could not do so. The court excluded the proposed evidence, and plaintiff in error excepted. It then offered to introduce a transcript of the record in the same case, the original writ of supersedeas from the Supreme Court of Appeals of Virginia, and the final order certified by the clerk of said court. This transcript included the evidence in said case sent up on appeal to the Supreme Court of Appeals of Virginia. This was also, upon objection, excluded, and plaintiff in error excepted.

No other evidence having been offered to sustain its contention in respect to the payment of the judgment in the Hill case, the court directed the jury to return a verdict for defendant in error in respect to that item. Plaintiff in error excepted, and assigns each of the said rulings of the court as error.

Passing the objection to the admissibility of the evidence, raised by defendant in error because the claim to deduct the amount of the Hill judgment from the amount found by the engineer to be due them, for that it was not pleaded as a set-off or payment, and not admissible under the plea of non assumpsit, and treating, as the District Judge did, the evidence as relevant to the issue, we proceed to inquire respecting the validity of defendant's exception.

The record in the case of Elkanah Hill v. Railway Co., the plaintiff in error, and defendants in error, jointly, discloses a declaration containing five counts, all of which aver that plaintiff was the owner, to the middle of the stream, of a tract of land lying on the waters of Russell Fork creek, upon which he had constructed and operated a mill; also that, upon said creek were rich, productive bottom lands used and cultivated by plaintiff.

The first count charges that defendants wrongfully trespassed upon said lands, and by the several means, elaborately set out, destroyed his milldam and injured the bottom lands. The second count charges that defendants wrongfully and unjustly erected and built a certain wall, bank, or mound in, along, and near the said creek, on the opposite bank to plaintiff's land, in a careless, negligent, and improper manner; that by reason thereof the plaintiff's land was overflowed, and covered with sand, stones, and gravel, to the injury of his mill and bottom

lands. The third count charges that the embankment was constructed to an unreasonable height, and extended so near to, and out so far in, the edge of the creek as to divert the water over plaintiff's land and wash away his bottom lands, banks, mill, etc. The fourth count charges that the embankment was built in a negligent, careless, and improper manner. The fifth count charges the negligent and careless construction of the embankment on the side of the creek opposite plaintiff's land and mill. All of said acts are alleged to have damaged plaintiff's land and mill.

The defendants jointly pleaded "not guilty," and the parties went to trial on the general issue. The jury returned a general verdict for plaintiff, and assessed his damages at $2,000. Judgment was rendered on the verdict against defendants jointly, and, upon appeal to the Supreme Court of Appeals of Virginia, this judgment was affirmed. Carolina, C. & O. R. Co. v. Hill, 119 Va. 419, 89 S. E. 902.

It would seem that plaintiff's cause of action, as set out in one or more counts of his declaration, was for the improper and wrongful location by the engineers of the roadbed and embankment along the banks of the creek, whereby he sustained the injuries of which he complains, while other counts are capable of the construction of an allegation of a negligent manner of performance of the work. For either wrongful act or trespass the defendants in that action were jointly liable to plaintiff. The liability of Childress & Taylor to Rinehart & Dennis Company for indemnity or exoneration for the amount paid by it in satisfaction of the judgment is dependent upon other principles of law. Defendants in error, Childress & Taylor, having introduced in evidence the "final estimate" of the engineer and the contract under which the work was performed, were entitled to recover the amount certified to be due, unless the Rinehart & Dennis Company by competent testimony, established either payment or a set-off to the full or partial amount of the claim. We concur with the District Judge that this was an affirmative defense, the burden of which was upon Rinehart & Dennis Company.

The law being settled that, save in exceptional cases, no action will lie between joint tort-feasors for contribution or exoneration, it became the duty of the Rinehart & Dennis Company to show that their claim for exoneration came within the exceptions to the general rule. This they could do, in the light of the contract, by showing either that, in the action brought by Hill against them jointly, the recovery was based upon some negligent act for which Childress & Taylor were alone liable, as for negligent performance of the work, or that the recovery was based upon some act of Childress & Taylor within the provisions of the contract against which they contracted to indemnify Rinehart & Dennis Company. The declaration alleged that the damage was sustained by reason of the joint negligence of the parties, in one of several ways—a joint trespass; a wrongful erection of the embankment; an unreasonable location and height of the embankment; a careless and negligent manner of doing the work. For injury sustained by Hill for one or more of the alleged wrongful acts, such as the location of the embankment, or its height, as fixed by the plans and specifica-

tions of the engineer, Childress & Taylor were not responsible to Rinehart & Dennis Company; but if the injury was inflicted upon Hill by the negligent manner of doing the work, they were responsible. Again, if the damage was sustained "by depositing materials, it came within the terms of the provision for indemnity."

In the absence of any specific or special pleas filed by the plaintiff in error in this action, by which the court and the defendants in error were informed as to its contention, it was proper and in accordance with the well-settled practice for the court to call upon counsel to state or avow in what manner they proposed to make the transcript relevant to the issue. In the absence of such evidence, the transcript was irrelevant and incompetent. As stated by the learned District Judge, its relevancy, and therefore its admissibility, was dependent upon plaintiff in error showing by evidence aliunde the transcript that the liability to Hill arose solely from the negligence or other wrongdoing of Childress & Taylor, or that an ascertainable definite part of the damages recovered was due to such negligence. The court may have admitted the transcript, and, upon failure of plaintiff in error to follow it up with such evidence, have stricken it from the record, or directed a verdict upon the record. The method or order of presenting the question was within the sound discretion of the District Judge.

Plaintiff in error is entitled to have its exception to the direction of a verdict on this claim considered as if it had introduced the transcript and rested. What occurred is equivalent to the declaration, by counsel, that this was what they proposed to do. By frankly saying to the court that they could not avow that they would introduce evidence tending to show a condition which would make the transcript relevant and a link in a chain of evidence tending to establish their right to have the amount paid in discharge of the judgment, deducted from the balance due defendant in error, they conceded that, with the transcript in evidence, such would be their attitude before the court. From this viewpoint, we concur with the District Judge that they had failed to carry the burden of proof which the law imposed upon them.

[2] For the reasons stated by the District Judge, we concur with him that the record, sent to the Court of Appeals of Virginia, containing the evidence, or only so much thereof, as was deemed necessary to present appellant's exceptions, was not competent. The issue being tried in that case was not the same as in this. The exceptions to the charge of the court in regard to the other items in the declaration were not pressed. The contention in regard to them was fairly submitted to the jury.

The judgment of the District Court will be affirmed.

NEW YORK, P. & N. R. CO. v. WILKINS et al. THE N. Y., P. & N. BARGE NO. 4. THE DELMAR.

(Circuit Court of Appeals, Fourth Circuit. January 20, 1919.)

No. 1641.

COLLISION ⊂⊃104—FAULT—BURDEN OF PROOF—VIOLATION OF HARBOR RULES.
A tug leaving the port of Norfolk, with a tow exceeding by 300 feet the length prescribed by the harbor regulations, *held* to have the burden of showing that such violation did not cause or contribute to a collision in Elizabeth river between the tow and another vessel.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit in admiralty by Lillie Wilkins, administratrix of the estate of Alexander Wilkins, deceased, and others, against the tug Delmar and the N. Y., P. & N. Barge No. 4; the New York, Philadelphia & Norfolk Railroad Company, claimant. Decree for libelants, and claimant appeals. Affirmed.

For opinion below, see 248 Fed. 823.

Floyd Hughes, of Norfolk, Va. (Thomas H. Willcox and Hughes & Vandeventer, all of Norfolk, Va., on the brief), for appellant.

John W. Oast, Jr., and R. T. Thorp, both of Norfolk, Va., for appellees.

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

PRITCHARD, Circuit Judge. This libel was filed to recover for loss of life of Alexander Wilkins, on the 29th day of October, 1916, about 6 o'clock p. m., caused by a collision at a point northerly of and in the vicinity of the can buoy at the entrance to the West Norfolk channel from the main channel of the Elizabeth river, Norfolk, Va., between an unnamed gasoline launch, in which the deceased, Edward Bishop, Elizabeth H. Simmons, and Lubertia Howell were at the time, and barge No. 4, with 28 loaded railroad freight cars on board, in tow of the tug Delmar, whereby the launch was capsized and lost, and the four persons on board drowned, and is an appeal to this court from the District Court of the United States for the Eastern District of Virginia, at Norfolk. Administrators for the three persons named, other than the libelant, filed their petitions in said libel case under the rule.

The gasoline launch was about 30 feet long, 6 feet broad, 3½ feet deep, with a wooden house or cabin extending from a point about 6 feet abaft the stem and extending aft to a point about 6 feet from the stern, and at the time of the accident was in charge of Wilkins, her owner and master, and Bishop was acting as engineer. Barge No. 4, designed for the transportation of railroad freight cars between Norfolk and Cape Charles, is 340 feet long, 50 feet broad, and 1,174 tons net register, and was being towed on a hawser of some 80 or

90 fathoms long, by the steam tug Delmar, 112.3 feet long, 26.9 feet broad, and 11.7 feet deep, and 130 tons net register, 240 tons gross.

The libelant alleges that on the date named the launch was proceeding at about 6 miles an hour, up the Elizabeth river to the westward of the channel, bound for Norfolk, the course of the launch being in a general southeasterly direction, parallel to the main channel extending between Lambert's Point and Pinner's Point; and the Delmar, with the barge in tow, was proceeding from the N. Y., P. & N. terminal at Port Norfolk, bound for Cape Charles. As the tug proceeded out of the West Norfolk channel, and began to shape her course for the northward, the launch stopped her engines, and waited for the barge to follow the tug; but, instead of doing so, it made a shorter turn than the tug, and took a course to the westward of the can buoy at the entrance of the West Norfolk channel, heading in the direction of said launch, which was drifting under the influence of a strong flood tide. The launch immediately proceeded to back to avoid the barge; but the latter swung in towards the launch faster than the launch could get away, so that the cable from the barge to the tug caught the bow of the launch, tipping it over on its port side, where it lay until the forward part of the barge struck it, and carried it under water, drowning all on board, and the launch was a total loss. At the time of the collision the weather was cloudy and calm, and the tide flood.

The libelant charges the following faults against the Delmar: That she was navigating in the harbor with a tow which, including the length of the Delmar, exceeded the length of 700 feet, contrary to the harbor regulations, the hawser being 540 feet long; that she was not manned by a competent master and crew; that she was navigated without a competent lookout properly stationed and attending to his duties; that she was proceeding at an illegal rate of speed, and on the west side of the channel, and that she did not observe the launch lying to the westward of the channel, and the course of her tow, in time to take precautions against running down the launch; and further charges as faults against the barge that it was not managed by a competent master and crew; that it did not have a competent lookout, properly stationed and attending to his duties; in that it was part of a tow which including the length of the Delmar, exceeded 700 feet, and navigated in the harbor of Norfolk; that it did not follow the course of the Delmar, but steered to the port and to the westward of the can buoy at the entrance of the West Norfolk channel, and thereby without warning ran down the launch, which was waiting for it to pass on the course of the tugboat; and that, when the collision became imminent, the towing hawser was not turned loose from the barge, as it easily could have been.

The respondent admits collision with a gasoline launch at about the time stated in the libel, but contends that it occurred in the main channel of the Elizabeth river, nearly opposite black spar buoy No. 11 and denies generally the facts relating to the collision as alleged in the libel, and particularly charges that the launch, before and when it passed the Delmar, was proceeding up the river on the extreme eastern

edge of the channel, the Delmar at the time proceeding out of the West Norfolk channel, and shaping her course to the northward, so as to keep to the starboard side of the main ship channel, after passing Lambert's Point piers. It also denies that the barge did not follow the tug, or that it headed in the direction of the launch, or that the launch was drifting under the influence of a strong flood tide, and alleges that the tug, proceeding down the channel on her usual and proper course, with the barge following in her wake, passed the launch starboard to starboard, when about opposite the merchandise piers at Lambert's Point, the launch at that time being several hundred feet to the eastward of the tug, and well over on the eastern side of the main ship channel, the launch and tug having interchanged "salute" whistles, when about abreast of each other. Shortly afterwards the tug heard distress signals from the barge, and then observed that the launch had suddenly and unexpectedly and without warning changed her course in the wake of the tug; that the bow of the launch struck the forward end of the barge and immediately sank; that nothing could have been done, either on the part of the tug or the barge to avoid the collision, and no other maneuver was possible, save to stop the tug's engine, which was done.

Respondent also charges that the launch was at no time on the port side of the tug or barge, but, on the contrary, that she was far to starboard; that the launch was navigated by unskillful, unlicensed, and negligent navigators; that she was not in charge of an experienced and careful master; that she had no efficient lookout properly stationed; and, further, that the decedent, Wilkins, being master of and in charge of the launch's navigation, was guilty of negligence contributing to the collision, which is a bar to a recovery by his administratrix herein.

The court below entered a decree awarding $7,500 damages for the loss of the life, of Wilkins, $600 for the loss of the launch, $4,500 for the loss of the life of Edward Bishop, and $1,500 each for the loss of the lives of Elizabeth H. Simmons and Lubertia Howell. The court below, among other things, found as a fact that—

"The tow, as well as the hawser in use at the time of the collision, were both greater in length than prescribed by the state and federal statutes. The tug was 129 feet long, the hawser 90 fathoms, or 540 feet, and the barge 340 feet, making more than 1,000 feet for the entire tow, which exceeded the local regulations by 300 feet, and the hawser 15 fathoms, or 90 feet, longer than allowed by the federal statutes."

It appears that the waters between the port of Norfolk and the terminal at Cape Charles consist of narrow channels and anchorages, more or less dangerous at all times, and extremely so when a tug with a tow leaves either one or the other of the terminals mentioned with a 540-foot tow line, and required to traverse a circuitous course.

Counsel for the appellant insist that this rule only applies to seagoing barges—

"and the department that promulgated these regulations ruled on January 25, 1909, six days prior to the regulations taking effect, that these barges were not seagoing barges subject to such regulation, a fact which has been before the court in all the cases in which these car floats have been involved."

Regulations promulgated pursuant to Act Cong. May 28, 1908, c. 212, 35 Stat. 428, require hawsers or tows of seagoing barges navigating the inland waters of the United States to be limited in length to 75 fathoms, and should in all cases be as much shorter as the weather or sea will permit. Section 18 of the harbor regulations also provides that "no tows exceeding 700 feet in length shall enter or depart from the harbor." It is probable that these regulations were adopted in view of the fact that only seagoing barges under the act of Congress were affected thereby. The act of Congress, standing alone, could not be invoked in a case like the one at bar. Hence we have the harbor regulations which apply to tows, either seagoing or otherwise, and prohibit any tow exceeding 700 feet in length to enter or depart from the harbor.

Indeed, the contention of counsel for appellant is based upon the theory that vessels passing through these dangerous channels may do so at will with any length of hawser, without considering any risk that may be incurred thereby. The master of the Delmar, who was a witness in the court below, clearly indicated as much by the following question and answer:

"Q. Don't you pay any attention to the regulations of the barbor master, which provide you shall not proceed south of Sewall's Point, with a tow exceeding 700 feet in length? A. We always go out longer than that I suppose."

This condition, if conceded, does not relieve the tows entering the harbor from the duty of conforming to the rules, and the court below having found as a fact that the tow exceeded the length prescribed by the port rules casts upon the tow the burden of showing that such violation did not contribute to the injury, and this has not been done in this instance. In the case of The Pennsylvania, 19 Wall. 125–136 (22 L. Ed. 148), the court, in referring to this point, said:

"But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute. In the case of The Fenham, 23 Law Times, 329, the Lords of the Privy Council said: 'It is of the greatest possible importance, having regard to the admiralty regulations, and to the necessity of enforcing obedience to them, to lay down this rule: that if it is proved that any vessel has not shown lights, the burden lies on her to show that her noncompliance with the regulations was not the cause of the collision.'"

Also in the case of Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291–298, 37 Sup. Ct. 270, 61 L. E. 726, the Supreme Court quotes with approval the foregoing.

There are a number of other decisions of the Supreme Court to the same effect, notably Belden v. Chase, 150 U. S. 674, 698, 14 Sup. Ct. 264, 37 L. Ed. 1218, and Richelieu & Navigation Co. v. Boston Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398.

Having carefully considered the other assignments of error, we are of opinion that they are without merit.

For the reasons stated herein, the decree of the lower court is affirmed.

BROWN v. UNITED STATES.*

(Circuit Court of Appeals, Fifth Circuit. February 12, 1919.)

No. 3232.

1. CRIMINAL LAW ⟸242(1)—FEDERAL COURTS—TRIAL OF CAPITAL CASES IN COUNTY OF OFFENSE.

Judicial Code, § 40 (Comp. St. § 1022), providing that capital cases shall be tried in the county where the offense was committed, where that can be done without great inconvenience, does not contemplate a transfer of the cause to another court, but a trial by the same court in the county where the offense was committed, and the court where the indictment was found does not lose jurisdiction by ordering such a transfer for trial.

2. CRIMINAL LAW ⟸113—CAPITAL CASES IN FEDERAL COURTS—WHERE TRIABLE.

Judicial Code, § 40 (Comp. St. § 1022), providing that capital cases shall be tried in the county where the offense was committed, "where that can be done without great inconvenience," does not give a defendant an absolute right to trial in such county, but the matter rests in the discretion of the court.

3. INDICTMENT AND INFORMATION ⟸86(2)—OFFENSES WITHIN FEDERAL JURISDICTION.

An indictment charging commission of an offense on a parcel of land described by metes and bounds, alleged to have been acquired with the consent of the state for "public purposes" by the United States and to be under its exclusive jurisdiction, *held* sufficiently specific under Criminal Code, § 272 (Comp. St. § 10445), to give jurisdiction to a federal court.

4. CRIMINAL LAW ⟸304(14)—JUDICIAL NOTICE—OFFENSES WITHIN FEDERAL JURISDICTION—PLACE OF OFFENSE.

Where an indictment in a federal court sufficiently described the place where the offense was committed, the court will take judicial notice of facts which vest the United States with exclusive jurisdiction over such place.

5. CONSTITUTIONAL LAW ⟸62—DELEGATION OF LEGISLATIVE POWER.

Rev. Civ. St. Tex. 1911, art. 5275, authorizing the Governor, on application therefor, to cede exclusive jurisdiction to the United States over lands described in the application and acquired by the United States for certain specified purposes, operates as a blanket consent by the Legislature to such cession, leaving to the Governor only the power to determine when the specified conditions exist, and is not a delegation to him of legislative power.

6. CRIMINAL LAW ⟸1169(1)—HARMLESS ERROR—OFFENSES WITHIN FEDERAL JURISDICTION—EVIDENCE.

In a prosecution for murder committed on land alleged to be within the exclusive jurisdiction of the United States, where the land is described and shown by oral testimony to have been in the exclusive possession of the United States at the time, it was not necessary to prove its title, and introduction of title documents and deeds, could not have injured defendant, whether technically proven or not.

7. HOMICIDE ⟸118(1)—SELF-DEFENSE—DUTY TO RETREAT.

One attacked by another with a knife, not in his own house or on his own premises, is justified in fatally shooting his assailant only where apparently he cannot avoid his own injury by retreating.

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

*Certiorari granted 250 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

In Error to the District Court of the United States for the Southern District of Texas; William B. Sheppard, Judge.

Robert B. Brown was convicted of murder, and brings error. Affirmed.

James R. Dougherty, of Beeville, Tex. (G. R. Scott and Boone & Pope, all of Corpus Christi, Tex., and Dougherty & Dougherty, H. S. Bonham, and James F. Odem, all of Beeville, Tex., on the brief), for plaintiff in error.

John E. Green, Jr., U. S. Atty., of Houston, Tex. (John R. Beasley, of Beeville, Tex., on the brief), for the United States.

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

GRUBB, District Judge. The plaintiff in error was tried and convicted of the murder of one James P. Hermes and sentenced to a term of 15 years in the Atlanta penitentiary for the crime of murder in the second degree. From the judgment of conviction the defendant sued out this writ of error.

The plaintiff in error has assigned 54 errors on the record. Instead of taking up the assignments seriatim, it will serve the ends of brevity and clearness to group them according to the various questions they present.

[1] The first group insisted on in argument relates to the preliminary questions as to whether the defendant was properly tried in Nueces county, Tex., instead of in Bee county, the county in which the offense was committed, and as to whether the court below, at the time of the trial, still retained jurisdiction of the cause.

Section 40 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1100 [Comp. St. § 1022]) provides that—

> "The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience."

Under this section the defendant applied to the District Judge for a trial in Bee county, and the court granted the application, and ordered the case set down for trial at Beeville, the county seat of Bee county, at a special term. The special term was not held. Before the case was again set for trial, the District Judge died. The case thereafter came up for hearing at Corpus Christi before Hon. W. B. Sheppard, who had been designated to sit in the Southern district of Texas. The court, on motion of the district attorney, dismissed the pending indictment, under which the order for a trial at Beeville had been made, and the grand jury then returned a new indictment, identical in substance with the old one. The defendant objected to the dismissal of the first indictment. The propriety of the dismissal, however, is not open to question. 12 Cyc. 374. Nor could any injury have resulted to the defendant from being tried under the new indictment, unless for the reason that the court had lost jurisdiction of the offense, as contended by defendant, before the grand jury returned the second indict-

ment, by reason of the order of the District Court changing the place of trial from Corpus Christi to Beeville.

The transfer of a cause from one court to another, properly effected, would undoubtedly divest the original court of further jurisdiction, as was the case in Smith v. Commonwealth (Ky.) 25 S. W. 107, relied upon by the plaintiff in error. In the instant case, there was no transfer from the original court to another. The prosecution was instituted in the District Court of the United States for the Southern District of Texas, Corpus Christi Division, and remained in that court until conviction and sentence. Section 40 does not contemplate a transfer of the cause to another court, but only a trial by the same court in the county where the offense was committed. The District Court in which the first indictment was returned did not part with jurisdiction over it by ordering a trial at Beeville, and, even if the subsequent trial had been had under the first indictment, the District Court sitting at Corpus Christi would have had jurisdiction to there try it. The dismissal of the first indictment and the return of the second was authorized, but, in any event, the defendant suffered no prejudice from being tried under the second indictment, instead of the first.

[2] After the return of the second indictment, the defendant reinterposed his request for a trial in Bee county, which, after a hearing, was denied. Section 40 of the Judicial Code does not confer upon a defendant an absolute right to a trial in the county where the offense was committed, but only a qualified right in cases where such a trial could be had "without great inconvenience." The District Court is vested with discretion in making this determination. The trial judge, after a hearing, determined that a trial could not be had at Beeville without great inconvenience, for reasons recited in the order, and which do not show any abuse of discretion, if, indeed, they are not sufficient. Nothing less than an abuse of discretion would justify an interference by this court on appeal.

[3] The second question, insisted upon by the plaintiff in error, relates to the sufficiency of the indictment on which the defendant was tried, and under which he was convicted. It is questioned for failing to sufficiently describe the locality where the alleged murder was committed to give a federal court jurisdiction. Jurisdiction in the federal court was claimed by the government under the following part of the third subdivision of section 272, chapter 11 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1142 [Comp. St. § 10445]):

"Or any place purchased or otherwise acquired by the United States by consent of the Legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

The indictment alleged that the United States acquired in Beeville, Bee county, Tex., a parcel of land for the public purpose of the United States, described by metes and bounds; that, prior to the date of the commission of the offense, constitutional and exclusive jurisdiction over the site of said parcel of land was ceded to the United States by the state of Texas in the manner provided by law; and that, from the date of the cession until the time of the finding of the indictment, the said parcel of land was under the exclusive jurisdiction of the

United States, and was so on May 7, 1917, when the offense was there committed.

The indictment is criticized because it fails to allege the character of public use for which the parcel of land was acquired and used by the government. It may be conceded that the third subdivision of section 272 of the Penal Code confers no right on the United States to accept a cession of jurisdiction from a state for other than the purposes set out in section 272. For the purposes of this case, the use must have been for a "needful building." Exclusive jurisdiction of a tract used for a purpose other than one of the named statutory purposes would be unauthorized. The site was, in fact, acquired for a post office, but the indictment avers only that it was acquired for public purposes. It is contended that this is a fatal defect, because the locality of the offense was jurisdictional, and the indictment must show jurisdiction on its face. The indictment does identify the tract on which the crime is alleged to have been committed by describing it by metes and bounds, and also by alleging the date of the cession of jurisdiction by the state of Texas to the United States. The defendant was fully informed as to the locus of the alleged offense and the claim of exclusive federal jurisdiction arising from it, and it is difficult to see how he could have been prejudiced by the imperfect averment, if there was one, and why it should not, therefore, within the terms of section 1025, R. S. (Comp. St. § 1691), be deemed sufficient.

[4] Again, the place being sufficiently described, if the court judicially notices its character, then neither averment nor proof of it would be essential. In the case of Jones v. United States, 137 U. S. 202, on page 212, 11 Sup. Ct. 80, on page 83 (34 L. Ed. 691), the Supreme Court said:

"Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."

And again, on page 214 of 137 U. S., on page 84 of 11 Sup. Ct. (34 L. Ed. 691), the court said:

"All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the Legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings."

In that case it was held that an executive proclamation that the island of Navassa, on which a murder was charged to have been committed, appertained to the United States by determination of the President, was basis for the court's taking judicial notice that it was a place under the sole and exclusive jurisdiction of the United States. In this case exclusive federal jurisdiction depended upon a written application by the United States to the Governor of Texas for a cession of jurisdiction, the cession by the Governor of such jurisdiction and its acceptance by the United States. In line with the case cited, we hold that

the federal courts take judicial knowledge of the documents mentioned and of the character of the place described in the indictment, as to jurisdiction resulting from them. In the case of Holt v. United States, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138, the Supreme Court said of an indictment, which alleged that an offense was committed "within the Ft. Worden military reservation, a place under the exclusive jurisdiction of the United States":

"The indictment is well enough. The words quoted at the outset convey with clearness sufficient for justice that the Ft. Worden military reservation was under the exclusive jurisdiction of the United States at the time of the murder."

The case of Benson v. United States, 146 U. S. 325, 330, 331, 13 Sup. Ct. 60, 36 L. Ed. 991, is to the like effect.

Again, we think the averment that "on the 21st day of September, A. D. 1915, constitutional and exclusive jurisdiction over the site of said lot, tract and parcel of land was ceded to the United States of America by the said state of Texas in the manner provided by law," is a sufficient averment of a cession for one of the purposes enumerated in the third subdivision of section 272 of the Penal Code, and which authorize the United States to accept such a cession, upon the principle that public acts of public officials are presumed to be rightly executed. The application for the cession, the cession, and its acceptance were acts done by the respective federal and state officials in the line of their official duties, and are presumed from the cession and its acceptance to have been properly done, especially when, as in this case, possession and exercise of jurisdiction follow the grant. 12 Cyc. 389.

[5] Article 5275 of the Revised Civil Statutes of Texas (1911) authorized the Governor, upon written application being made to him for that purpose by the United States, accompanied with proper evidence of the acquisition by the United States "for any of the purposes and in either of the modes authorized by this title" of lands, which are described therein by metes and bounds, to cede exclusive jurisdiction over such lands to the United States. That title (article 5275) authorizes the United States to acquire lands in Texas as sites on which to erect and maintain postoffices. When the Governor executes the cession, it will be presumed that the requirements of that act (R. S. Texas 1911, arts. 5252, 5275, 5276) and of the United States Penal Code have been complied with.

The plaintiff in error also questions the authority of the Governor, under the general power conferred by article 5275, supra, to cede jurisdiction in specific instances without legislative direction in each specific case. We do not agree that article 5275 delegates legislative power to the Governor. The blanket consent of the state is contained in article 5275 for all government-acquired lands, upon certain terms and conditions. The Governor is empowered to determine when the conditions that make the legislative consent applicable have occurred. That there is no unconstitutional delegation of legislative power to the executive in this is consistent with the holding of the Texas Court of Criminal Appeals in the case of Baker v. State, 47 Tex. Cr. R. 482, 83 S. W. 1122, 122 Am. St. Rep. 703, 11 Ann. Cas. 751, and of the

Supreme Court of the United States in the case of Field v. Clark, 143 U. S. 649, 694, 12 Sup. Ct. 495, 36 L. Ed. 294.

[6] The plaintiff in error also assigns error based upon the action of the District Court in permitting certain deeds and other muniments of title to go to the jury without proper proof of their execution. The United States was in possession, through contractors, engaged in excavating for a post office, of the land where the murder was committed, when it was committed. The defendant himself was a contractor under the government, and claims to have been rightfully on the premises, when he killed Hermes, by virtue of that relation to the government. The witnesses orally described the place of the killing as the post office site. In this state of the record, the government was not required to prove its title, as in an action of trespass, and the introduction of the deeds and title documents could not have injured the defendant, whether technically proven or not. In the case of Holt v. United States, 218 U. S. 245, 251, 31 Sup. Ct. 2, 6 (54 L. Ed. 1021, 20 Ann. Cas. 1138), the Supreme Court said:

"Several objections were taken to the admission and sufficiency of evidence. The first is merely an attempt to raise technical difficulties about a fact which no one really doubts, namely, that the band barracks, the undisputed place of the crime, were within the exclusive jurisdiction of the United States. A witness testified that they were within the inclosure of Ft. Worden under military guard and control, from which all unauthorized persons are excluded, and that he knew that the fence was coincident with the boundaries shown on a map objected to, but admitted. He identified the band barracks as described in certain condemnation proceedings. The state of Washington had assented by statute to such proceedings and Congress had authorized them. The deeds and condemnation proceedings under which the United States claimed title were introduced. The witness relied in part upon the correctness of official maps in the Engineers' Department made from original surveys under the authority of the War Department, but not within his personal knowledge, and he referred to a book showing the titles to Ft. Worden compiled under the same authority. The documents referred to are not before us, but they properly were introduced, and so far as we can see justified the finding of the jury, *even if the evidence of the de facto exercise of exclusive jurisdiction was not enough, or if the United States was called on to try title in a murder case.* We think it unnecessary to discuss this objection in greater detail."

[7] Another group of assignments of error present the correctness of the rulings of the District Court upon the applicable law of self-defense. The District Judge charged the jury that the defendant might owe the deceased a duty to retreat under certain conditions, though the deceased was approaching him with a knife in his hand. The plaintiff in error's contention limits the duty to retreat to cases in which the deceased assaults his slayer without a deadly weapon. A tendency of the evidence was to the effect that the deceased, Hermes, approached defendant with an open knife in his hand, with which he attempted to strike defendant. The evidence without conflict showed that the defendant, on the approach of Hermes, retreated 20 or 25 feet to where he had left his raincoat, in which was his pistol, and, after obtaining his pistol from it, stood his ground, using his pistol with fatal effect on Hermes. The defendant was rightfully where he was at the time of the quarrel, but was not on his own premises. These facts make

pertinent the question whether one who is assailed by another with a deadly weapon is under all circumstances excused, by that circumstance, from any duty to retreat from his assailant, if himself without fault in provoking the assault.

This is the contention of the plaintiff in error's counsel urged in an able argument and brief. We are not convinced by it that there is a hard and fast rule that he who repels an assault made by another with a deadly weapon may, because of the character of the weapon used by his assailant, repel force with force to the extent of taking life, without retreating, though he could retreat with safety to himself. In the case of Beard v. United States, 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086, the Supreme Court held that one who was assaulted on his own premises, though not in his dwelling house, could repel the assault to the extent of taking his assailant's life, if necessary, without retreating. In the case of Alberty v. United States, 162 U. S. 499, 505, 16 Sup. Ct. 864, 40 L. Ed. 1051, the Supreme Court held that one who killed another, who, in the nighttime, was endeavoring to enter the window of a room, in which was his wife, and who, upon the approach of the defendant, threatened to kill him, and made demonstrations to that end, was justified in killing the deceased, without retreating to avoid doing so. In the former case, the Supreme Court quotes from cases in other jurisdictions, and apparently with approval, the language of the opinions in which would indicate that the duty of one to retreat, when violently assaulted, had no place in modern criminal law. However, in the subsequent case of Allen v. United States, 164 U. S. 492, 497, 17 Sup. Ct. 154, 156 (41 L. Ed. 528) the Supreme Court held the charge of the trial court to be correct, which contained this language:

"The law of self-defense is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character, or that may produce great bodily harm, against which you can exercise a deadly attack. If he is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm from which death or permanent injury may follow, in such a case he may lawfully kill the assailant. When? Provided he use all the means in his power otherwise to save his own life or prevent the intended harm, *such as retreating as far as he can, or disabling him without killing him, if* it be in his power. The act coming from the assailant must be a deadly act, or an act that would produce great violence to the person, under this proposition. It means an act that is hurled against him, and that he has not created it, or created the necessity for it by his own wrongful, deadly or dangerous conduct—conduct threatening life. *It must be an act where he cannot avoid the consequences. If he can, he must avoid them, if he can reasonably do so with due regard to his own safety.*"

Of this charge, the Supreme Court said:

"Nor is there anything in the instruction of the court that the prisoner was bound to retreat as far as he could before slaying his assailant that conflicts with the ruling of this court in Beard v. United States, 158 U. S. 550 [15 Sup. Ct. 962, 39 L. Ed. 1086]. That was the case of an assault upon the defendant upon his own premises, and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house. So, too, in the case of Alberty v. United States, 162 U. S. 499 [16 Sup. Ct. 864, 40 L. Ed. 1051], the defendant found the deceased trying to obtain access to his wife's chamber through a window, in the nighttime, and

it was held that he might repel the attempt by force, and was under no obligation to retreat if the deceased attacked him with a knife. *The general duty to retreat, instead of killing, when attacked, was not touched upon in these cases.* Whart. on Homicide, § 485."

It is true that the assault on the defendant in the Allen Case, as shown by the statement of facts on a former appeal, was not made with a deadly weapon; but the Supreme Court assumed, as did the trial court, that the facts in the record showed it might have been made under circumstances that created a necessity for repelling it, either without retreating or only after having retreated, as the jury might infer. The general rule as to the duty of retreat is set out by Wharton in the section cited by the Supreme Court as follows:

"In case of personal conflict, it must appear, in order to establish excusable homicide in self-defense, that the party killing had retreated, either as far as he could, by reason of some wall, ditch or other impediment, or as far as the fierceness of the assault would permit him. * * * The true view is that a 'wall' or 'ditch' is to be presumed whenever retreat cannot be further continued without probable death, and when the only apparent means of escape is to attack the pursuer. And retreat need not be attempted when the attack is so fierce that the assailed, by retreating, will apparently expose himself to death."

When the person assaulted is not on his own premises or in his own house, and is not engaged in preventing an independent and forcible felony, but, while engaged in a personal and unprovoked conflict, is seeking to defend his own life, we think the proper rule is that, before repelling force with force, to the extent of taking life, he must retreat to avoid injury to himself, provided that he can retreat with reasonable safety to himself, unless the circumstances are such as would lead a prudent man reasonably and in good faith to believe that, contrary to the facts, retreat would bring upon him danger to his life or limb. This issue is to be determined by the jury from all the attendant facts, and does not depend upon the existence of one alone, for illustration, the use by the assailant of a deadly weapon. It is manifest that an assault with a knife, as distinguished from a gun, might be made from such a distance as that the person assaulted could by retreat escape with no risk. The law, in its tenderness for human life, does not authorize the taking of life to repel such an assault.

An assault without a deadly weapon, because of great disparity of strength, might become fatal if the assailant closed with his adversary. If the manifest purpose of the strong assailant was to kill or rape, then the weak person assaulted might be able to attain safety only by repelling it from a distance, by shooting the assailant. We think it clear that the Beard and the Alberty Cases are exceptions only to a general rule, which requires retreat where, in fact and appearance, retreat is safe, and that the general rule applies to the facts of this case. The deceased approached the defendant in the daytime from a distance. If he had a weapon, it was a knife only, and not formidable at a distance. The defendant had time to, and did, retreat 25 feet, to get his pistol. If the jury believed that he could, by further retreat, have avoided injury, and that a reasonably prudent man would have drawn this conclusion from the circumstances and character of the assault, then it

was the defendant's duty to have retreated, and, failing to do so, he is not to be excused for killing the deceased. The court was not in error in imposing this limited duty of retreat upon the defendant.

The charge of the court is criticized for not defining a deadly weapon. It contains a definition of that term which we think sufficient. The court's charge left to the jury to determine which was, in fact, the fatal shot of the four fired by the defendant, and permitted the jury to acquit the defendant of responsibility for murder because of the fourth shot, if they found that the third was the only fatal one. The charge is also criticized because of the asserted repeated references to the duty to retreat contained in it. We do not think there was unwarranted iteration in this respect. There was a portion of the charge that omitted reference to the element of apparent, as distinguished from actual, danger to be apprehended from the alleged assault on defendant by the deceased. No exception was reserved to this part of the charge separately, and no ground of exception to the charge in its entirety covers the point. The charge, in other portions, covered the doctrine of apparent danger. The omission in the part complained of would doubtless have been supplied, if the court's attention had been directed to it before submission to the jury. No reversible error can be predicated upon an omission, first complained of after verdict. We think the charge of the court fairly covered the law of the case.

The plaintiff in error assigns the refusal of a number of special requests to charge. Of them, without specific reference to each, we may say that those that asserted correct legal propositions were substantially charged in the general charge of the court.

Finding no reversible error in the record, the judgment is affirmed.

WHITE OAK FUEL CO. v. CARTER et al.*

(Circuit Court of Appeals, Eighth Circuit. April 4, 1919.)

No. 5268.

CONTRACTS ⊂=267—RIGHT OF RESCISSION—PARTY HIMSELF IN DEFAULT.

The right to repudiate a contract for the default of the other party thereto cannot be exercised by a party who is himself in unexcused default of performance of an essential covenant thereof.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by Bertram U. Carter and others against the White Oak Fuel Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

John P. Leahy, of St. Louis, Mo. (John V. Lee, of St. Louis, Mo., on the brief), for plaintiff in error.

Chase Morsey, of St. Louis, Mo. (Matt G. Reynolds, of St. Louis, Mo., and W. D. P. Farthing, of East St. Louis, Ill., on the brief), for defendants in error.

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

*Rehearing denied September 1, 1919.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. The White Oak Fuel Company, hereafter called defendant, entered into a written contract with Carter Bros. Company, hereafter called plaintiff, by the terms of which the defendant agreed to furnish to plaintiff 4 to 6 cars per month of White Oak special 2-inch lump coal, at $1.42½ per ton, and 5 to 8 cars per month of White Oak special 6-inch lump coal, at $1.57½ per ton, free on board plaintiff's switch in East St. Louis, Ill., in regularly scattered monthly shipments beginning August 7, 1916, and ending April 1, 1917. The plaintiff agreed to receive all the coal contracted for, at the place and during the time mentioned, and to pay the agreed price, the payments to be made on or before the 10th of each month for the coal delivered during the preceding month.

The plaintiff brought suit for breach of the contract, and recovered judgment against the defendant, and this proceeding seeks a review of the trial and a reversal of the judgment. The plaintiff alleged a failure of the defendant to deliver the coal contracted for, and the damage suffered as a consequence. The defendant alleged that plaintiff had breached the contract, by refusing to receive the coal and by failing to make monthly payments by the 10th of the month for coal delivered to it in the preceding month, and therefore defendant had rescinded the contract and refused to deliver more coal, and had so notified the plaintiff. The plaintiff's reply denied any refusal to receive coal, and pleaded that the time of payment for the coal delivered was extended by agreement of the parties and was paid for before the expiration of the time thus fixed.

The evidence showed that defendant had furnished only a part of the number of cars contracted to be delivered in each of the months of August, September, and October. There was a conflict of evidence as to whether defendant had offered to furnish and plaintiff had refused to receive more cars in each of these months. The court permitted the plaintiff to show that after the written contract was signed an oral agreement was made, without any new consideration, extending the time of payments to a day in each month much later than provided in the written contract. The plaintiff paid in September for the coal delivered in August, and in October for the coal delivered in September; but the defendant notified plaintiff before the 10th of November that, unless it paid its bills promptly that month for the coal delivered in October, there would be no more coal shipped under the contract. The plaintiff did not pay for the coal delivered in October until November 22d, and no coal was delivered to plaintiff under the contract after October.

The case was submitted to the jury, conditioning plaintiff's right to recover on the absence of any offer by defendant to furnish more coal in August, September, and October, and of a refusal by the plaintiff to accept it, and also on the existence of a waiver by defendant of the making of payments on the 10th of each month, as provided in the written contract, and the verdict was against the defendant. The ver-

dict must be taken as establishing the fact that the defendant was guilty of an unexcused breach of the contract to furnish the stipulated amount of coal in August, September, and October, and that such default continued and existed at the time the defendant declared it would furnish no more coal under the contract.

The defendant contends that evidence of an oral agreement to extend the time of payments should not have been received, and that it was error to submit to the jury the existence of a waiver of the time of payment derivable only from such evidence. The argument is that the written contract was for the sale of goods of the value of upwards of $50, and that no oral modification of this contract could have been made because of the terms of the statute of frauds, and also because there was no consideration for such oral contract. The plaintiff contends that the time of payment was not of the essence of the contract, and there had been no breach of any of its essential terms by the plaintiff, so that defendant was not justified in declaring it at an end and in refusing further performance, and therefore the question of waiver was not in issue.

As has been stated, the verdict establishes the fact that at the time the defendant attempted to terminate the contract, and when it declared that it would proceed no further thereunder, it was itself in default of performance of an essential covenant of the contract, because it had failed to deliver the agreed amount of coal the plaintiff was to receive in August, September, and October. The right to repudiate a contract for the default of the other party thereto cannot be exercised by a party who is himself in unexcused default of performance of an essential covenant thereof. Chitty on Contracts (15th Ed.) 722; Walds Pollock on Contracts (3d Ed.) 345; Norwood Paper Co. v. Columbia Paper Bag Co., 185 Fed. 454, 107 C. C. A. 524; Fairchild-Gilmore-Wilton Co. v. Southern Refining Co., 158 Cal. 264, 110 Pac. 951; Mason v. Edward Thompson Co., 94 Minn. 472, 103 N .W. 507; Central Lumber Co. v. Arkansas Valley Lumber Co., 86 Kan. 131, 119 Pac. 322; Griffin v. Griffin, 163 Ill. 216, 45 N. E. 241; Reddish v. Smith, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. Rep. 781; John A. Gauger Co. v. Sawyer & Austin Lumber Co., 88 Ark. 422, 115 S. W. 157; Norris v. Letchworth, 167 Mo. App. 553, 152 S. W. 421; 2 Black on Rescission, § 553; 13 Corpus Juris, 614.

The court should have instructed the jury that if there was no breach of the contract, because of the plaintiff's refusal to receive coal offered by the defendant in fulfillment of the contract, the plaintiffs were entitled to recover. It was therefore not error of which defendant can complain that the court also submitted the existence of an agreement by defendant to waive the making of payments promptly by the 10th of each month, and conditioned plaintiff's recovery on findings in favor of plaintiff on both propositions.

Complaint is made because the court refused to permit an employé of the defendant to testify what the defendant's president had said in September over the telephone, after he had called up the plaintiff with reference to payment for the coal. It follows from what has been said, that whatever was said on this subject was an immaterial matter of in-

quiry at the trial, because the plaintiff's default of payment was not properly an issue in the case. There was therefore no error in excluding this evidence.

This disposes of all the material assignments of error. The judgment will be affirmed.

WEEMS et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5236.

1. CRIMINAL LAW ⇐1036(8)—APPEAL—SUFFICIENCY OF EVIDENCE.
Failure of witnesses to clearly identify a city mentioned in their testimony *held* waived, where the omission was not called to the attention of the trial court.

2. INTOXICATING LIQUORS ⇐236(1)—PROSECUTION FOR INTRODUCING INTO PROHIBITION STATE—SUFFICIENCY OF EVIDENCE.
Evidence in a prosecution for introducing liquors into a prohibition state *held* sufficient to justify submission of the case to the jury.

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

Criminal prosecution by the United States against Frank Weems and Frank Bussey. Judgment of conviction, and defendants bring error. Affirmed.

John M. Goldesberry, of Collinsville, Okl. (Archibald Bonds, of Muskogee, Okl., on the brief), for plaintiffs in error.

C. W. Miller, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

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

AMIDON, District Judge. The defendants, Frank Weems and Frank Bussey, were indicted and convicted for introducing a large quantity of intoxicating liquors into the state of Oklahoma. The evidence tended to show that the parties shipped two trunks from Kansas City to a town in Oklahoma. Special agents opened these trunks at Kansas City, and found that one of them contained two and the other one cask of whisky. These trunks were checked on tickets upon which one or both of the defendants entered the train at the Union Station. The special agent, by inspecting the records in the baggage office, found the number of the tickets for which the checks were issued, and then watched for the passenger or passengers presenting the tickets at the gate and the train. This agent was unable to state whether the trunks were checked on two different tickets, or only one, but clearly identified one of the tickets corresponding to the checks, and then traced the parties into a sleeper at Kansas City. The special agent then phoned to a special agent in Oklahoma, who got on the train one station from the place for which the tickets read. The parties, instead of going

to the station, got off at a water tank about half a mile back. They left the sleeper on the side opposite the station. The officer watched them under the train, and followed them around the rear. By that time they were retreating. He gave pursuit, and as soon as they say they were followed they started to run. They dropped two suit cases which were well loaded with whisky. An overcoat was picked up, bearing the identification marks of Frank Weems, and containing a letter addressed to his wife. The parties escaped, and the defendants were not apprehended for two or three days. The trunks were put off at the station, and one of them contained two casks and the other one cask of whisky. The identification of the parties who got off the train, as the defendants, was not very clear; but there was evidence identifying one of the parties as one of the men who held the tickets and boarded the train at Kansas City. This, and the other circumstances to which we have referred, constitute the evidence upon which the case was submitted to the jury.

[1] There are two matters complained of—one, that the Kansas City referred to by the witnesses is nowhere identified as Kansas City, Mo. The whole testimony, however, shows with reasonable clearness that that was the city which the witnesses had in mind. The train started from there. They constantly referred to the Union Station at Kansas City. It is also true that this question was not raised in any way at the trial. It could easily have been corrected, and we think it was waived by not being specifically called to the attention of the court.

[2] The other assignment of error is based upon a motion at the conclusion of the evidence to return a verdict of not guilty. We think there was sufficient evidence to justify submitting the case to the jury.

The judgment is therefore affirmed.

ELDRED et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5235.

PUBLIC LANDS ⇐120—SUIT FOR CANCELLATION OF PATENTS—FRAUDULENT ENTRIES.

The United States *held* entitled to cancellation of patents for soldiers' homesteads which were taken by the entrymen under contracts to convey to another, who paid all expenses and the agreed price on conveyance after final proof.

Appeal from the District Court of the United States for the District of Nebraska; Martin J. Wade, Judge.

Suit in equity by the United States against Everett M. Eldred and others. Decree for the United States, and defendants appeal. Affirmed.

William F. Gurley, of Omaha, Neb. (David A. Fitch, of Omaha, Neb., on the brief), for appellants.

T. S. Allen, U. S. Atty., of Lincoln, Neb. (Howard Saxton, Asst. U. S. Atty., of Omaha, Neb., on the brief), for the United States.

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

AMIDON, District Judge. This is a suit in equity by the United States against the defendant Eldred to cancel patents obtained upon soldiers' homestead entries. The trial court found the entries to be fraudulent and entered a decree in favor of the government. The defendant appeals.

The defendant is a prosperous ranchman living in Deuel county, Neb. He had been occupying large tracts of public domain, inclosing the same by fences, as a part of his ranch. He had been ordered to remove the fences. To meet this emergency he went to Saline county, Neb., and induced a large number of old soldiers to locate homestead entries on the land under the Kincaid Act. He paid their expenses from the time they started; he selected their claims, erected improvements upon them, boarded the claimants while they were carrying on their pretended residence, and paid the expenses of making final proof. As soon as the entrymen obtained their patents, he paid each of them $500 for his homestead, in exact accordance with the agreement which he made with them when he first saw them. If such a fraud as this could be sustained, there would be no limit to the amount of public lands which could be obtained through dummy entrymen. This is not the law. On the contrary, the law has of late years been going steadily against such practices. United States v. Richards (D. C.) 149 Fed. 443, 175 Fed. 911; Booth-Kelly Lumber Co. v. United States, 237 U. S. 481, 35 Sup. Ct. 659, 59 L. Ed. 1058; United States v. Moorhead, 243 U. S. 607, 37 Sup. Ct. 458, 61 L. Ed. 926.

The judgment is affirmed.

HAMLIN et al. v. GROGAN.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5219.

1. APPEAL AND ERROR ⊜1009(1)—REVIEW ON APPEAL—FINDINGS OF FACT.
   A finding of fact by a chancellor, who heard the witnesses, will not be reversed, except in a clear case.
2. MARRIAGE ⊜50(5)—PROOF OF CONTRACT—CIRCUMSTANTIAL EVIDENCE—COHABITATION AND REPUTATION.
   A contract of common-law marriage may be shown as an inference of fact from cohabitation, declarations of the parties, and reputation among friends and kindred.
3. MARRIAGE ⊜40(11)—PRESUMPTION OF LEGALITY.
   Where a contract of marriage is proved, the burden of proof rests upon the party contesting it to show that one of the parties was not qualified to enter into the contract by reason of an existing prior marriage.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Bill of interpleader in equity by Oscar T. Hamlin, administrator, against George H. Grogan and others. Decree for defendant Grogan, and complainant and the other defendants appeal. Affirmed.

Oscar T. Hamlin, of Springfield, Mo. (Lou L. Collins and Willard W. Hamlin, both of Springfield, Mo., on the brief), for appellants.

G. M. Sebree, of Springfield, Mo. (W. J. Orr, of Springfield, Mo., Frank P. Sebree, of Kansas City, Mo., and L. R. Patton, of Galveston, Tex., on the brief), for appellee.

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

AMIDON, District Judge. [1] The controversy in this suit turns upon the question whether appellee, George H. Grogan, was the husband of Eliza Grogan at the time of her death. There is no charge of adultery or bigamy. It is entirely a matter of who is entitled to the estate of Mrs. Grogan. The marriage was established by cohabitation, by both of the parties holding themselves out as husband and wife, and by documentary evidence in the handwriting of Mrs. Grogan. The case was carefully tried by an able and experienced judge. He found in favor of the marriage. His finding is amply supported by the evidence. Unless we are to completely disregard the rule that the finding and decree of a chancellor, who has heard the witnesses, will not be disturbed, except in a clear case, the decree ought to be affirmed. Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Coder v. Arts, 152 Fed. 943, 946, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; Silver King, etc., Mining Co. v. Silver King Consolidated, etc., Co., 204 Fed. 166, 177, 122 C. C. A. 402. We have carefully read the record, and, if we were trying the case ourselves, we should reach the same conclusion as that arrived at by the chancellor. No questions of law are presented, except such as are deeply involved in the primary question of fact. We do not feel that any good purpose would be served by an elaborate marshaling of the testimony to justify the decree. Each case involving such a controversy must turn upon its own evidence. The law is well established, and has been recently declared by the Supreme Court and by this court. Travers v. Reinhardt, 205 U. S. 423, 27 Sup. Ct. 563, 51 L. Ed. 865; Great Northern Ry. Co. v. Johnson, 254 Fed. 683, —— C. C. A. ——.

[2] The most serious of appellants' contentions is that in the case of a common-law marriage the contract between the parties must be proven as a tertium quid anterior to and independent of cohabitation, declaration of the parties, and manner of life. Such is not the law. By the overwhelming weight of authorities the contract may be shown as an inference of fact from cohabitation, declarations, and reputation among friends and kindred. In such a case the fact of contract is not a "presumption," but is a fact proven by circumstantial evidence. Such circumstantial evidence, if clear and persuasive, establishes the existence of the contract of marriage between the parties as satisfactorily as if the contract had been reduced to writing, or had been expressed in the presence of living witnesses in the plainest form of contractual

words. The cases are fully reviewed in Travers v. Reinhardt, 205 U S. 423, 27 Sup. Ct. 563, 51 L. Ed. 865. The law on the subject received an accurate statement by one of the greatest judges of our race in the language of Lord Westbury quoted in the Travers Case at page 441 of 205 U. S., at page 569 of 27 Sup. Ct. (51 L. Ed. 865). See, also, Nelson v. Jones, 245 Mo. 579, 151 S. W. 80; Betzinger v. Chapman, 88 N. Y. 488; Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568; White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; 18 Ruling Cases, 421, §§ 46 and 57, and cases there cited.

[3] The foregoing view as to the proof of the contract of marriage answers the contention of appellants that the trial court in reaching its conclusion proceeded by resting the presumption of the contract of marriage upon the presumption that appellee's former marriage had been terminated in some lawful way. No such double presumption exists in the reasoning of the trial judge. As already stated, the existence of the marriage contract between Mr. and Mrs. Grogan is proven as a fact by circumstances, and does not rest upon a presumption. So the court could properly base its decree upon the presumption that Grogan was qualified to enter into the contract of marriage by reason of his former marriage having terminated in some lawful way. It is also true that the burden of proof as to the existence of the former marriage at the time of entering into the second contract was upon appellants. They could discharge that burden only by proof. It could not be done by the metaphysics of presuming that the former wife was still living, and the marriage with her in force.

The decree is affirmed.

HEYNACHER v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. April 15, 1919.)

No. 5210.

1. CRIMINAL LAW ⟸1134(3)—APPEAL—NECESSITY OF REVIEW.
Where the punishment imposed did not exceed that authorized for one of two offenses, if no error was committed in respect to such offense, the other need not be considered.

2. ARMY AND NAVY ⟸40—ESPIONAGE ACT—VALIDITY.
Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c) is valid. The obstruction of the military service of the United States need not be by physical acts, but may be by written or spoken words, and the government is not required to show that some particular person was dissuaded from entering the service.

3. CRIMINAL LAW ⟸683(1)—ESPIONAGE ACT—REBUTTAL EVIDENCE.
In a prosecution for violating Espionage Act, tit. 1, § 3 (Comp. St. 1918, § 10212c), by attempting to cause disloyalty in the military forces and by obstructing recruiting, a letter from defendant to the president of the German-American Alliance of his state, inclosing a newspaper clipping telling of the escape of a German soldier, who told of the brutality of German officers, conditions behind the German lines, etc., with defendant's comment, "What kind of a swine is this?" *held* admissible to rebut the effect of defendant's evidence that he was a member of the Red Cross and gave free posting to army and navy advertisements on his bill boards, etc.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing denied September 1, 1919.

In Error to the District Court of the United States for the District of South Dakota; Jas. D. Elliott, Judge.

Walter Heynacher was convicted of violating the Espionage Act, and he brings error. Affirmed.

W. F. Mason, of Aberdeen, S. D., for plaintiff in error.

Robert P. Stewart, U. S. Atty., of Deadwood, S. D. (Edmund W. Fiske, Asst. U. S. Atty., of Sioux Falls, S. D., and George Philip, of Rapid City, S. D., on the brief), for the United States.

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

HOOK, Circuit Judge. [1] The plaintiff in error was convicted of violations of section 3, title 1, of the Espionage Act of June 15, 1917 (40 Stat. 217 [Comp. St. 1918, § 10212c]), charged in two counts of an indictment—first, by causing and attempting to cause disloyalty, etc., in the military forces of the United States; and, second, by obstructing the recruiting and enlistment service of the United States when it was at war with the Imperial German government. The sentences under the two counts were the same and were to run concurrently. The punishment imposed did not exceed that authorized by the statute for the latter offense, consequently if no error was committed in respect of that offense the other need not be considered. Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830.

[2] The charge was that on or about December 15, 1917, the accused willfully obstructed the recruiting and enlistment service by publicly saying to a young man who was eligible to enlistment and subject to conscription:

"That he should not enlist; that the present war was all foolishness and (a vulgar word which need not be repeated), and that my talk of enlisting was all nonsense; that the war was for the big bugs in Wall Street; that it was all foolishness to send our boys over there to get killed by the thousands, all for the sake of Wall Street; that he should not go to war until he had to."

There was substantial evidence in support of the verdict and it need not be recited here. The constitutionality of the clause of the Espionage Act in question, that the obstruction of the service need not be by physical act but may be by written or spoken words, and that the government is not required to show that some particular person was dissuaded from entering the service, have been so frequently decided by this and other courts that reference to the many cases is unnecessary. In Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. —— (March 3, 1919), the court said:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

See, also, Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. —— (March 10, 1919).

The indictment and the evidence at the trial were sufficient under the statute.

[3] There is a complaint about the admission of evidence. In defense the accused showed that he was a member of the Red Cross and that he gave free posting on a system of billboards which he controlled of advertisements for the army and navy, the various government war loans, and the food and fuel administrations, amounting in value to several hundred dollars. This was to show his loyalty and the want of unlawful intent, and to give strength to his version of the language he used, which was quite different from that set forth in the indictment and testified to by witnesses for the government. To rebut this the government introduced as part of the cross-examination a letter of November 27, 1917, from the accused to the president of the German-American Alliance of his state, and a newspaper clipping inclosed with the letter. In the letter was the sentence:

"I cannot understand that you still won't recognize the services of Hans Demuth for the German interests of South Dakota."

This in itself was probably not very significant, but the newspaper clipping was an account of the escape of a certain German soldier to this country, who told of the brutality of some German officers, conditions behind the German lines, etc. Upon this clipping the accused had written, "What kind of a swine is this?" It is contended that the court erred in receiving this evidence, but it is clear that it was properly admitted. It tended to show that the public manifestations of loyalty on which the accused relied for the purposes mentioned should not receive the full consideration he claimed for them. There is nothing else in the assignments of error that is substantial.

The sentence is affirmed.

CULVER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 1, 1919.)

No. 5193.

CRIMINAL LAW ⟸1170½(6)—REVIEW—PREJUDICIAL ERROR—CROSS-EXAMINATION OF DEFENDANT.

In a criminal prosecution for using the mails to defraud, it was prejudicial error to permit counsel for the government, on cross-examination of defendant, to inquire as to the property he owned at the time of the alleged offense and at the time of trial, even though some of such questions were excluded.

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

Criminal prosecution by the United States against John Culver. Judgment of conviction, and defendant brings error. Reversed.

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

W. J. Crump, of Muskogee, Okl., for plaintiff in error.

C. W. Miller, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

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

SANBORN, Circuit Judge. John Culver, one of the defendants below in this case, complains of error in his trial and conviction for devising a scheme to use the mails to defraud J. Moncrief, who, under the names of the Dyer-Bates Company of Winfield, Kan., and the Winfield Nursery Company, a corporation, owned and was selling nursery stock. On May 10, 1915, Moncrief made a contract with E. J. Luce, who was indicted and convicted with Culver, to furnish to him, at prices specified, nursery stock to fill orders to be taken by him from third parties on blanks to be provided by Moncrief, and Luce agreed to procure all his nursery stock from Moncrief, to pay him 10 per cent. interest on money he borrowed from Moncrief, and not to ask him for a loan of more than 20 per cent. of the orders he turned in. Under this contract Luce procured orders for nursery stock, turned them over to Moncrief, and borrowed from him or procured advances from him of about 20 per cent. of the amount of the orders for nursery stock. Culver was employed by Luce on a commission, or on a salary, or in some other way, to procure some of these orders which Luce caused to be mailed to Moncrief.

The scheme to defraud, which the government alleged in the indictment that Luce and Culver devised, was to obtain forged or otherwise worthless orders for nursery stock, to represent that the orders were genuine and valuable, that the makers were real persons when they were fictitious persons, that they were financially responsible when they were not, and to borrow 20 per cent. of the amounts of the orders, and never to pay it back. There was a long trial, and much conflicting testimony regarding the orders that were obtained, and the character of them, but no testimony regarding the property of Culver or his financial responsibility, nor was he a party to the contract between Moncrief and Luce. After the plaintiff had rested its case in chief, and Culver had testified for the defense upon his examination by his counsel, who asked him nothing about his property, counsel for the government on his cross-examination inquired of him whether or not he owned property of his own in Muskogee, where he lived in the summer of 1915, when these orders for nursery stock were taken. He answered that he did not. Asked if he then owned his own home, he answered that he did not. Asked if he owned considerable property at the time of his examination, he answered, "Well, right smart; yes." Asked if he owned his own home in Muskogee, he answered, "Yes, sir." Asked if he owned several farms, he answered, "Yes, sir." Asked how many farms he owned, his counsel objected to this question as incompetent, irrelevant, and immaterial. The court overruled the

objection, and the defendant answered, "Well, about one." The examination then proceeded in this way:

"Q. You own quite a lot of city property? A. Well, I can't say that; I—I own some; yes, sir.

"Q. What do you value your present property at? A. Well, I have never—

"Mr. Crump (counsel for Mr. Culver): I want to renew my objection, if your honor please.

"The Court: Objection sustained.

"Q. You recently bought one farm that you paid about something over $20,000 for, did you not?

"Mr. Crump: I object to that as incompetent, irrelevant, and immaterial.

"The Court: Sustained.

"Q. You have two automobiles for private use? A. I have not—

"Mr. Crump: I object to that, if your honor please.

"The Court: Sustained.

"Q. What business have you been engaged in since 1915 to the present time? A. Real estate.

"Q. You have accumulated all this money in the course of your business? A. Well, pretty well all of it.

"Q. Most all of it? A. Yes.

"Q. Well, just please state to the court how you acquired the principal part of the property that you have at this time.

"Mr. Crump: I object as incompetent, irrelevant, and immaterial, and not tending to prove any issue in this case.

"The Court: Sustained."

The first ruling of the court, that it was competent, relevant, and material in this case for the government to show how many farms Mr. Culver owned, was clear error. That issue was not in the case, and the number of farms he owned had no relevancy to the issues that were in the case. The court properly ruled upon the next question, that the value of Mr. Culver's property was immaterial, and the subsequent questions of the counsel for the government, such as "You recently bought one farm that you paid something over $20,000 for?" and "You have two automobiles for private use?" constituted a clear and injurious abuse of the right of examination of this witness. The entire examination upon this subject was clearly inspired for the purpose of, and intended to lodge in the minds of the jury by insinuation, the idea that Mr. Culver had accumulated property by means of the alleged fraudulent scheme charged in the indictment. It was error to enter upon the examination, it was error to permit any evidence on the subject, and the error here permitted cannot fail, in our opinion, to have prejudiced the defendant in the trial of his case.

The judgment below is accordingly reversed, and the case is remanded to the court below for a new trial.

McGREW v. BYRD.

(Circuit Court of Appeals, Eighth Circuit. March 29, 1919.)

No. 5105.

EJECTMENT ⊂=13—TITLE TO SUPPORT ACTION.

In the federal courts one cannot recover land in an action of ejectment on an equitable title only.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by Abraham R. Byrd against Elias Vincent McGrew. Judgment for plaintiff was reversed on error. 255 Fed. 759, — C. C. A. —. On petition for rehearing. Denied.

John T. McKay, of Kennett, Mo., for plaintiff in error.

Robert Burett Oliver, of Cape Girardeau, Mo. (Robert Burett Oliver, Jr., and Allen Laws Oliver, both of Cape Girardeau, Mo., on the brief), for defendant in error.

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

TRIEBER, District Judge. In an opinion filed January 15, 1919, the judgment of the District Court was reversed on a number of grounds, and the cause remanded, with directions to grant a new trial.

One of the grounds upon which the cause was reversed was that the court erred in granting a peremptory instruction to the jury to return a verdict for the plaintiff, although there was substantial evidence that at the time the deed to William Pruett, under whom the defendant in error claimed title, was executed by Dunklin county, Mo., he was dead, and we held that—

"As there was substantial evidence to warrant a finding by the jury that William Pruett, the grantee of the plaintiff, and under whom plaintiff claims title, was, at the time the patent was issued by the county court, dead, the court erred in refusing to submit the case to the jury under proper instructions on that issue."

A request for an instruction to that effect had been made by the plaintiff in error. This ground of reversal is not questioned by counsel in his petition, nor in the brief filed with the motion for rehearing. This alone necessitates a denial of the petition for rehearing.

But as the cause will have to be retried, and the trial court will be bound by what was determined by this court on the admission of evidence which had been objected to at the trial by the plaintiff in error, and by the court overruled, we deem it proper to pass upon these points raised by the petition for rehearing.

In our opinion we held that the court erred in admitting a certified copy of the register's certificate of purchase by William Pruett, holding that there is no statute of the state of Missouri requiring such a record to be kept, citing Nall v. Conover, 223 Mo. 477, 122 S. W. 1039, and Whitman v. Giesing, 224 Mo. 600, 123 S. W. 1052, to sustain our ruling.

Another ground upon which we held that the certified copy of the register's certificate of purchase by William Pruett was inadmissible is that under the statute, regulating the sales of swamp lands, the certificate of the register is merely evidence of the fact that an application for the purchase of the lands had been made, but that the purchase money could only be paid and received by the receiver. We said:

"A person may apply to the register to purchase the lands, but until the purchase money has been paid to the receiver, and receipts therefor issued in triplicate, no patent could be issued by the county court."

Counsel now claim that the Missouri cases cited by us have since been overruled by the Supreme Court of that state in Mosher v. Bacon, 229 Mo. 338, 129 S. W. 680, and Russ v. Sims, 261 Mo. 27, 169 S. W. 69. We cannot agree with counsel in this contention. These were equitable actions to quiet title under the statutes of the state of Missouri. In neither of these cases were the cases cited by us in the opinion referred to. In Mosher v. Bacon the court held that as the evidence was undisputed that the original patentee of the lands in controversy had paid the full purchase price therefor to the county, and complied fully with all the provisions of the statute, he had an equitable title to the lands. The court held:

"The equitable title is at least passed, for the purchase money is paid, and the state cannot transfer her title, which is a mere naked legal title, to another."

This was followed in Russ v. Sims, where the receiver's receipt for the purchase money was also introduced. In the case at bar no evidence of payment to the receiver was attempted to be introduced.

But this is not an action to quiet title, but strictly an action at law of ejectment. That one cannot, in the national courts, recover lands in an action of ejectment on an equitable title only, is well settled. Langdon v. Sherwood, 124 U. S. 74, 8 Sup. Ct. 429, 31 L. Ed. 344; Johnson v. Christian, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412; Schoolfield v. Rhodes, 82 Fed. 153, 27 C. C. A. 95; Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199, 107 C. C. A. 93. And this rule prevails in the state of Missouri. Ables v. Webb, 186 Mo. 233, 85 S. W. 383, 105 Am. St. Rep. 610; Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780.

Nor does Russ v. Sims sustain the contention that the register's record of applications for the purchase of swamp lands, or a certified copy thereof, is admissible in evidence. What the court did hold was that, as the act of 1901 (Laws of Missouri 1901, p. 251), known as the Carlton Act, and the act of 1907 (Laws of Missouri 1907, p. 271), made the abstracts prepared by one Carlton from the register's and receiver's books, which were at the time supposed to have been destroyed, prima facie evidence of land titles in Pemiscot county, the original books from which the abstracts were made, when found, were also admissible. The court clearly based its decisions upon those special acts. Had the court intended to overrule its former decisions, as claimed by counsel, it certainly would have so

stated, especially in view of the fact that the opinion in Russ v. Sims was written by the same judge who wrote the opinion in Whitman v. Giesing.

The petition for rehearing is denied.

ÆTNA INS. CO. et al. v. DAVIDSON S. S. CO. (two cases).

DAVIDSON S. S. CO. v. BACON.

(Circuit Court of Appeals, Seventh Circuit. December 17, 1919.)

No. 2455.

1. APPEAL AND ERROR ⟸1012(1)—FINDINGS OF FACT—REVIEW.
Where trial judge saw and heard the witnesses, findings upon issues of fact will not be set aside, unless the cold type in the record demonstrates findings either were unsupported by the evidence, or were made in the face of a preponderance to the contrary.

2. WHARVES ⟸20(2)—WHARFINGER'S LIABILITY FOR DAMAGES TO VESSELS.
Though a wharfinger is not a guarantor of safety, he must use reasonable diligence to ascertain the condition of the berths into which he invites vessels, and a navigator has the right to assume that such care has been exercised, and a wharfinger is liable for damages occasioned by a submerged obstruction that was close enough to the dock to be reached by vessels of usual length lying at the dock, and which reasonable diligence on his part would have disclosed.

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

Libels by the Ætna Insurance Company and another against the Davidson Steamship Company and by the Steamship Company against E. R. Bacon, consolidated. From a decree in favor of the Steamship Company, the Insurance Company and others and respondent Bacon appeal. Affirmed.

Charles E. Kremer, of Chicago, Ill., for appellants.

Harvey D. Goulder, of Cleveland, Ohio, for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Appellee's schooner went to appellant Bacon's elevator at South Chicago to be loaded with corn destined to Buffalo. While at the elevator dock she sprang a leak, and the cargo was somewhat damaged. Appellants, one the owner and the others the insurers, who had paid part of the loss on the cargo, alleged that the leak was due to the unseaworthiness of the schooner and to improper loading by appellee. According to appellee's libel against Bacon, owner of cargo, elevator, and dock, the loading, which was properly done, lowered the schooner so that her keel rested upon and was spilt by a submerged obstruction. On final hearing of the consolidated cases the District Court dismissed appellants' libel, and entered a decree in appellee's favor for the damages to the schooner.

[1] As the trial judge saw and heard the witnesses, his findings

upon the issues of fact will not be set aside, unless the cold type in the record demonstrates that a material finding either was unsupported by evidence or was made in the face of a clearly ascertainable preponderance to the contrary. Royal Exchange Assurance v. Graham & Morton Transp. Co., 166 Fed. 32, 92 C. C. A. 66; Monongahela River Consol. Coal Co. v. Schinnerer, 196 Fed. 375, 117 C. C. A. 193.

[2] Our study of the reported testimony leaves us under the conviction that the schooner was staunch and seaworthy when loading commenced; that loading was properly conducted; that there was a submerged pile somewhat beyond the limits of Bacon's dock, but so near thereto that vessels of usual length, lying at the dock, would extend to that point; that the obstruction was unknown to appellee; that, though Bacon was also unaware of its existence, reasonable diligence on his part would have disclosed the danger; and that the damages to the schooner and her cargo were wholly due to the submerged obstruction.

Though a wharfinger is not a guarantor of safety, he must use reasonable diligence to ascertain the condition of the berths into which he invites vessels, and the navigator has the right to assume that such care has been exercised. Smith v. Burnett, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756; C. F. Harms Co. v. Upper Hudson Stone Co., 234 Fed. 859, 148 C. C. A. 457.

The decree is affirmed.

HIMES v. SCHMEHL.

(Circuit Court of Appeals, Third Circuit. March 28, 1919.)

No. 2427.

1. PARTIES ⟸19—JOINT CONTRACT—JOINDER OF OBLIGEES.
Where a contract is joint, and not several, all the joint obligees or covenantees who are alive must be joined as plaintiffs.

2. TENANCY IN COMMON ⟸55(3)—ACTIONS EX DELICTO—JOINDER.
Tenants in common must join in actions ex delicto for an injury to their common property, though it be real estate, because the damages belong to them jointly.

3. EQUITY ⟸105—PARTIES—CONTRACT—JOINT REMEDY.
The rule that, where the contract is joint, so also is the remedy, likewise prevails in equity.

4. EQUITY ⟸103—DECREE IN ABSENCE OF NECESSARY PARTY.
A decree in equity may not be made, in the absence of a party whose rights must necessarily be affected.

5. COURTS ⟸310—JURISDICTION—NONJOINDER OF NECESSARY PARTY.
Bill by one of two co-owners and lessors of a graphite mine for nonpayment of rent, breach of covenant for good mining, and removal of the property of the lessors, was properly dismissed, where brought by one lessor only, though the joinder of the other would oust the jurisdiction of the court as to the parties before it, despite equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix).

6. PARTIES ⟸15—JOINT CAUSE OF ACTION—JOINDER OF SEPARATE LEGAL ACTIONS.
Where one of two joint lessors sues alone improperly in equity without joining his colessor, joinder in his bill of his independent legal cause of

action for an indebtedness from defendant lessee to him alone, even if proper, cannot convert the inseparable rights of himself and his colessor into separate rights, justifying his suit without joining his colessor.

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

Suit by Hiram C. Himes against Harry A. Schmehl. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Edmund B. Seymour, Jr., of Philadelphia, Pa., for appellant.

Thomas L. Hoskins, of West Chester, Pa., for appellee.

Before WOOLLEY, Circuit Judge, and HAIGHT and MORRIS, District Judges.

MORRIS, District Judge. The appellant, Hiram C. Himes, of New Jersey, plaintiff below, and his co-owner Edmund B. Seymour, Jr., of Pennsylvania by joint contract of lease demised a graphite mine and its equipment to the defendant, Harry A. Schmehl, of Pennsylvania. This suit arises out of that contract and is brought by Himes alone. The contract, made a part of the bill, does not disclose the respective interests of the lessors in the demised property. The rent is made payable to the lessors jointly; not severally as their interests may appear. The remaining covenants likewise run to the lessors jointly. The bill of complaint alleges the ownership in fee by Himes of thirty-one fiftieths interest in the mine, the failure of defendant to account as required by the lease for one-half of the product of the mine reserved as rent, breach of the covenant for good mining, the removal of certain fixtures and other property of lessors from the demised premises, and that the extent of the removals is unknown to the plaintiff. The bill also alleges an indebtedness of the defendant in the sum of $400 for money loaned to him by Himes and Seymour, and a further indebtedness of the defendant in the sum of $75 for money loaned to him by Himes. The bill prays discovery and an accounting for thirty-one fiftieths of the value of the property removed, and for a like share of the rent reserved.

The bill was dismissed under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) for nonjoinder of Seymour as party plaintiff, and for want of jurisdiction. From this decree, plaintiff appeals.

[1-4] It is an elementary rule of the common law that, where a contract is joint and not several, all the joint obligees or covenantees who are alive must be joined as plaintiffs. Farni v. Tesson, 1 Black, 309, 17 L. Ed. 67. A joint contract with several cannot be enforced by one of them alone. Cannon v. Maull, 4 Har. (Del.) 223. In Marys v. Anderson, 24 Pa. 272, the court applied the rule that, where the contract is joint, so also is the remedy, and held that one tenant in common may not maintain an action to recover his share of the rent from the lessee, where the lessee's contract is to pay the rent as a whole to all the lessors. Mr. Justice Daniel, in Calvert et al. v. Bradley et al., 16 How. 580, 597 (14 L. Ed. 1066), said:

"But in this same lease there is a covenant between the proprietors and the lessee that the latter shall keep the premises in good and tenantable repair, and shall return the same to those proprietors in the like condition, and

it is upon this covenant or for the breach thereof that the action of the plaintiffs has been brought. Is this a joint or several covenant? It has been contended that it is not joint, because its stipulations are with the several covenantees jointly and severally. But the answer to this position is this: Are not all the covenantees interested in the preservation of the property demised, and is any one or a greater portion of them exclusively and separately interested in its preservation? And would not the dilapidation or destruction of that property inevitably affect and impair the interests of all, however it might and necessarily would so affect them in unequal amounts?

"It would seem difficult to imagine a condition of parties from which an instance of joint interests could stand out in more prominent relief. This conclusion, so obvious upon the authority of reason, is sustained by express adjudications upon covenants essentially the same with that on which the plaintiffs in this case have sued."

Tenants in common must also join in actions ex delicto for an injury to their common property, even though it be real estate, because the damages belong to them jointly. Bullock v. Hayward, 10 Allen (Mass.) 460. The rule that, where the contract is joint, so also is the remedy, likewise prevails in equity. Railroad Co. v. Orr, 18 Wall. 471, 21 L. Ed. 810. Again, a decree in equity may not be made in the absence of a party whose rights must necessarily be effected by such decree. Shields v. Barrow, 17 How. 130, 15 L. Ed. 158.

[5] The cause of action for nonpayment of rent, breach of covenant for good mining, and removal of property of lessors is therefore in Himes and Seymour jointly. Their remedy is joint. Their interests are inseparable. Any sum awarded by the decree would belong to them jointly. Himes alone has no cause of action therefor.

The bill does not allege any reason for the nonjoinder of Seymour, but plaintiff seeks to excuse his nonjoinder, in that his joinder would oust the jurisdiction of the court as to the parties before the court. That consequence cannot make it regular to proceed without him. It only proves that the court below was not the proper tribunal to settle the controversy. If it be once settled that the suit may not be maintained, save by the joinder of Seymour as a party, Himes cannot set up the limited jurisdiction of the court for not so joining him. Parsons et al. v. Howard, Fed. Cas. No. 10,777. Nor can this result be affected by equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix). California v. Southern Pacific Co., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683.

[6] The plaintiff further contends that Seymour cannot be made a party plaintiff, as he had no interest in the alleged indebtedness of $75 from the defendant to the plaintiff. This cause of action is independent of the one heretofore considered and is cognizable at law. Its mere joinder in the bill, even if it be properly joined, cannot convert the inseparable rights of Himes and Seymour in the former cause of action into separate rights, or otherwise improve Himes' position with respect thereto.

As the bill of complaint shows that the plaintiff has not a separable cause of action touching the demised property, as the joinder of Seymour as a party would oust the jurisdiction of the court, and as the remaining alleged causes of action are below the jurisdictional amount, the District Court properly dismissed the bill. Its decree is affirmed.

ROSENBERG v. SEMPLE.

In re GOTTLEIB & CO.

(Circuit Court of Appeals, Third Circuit. April 5, 1919.)

No. 2439.

1. BANKRUPTCY ⟸160—INSOLVENCY—PROOF.
Insolvency, within the definition of Bankruptcy Act July 1, 1898, § 1 (Comp. St. § 9585), may, and in many cases must, be proved by proof of other facts, from which the ultimate fact of insolvency may be presumed or inferred.

2. BANKRUPTCY ⟸160—TRANSFER OF ACCOUNTS—INSOLVENCY—SUFFICIENCY OF EVIDENCE.
Evidence *held* to warrant a finding that bankrupt was insolvent at time of transfer of his accounts.

3. BANKRUPTCY ⟸467—APPEAL—FINDINGS BY REFEREE AND COURT—REVIEW.
Nothing less than a demonstration of plain mistake warrants overturning of finding by referee, concurred in by court on review, of insolvency of bankrupt at time of transfer of his accounts, made on evidence taken in presence of referee, and in some particulars vague, indefinite, uncertain, and conflicting, and involving questions of credibility.

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

In the matter of the bankruptcy of Gottleib & Co. The order of the referee in proceedings by Edwin R. Semple, trustee, adjudging void transfer of bankrupt's accounts to Adolph M. Rosenberg, was affirmed on review by the District Court (245 Fed. 139), and Rosenberg appeals. Affirmed.

Edwin G. Adams, of Newark, N. J., for appellant.

Samuel I. Kessler, of Newark, N. J., for appellee.

Before WOOLLEY, Circuit Judge, and HAIGHT and MORRIS, District Judges.

MORRIS, District Judge. Gottleib & Co., a corporation, transferred certain of its book accounts on December 7, 1915, to one Rosenberg, a creditor. An involuntary petition in bankruptcy, resulting in adjudication, was filed against it on February 2, 1916. Upon proceedings prosecuted by the trustee the referee in bankruptcy found that the transfer to Rosenberg was void under section 60b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. § 9644]). The order of the referee thereon was upon review affirmed by the District Court. 245 Fed. 139. From the order of affirmance, Rosenberg appeals.

The assignments of error allege that the evidence does not establish insolvency of the bankrupt at the time of the transfer. There is no assignment alleging error in the admission or rejection of evidence.

The company issued its capital stock to the amount of $15,000 to three persons; each receiving stock of the par value of $5,000. While it does not expressly appear what amount two of these stock-

holders paid for their stock, it does appear that one of them paid only $500 therefor. The company began business with its capital thus impaired, and so continued until May, 1915, when an involuntary petition in bankruptcy (not the present one) was filed against it. In July, 1915, before adjudication, a composition was effected with its creditors by giving notes, payable in equal installments at the end of 6, 12, 18, and 24 months, for the full amount of their respective claims, and paying the fees and expenses of the bankruptcy proceeding, amounting to about $4,000. Business was thereupon resumed, but all merchandise had to be obtained through Rosenberg, or on his credit. No one else would extend credit to the company. The company made no profit.

The first installment of the composition notes fell due on December 1, 1915, and only about one-half of the amount due thereon could be paid. An accountant testified that on December 1, 1915, the assets of the company amounted to $38,635.93, and its liabilities to $53,679.34; that the statement showing this result was made up from the books of the company, with the exception of the items of physical assets and the value thereof; that these were taken from the inventory and appraisement filed in the bankruptcy proceeding, and worked back to December 1, 1915. The president of the company testified that of the physical assets the machinery and merchandise were, on December 1, 1915, substantially the same in quantity and value as shown by the inventory and appraisement; that the value of the remaining item of physical assets, namely, real estate, was several thousand dollars less than shown by the appraisement; that the liabilities were increased very little, if any, after December 1; that there was no material change either in the assets or liabilities, between December 1 and 7, 1915; and that the market value of the machinery on December 1 was much lower than when it was purchased. The report of the trustee admitted in evidence showed that only $20,900 was realized from a sale of all of the assets of the bankrupt. The claims filed against the bankrupt estate amounted to approximately $59,000.

[1] The Bankruptcy Act provides that a person shall be deemed insolvent—

"whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Comp. St. § 9585.

But direct and detailed evidence of the facts constituting insolvency is not essential. Owing to its nature, insolvency is not always susceptible of direct proof. It may, and in many cases must, be proved by the proof of other facts, from which the ultimate fact of insolvency may be presumed or inferred. Ridge Ave. Bank v. Studheim (C. C. A. 3d) 145 Fed. 798, 76 C. C. A. 362; Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284; Fowler v. Crouse, 175 Fed. 646, 648, 99 C. C. A. 200; Healy v. Wehrung, 229 Fed. 686, 144 C. C. A. 96; Grandison v. Robertson, 231 Fed. 785, 145 C. C. A. 605; Grandison v. National Bank of Commerce, 231 Fed. 800, 806, 145 C. C. A. 620.

[2, 3] Notwithstanding the contrary has been urged with much

cogency by the attorney for the appellant, we think the evidence in this case, as in those just cited, warrants a finding that the bankrupt was insolvent at the time of the transfer of the accounts to Rosenberg. Moreover the evidence was in some particulars vague, indefinite, uncertain, and conflicting, and involved questions of credibility. It was taken in the presence of the referee, who expressly found that the bankrupt was insolvent at the time of the transfer. The District Court likewise so found. It is well settled that:

"Under such circumstances this court is not warranted in overturning the conclusions of two courts upon anything less than a demonstration of plain mistake." Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184; Deupree v. Watson, 216 Fed. 483, 132 C. C. A. 543.

Such a mistake has not been demonstrated.

The order of the District Court is affirmed.

FIRESTONE TIRE & RUBBER CO. v. SEIBERLING.

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

No. 2954.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—MACHINE FOR MAKING TIRE CASINGS.
   The Seiberling and Stevens patent, No. 762,561, for a machine for making casings for automobile tires, claim 1, assuming its validity, is entitled to a limited construction only, and, as so construed, *held* not infringed. Claims 2 and 14 are invalid, as for an aggregation of parts having no operating connection with each other.

2. PATENTS ⊂=177—INFRINGEMENT—CONSTRUCTION OF CLAIMS.
   A part which is clearly made an essential element of a combination claim by the patentee must be given effect as a limitation, although in actual use of the machine it proved unimportant.

3. PATENTS ⊂=328—VALIDITY—MACHINE FOR MAKING TIRE CASINGS.
   The State patent, No. 941,962, for a machine for making casings for automobile tires, is invalid for anticipation of some of the claims, while others are for aggregations, and not true combinations, and the patentee was not the inventor of the method used.

4. WORDS AND PHRASES—"SPINNING."
   The art of shaping a flexible sheet of metal down over irregular forms or dies, circular in cross-section, is very old, and is known as "spinning." It is done by clamping the metal sheet upon the form, revolving both together rapidly upon the axis of the circular cross-section, and then with a tool pressing the metal down against the form.

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

Suit in equity by Frank A. Seiberling against the Firestone Tire & Rubber Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 234 Fed. 370.

Edward Rector, of Chicago, Ill., and Frederick P. Fish, of Boston, Mass., for appellant.

Wm. L. Day, of Cleveland, Ohio, and Robert F. Rogers, of New York City, for appellee.

Walter F. Rogers, of Washington, D. C., amicus curiæ.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Seiberling brought the usual infringement suit against the appellant, based upon two patents, each relating to the manufacture of casings for automobile tires. The first was issued to Seiberling and Stevens on June 14, 1904, and was No. 762,561; the second was issued to Seiberling on November 30, 1909, No. 941,962, upon an application made by State. The court below held valid and infringed claims 1, 2, and 14 of the earlier patent, and 16 claims of the later patent. The defendant had denied that there was either validity or infringement. After the case had been argued in this court, a Belgian patent (Mathern, of September 20, 1906) said to show anticipation of State as to some features involved, was discovered; and, upon an application to remand the case for further proofs, a stipulation was finally made and approved by the court by which this patent and explanatory affidavits were incorporated into the record. The case was then again argued. The record and proofs are unusually voluminous, but, in view of the conclusions which we reach, a relatively brief statement will be sufficient.

A tire casing of the class now involved is composed of successive layers of fabric, cemented together by a suitable composition and shaped into the form of a tube, which is open on one side so that it is horseshoelike in cross-section, and the ends of which are joined together to make it circular and endless. The tube opening or slot is along the inside; and a solid rubber body is added along the outer circumference or periphery to constitute the tread portion of the finished casing. The general process of manufacture by hand, much older than the Seiberling and Stevens patent, was this:

An annular metallic core having spokes and a hub was centrally mounted upon a shaft so that it could revolve, the core thus resembling the rim or tire of a wheel. This core was approximately circular in cross-section, and its cross-section diameter as well as its entire diameter through the hub from edge to edge of the rim were proportioned according to the size of the casing to be made. The operator coated this core with an adhesive substance. He then took a strip of rubber-impregnated fabric which would stretch out to be as long as the circumference of the core, and in width somewhat less than the circumference of the cross-section. As he revolved the core on its hub, he stretched and pasted this fabric strip upon the core, pressing and shaping it with his fingers or with hand tools so that it adhered in all places and was without wrinkles. He repeated this operation as many times as there were to be fabric layers in the casing. The impregnating composition, having the character of rubber, would also attach each

two layers of the fabric together. The strip of fabric was cut upon the bias, and the warp threads therefore ran from the inner open edge of the tube in a diagonal course along, across and around the tube to the other open edge thereof; and the next layer of fabric put on was reversed so that these warp threads crossed those of the first layer at a selected angle. Where the ends of the fabric met each other, they were overlapped enough to make a pasted joint. Each layer of fabric was first pressed down and attached by the hand of the operator on its central portion throughout its length, thus constituting the part of the casing corresponding to the tread. The degree of lateral curvature here is slight, and there would be no difficulty in making a smooth attachment, but as it was continued around the remaining circumference of the cross-section, there would be an obvious tendency to gather and wrinkle. This wrinkling would be fatal to the strength of the casing, and it could be avoided only by careful manipulation and gradual shaping. The ultimately smooth and unwrinkled surface could be had by virtue of a quality which all woven material has had since weaving was known; i. e., that it will contract in one direction as it stretches in another. When a fabric is stretched in one diagonal direction, its square meshes become diamond-shaped, with the length of the diamond along the line of stretch and its width at right angles. This produces a contraction of the fabric in the line of its width. In tire building, it is primarily the central part of the strip which is thus stretched longitudinally as it is attached to the tread of the core, leaving the side portions or wings projecting and free. Upon the same principle, if these side portions are then stretched laterally, they will shrink longitudinally, and, if this stretching is done in progressive measure as the edges are approached, the longitudinal shrinking will be greatest at the edge. In this way, it results that the fabric may be shaped smoothly and without wrinkles to the entire side core surface.

[1] The Seiberling and Stevens patent seems to disclose a machine for doing this work automatically, instead of manually. The machine comprised (so far as now necessary to mention): First, a main power driven shaft which would indirectly engage and drive the core and with such selective connections that the core could be revolved at low speed or at high speed, or entirely released, as desired; second, a reel carrying the rubber-impregnated fabric strip; third, a tension roller retarding the reel, and thus causing the central tread strip of the fabric to be given a continuing stretch after the free end is attached to the core; fourth, a pressure roller or cylinder concaved on its exterior to match the shape of the tread of the core, whereby the tread portion of the strip was pressed upon and attached to the core as the latter revolved; fifth, an arm carrying, at its end, a laterally spring-pressed finger—"the jigger finger," and which arm was intended to be reciprocated rapidly, radially of the core, in such a way that the finger traveled in and out radially, pressing against the side of the core as the latter revolved, and which pressure finger therefore traveled a saw-tooth course between the edge of the stretched, central, tread portion of the fabric and its final outer edge, and corresponded in function to the

human finger pressing the fabric down against the core and stretching it into shape; sixth, a further arm containing a further pressure wheel to be applied along the edge of the attached fabric, after it was attached, to press it into a crease, constituting "stitching." The described operation is consistent with the idea that the side pressure-attaching finger would follow immediatly the tread pressure roller, so that with one revolution of the core the machine would attach the fabric, press down the tread and press in the sides, and so that all of these devices would be in operation at the same time on the same strip. After one complete revolution, the core was stopped and the fabric cut away from the reel strip. If the one revolution had not been sufficient, then, after the fabric was cut away and the loose end pasted down, as many more turns could be had as necessary—apparently with all the attaching means at work together—if desired. Based upon the disclosure thus generally described, the patentees claimed:

1. "The combination in a machine of the class specified of a tension device to simultaneously smooth and flatten strips of fabric, a revoluble core to receive said strips from said device, means to form said strips approximately longitudinally about said core and means to regulate the tension on said feeding device."

2. "A machine of the class specified consisting of revoluble means to support the article to be built while in the process of manufacture and means for creasing or stitching portions of said article on said revoluble means."

14. (The fourteenth claim does not differ from the second in any respect now material.)

The second and fourteenth claims must be held invalid for the same reasons pointed out with regard to claim 4 of the State patent, later discussed. The creasing rollers are hung on a swinging arm which happens to be attached to the frame of the machine. It might as well be fastened to the ceiling of the room. The pressure applied to the creasing rollers, which forces the fabric into the creases, is the pressure of the operator's hand. They are not at any time or to any extent operated by the mechanism which operates the other parts of the machine. They are "only used at intervals." There is no combination between these creasing rollers with their supporting arm and the other parts named in the claim. Their mutual relation is precisely that of the writing lead and the erasing rubber in the rubber-tipped pencil, where the only connecting link is the carrier. Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719. It may further be observed that claim 2 is not limited to a machine handling flat strips of fabric, unless by the phrase "in a machine of the class specified." This phrase, as found in other claims (e. g., 3) shows no intent to effect such limitation. If the claim covers devices which receive and treat strips of fabric prewoven to form—as it seems to—it is anticipated by Johnston, Jeffrey or Moore.

We do not thus dispose of claim 1. We are not prepared to say that it is anticipated or that there is no combination between its elements when they are treated as the specification indicates. The tread-pressure roller automatically effects the revolution of the core. With it, the reel and the tension device may be in simultaneous operation. The side pressure fingers are reciprocated by tripping in a connection with

the main driving mechanism, and may be operated simultaneously with the other just named parts—at least, for part of their work. It is not necessarily fatal to the theory of combination that continuing the work of the pressure fingers may be necessary after the tension device has exhausted its function. Without intending to pass upon all the questions involved, we prefer to assume the validity of this claim and look to see if there is infringement.

The defendant's device is particularly described hereafter. It is enough now to say that it has no tread-forming roller which operates simultaneously with and in advance of the side-forming means, and that it has discarded the jigger finger, operated by the driving power of the machine, and has substituted side-pressing means of different form and operation.

[2] Whether defendant's instrumentalities are equivalent to those of the Seiberling and Stevens patent, under any scope which the state of the art permits to the phrase "means to form said strips longitudinally along said core," is a question which we find unnecessary to decide. Another reason sufficiently requires the conclusion that claim 1 is not infringed. Out of the four elements named in the claim, the first is "a tension device," which feeds fabric strips to the core, and the fourth is "means to regulate the tension of said feeding device." In a certain sense, every tension device is, in itself, a means for regulating, and it is not impossible that, under some conditions, a tension device by itself might be held sufficiently responsive to the descriptive words of both the first and the fourth elements; but this claim must be construed to require the independent existence of the fourth element. This is the apparent force of the face of the claim. The specification carefully describes regulating means by which the tension resistance can be instantly varied at the pleasure of the operator, by turning an adjusting screw. The present first claim is a substitute for the first three claims as filed. At the time of filing, claims 1 and 3 contained no reference either to tension device or regulating means, while claim 2 did not mention a tension device separately from its included "means to adjust the tension on the feeding means." After a rejection, claim 3 was amended by inserting a reference to the tension device itself. After a further rejection, the three claims were canceled and the present one substituted. It was then allowed. The applicant had presented one claim referring independently to the tension device and one claim referring independently to the means for adjusting the tension. With this in his mind, he withdrew them and presented and secured a claim calling for each of these elements as separately existing. The intent to regard the ability to modify the tension device as an essential part of the invention which was being patented, could not well be clearer. It seems now to have developed that this adjustability is not very important, in the commercial use of the machine; but these patentees then might well have believed that it was vital to an operative machine. They had in their minds a friction tension, and they saw that the amount of stretch to be given to the fabric by it would depend upon the length of the fabric strip under stretch, the width of the strip, the strength and other inherent qualities of the fabric, the extent and moisture

contents of the rubber impregnation and very likely the temperature and humidity of the air in the factory. All these conditions might change from hour to hour. Hence the independent and separate call for regulating means cannot be considered a mere inadvertence, the limiting effect of which a court would be inclined to escape, if possible. Although it may be voluntary and unnecessary, it must be given effect. McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; Arnold-Creager Co. v. Barkwill Co. (C. C. A. 6) 246 Fed. 441, 444, 158 C. C. A. 505.

Defendant uses a different tension device. There is no efficient frictional resistance to the travel of the fabric to the machine, but the resistance is caused by a positive gear connection. The periphery of the fabric feed roller is compelled to travel at a speed proportionate to the peripheral speed of the core, and at a fixed percentage less. This percentage is determined when the machine is built, by providing, for the feed roller and for an intermediate roller peripherally driven by the core, intermeshing gears of the same number of teeth, and by making the feed roller of smaller diameter than the intermediate roller. After the amount of stretch is thus determined and fixed—at, say, 14 per cent.—it can never be varied, unless by an expedient which plaintiff suggests and upon which theory alone he seems finally to rely to make out infringement of this claim. It is said that, by substituting upon the feed roller another gear with a greater or less number of teeth the speed of the feed roller can be increased or diminished. This is true; and it may well be that if the defendant's machine were built in contemplation of such a change, and if an assortment of gears were provided with it therefor, it should be thought to contain "means to regulate the tension"; but there is nothing to indicate that the machine was built with any such purpose, or that the defendant has any means of thus regulating the tension, or ever has done so or desired to do so. In this situation, it seems an apt suggestion by defendant's counsel that we might as well say an ordinary table contains "means for regulating" its height, because we can take off the legs and put on some longer ones.

The theory that the constant stretch insured by defendant's mechanism constitutes both a tension device and a means for regulating it is urged by plaintiff's counsel, when they say that "to regulate" means "to maintain." To adopt this theory is to say that the phrase "means to regulate," etc., adds nothing to the claim. We cannot conceive any tension device which is not, in itself, "means to maintain" a fixed tension. Further, the theory would be, obviously, untenable, unless the patent were entitled to the most extreme liberality because it produced very great practical commercial results. It cannot have such a degree of credit. If the machine in the patented form had proved successful, and had gone into extensive or even considerable use, it might be regarded in this light, even though it had not been generally accepted until aided by later patented improvements. This did not happen. One machine was built, but there is evidence that no tires were successfully made upon it, and that the jigger fingers would not smooth the sides so as to make first-class tires. Certainly, its attempted

use by the Goodyear Company was abandoned, the machine discarded, and no other ever built.

We further find that upon the application for the State patent Mr. Seiberling, familiar with everything which had been done on the Seiberling and Stevens machine, made an affidavit that State's machine "was the first to successfully make such tires on a commercial scale by machinery." This affidavit does not work any estoppel, but there is every reason why we should accept it as true in its necessarily implied reference to the Seiberling and Stevens machine, and decline to give that patent the breadth of construction, beyond its letter, which is appropriate only for a great practical success.

Whether defendant employs any tension device "to simultaneously smooth and flatten strips of fabric," interposing, as it does, nothing between the feed roll and the means which throw the fabric out of flat, may be passed without consideration. For the reasons stated, it must be held that there is no infringement of claim 1.

[3] The Seiberling and Stevens patent belonged to, or was practically under the control of, the Goodyear Company, one of the largest manufacturers of tires, and of which Mr. Seiberling was general manager. State was in the employment of the same company. After about five years, State filed his application for the second patent in suit. His machine was developed and his patent application prosecuted under the supervision of Mr. Seiberling. State's machine was of the same general type as Seiberling and Stevens. His most substantial change or improvement was that he discarded the reciprocal in-and-out forming finger of Seiberling and Stevens and substituted a tool which he rightly calls a spinning roll. He provides, in the same general way, a core and a fabric reel and a retarding device, whereby he gets his strip of fabric attached to the core for the width of the tread portion, leaving the remaining wing portions projecting outwardly. Attached to the base of the frame which carried the revolving core was a standard, manually adjustable horizontally to and from the core; that is to say, it traveled in a horizontal track, which track was an integral part of the frame. At the upper end of this standard was a revolving head or table, called by State a turret, and so plainly the turret of the common turret lathe that his choice of name was most natural. Mounted at four equidistant points on the edge of this table are four tools, independent of each other, except for their common base. The first carries the tread roller, the second the spinning rolls, the third the stitching rolls, and the fourth the bead attaching rolls. The turret standard was fixed in the plane of the revolving core, beyond the periphery thereof, and State revolved his turret until the tread roller was in the same plane, with its axis at right angles thereto. He then moved the standard and turret forward so that the tread roller bore against the tread on the core, with such pressure as the operator chose to give it. When the tread was sufficiently smoothed down and attached, he moved the standard back, gave the turret a one-fourth revolution, bringing the spinning roll device to bear and moved that forward in the plane of the core until the operation of spinning down the side was complete. He then withdrew the standard, gave the turret

another one-fourth revolution, and, in the same way, moved it forward again and used his creasing or stitching roll, if necessary. Then, again, by a similar operation, he brought into effect the fourth device on his turret, which was a bead-forming, or trimming roll, to be used in certain cases only. In each instance, the time during which and the pressure with which the tool was to be applied (except for certain spring pressure) was regulated by the operator's hand. In no instance did the machine do anything except to keep the core revolving. The fact that the tools were mounted on a revolving table, which table was mounted on the frame of the machine, cannot be important. From the standpoint of an interdependent combination, the situation is the same as if these four tools had been lying upon a work bench by the side of the operator and he had successively selected the ones he desired. While this is obvious, it is emphasized by the fact, clearly appearing, that operators using the State machine often discard the spinning tool mounted on the turret, and, after the tread is formed, spin the sides down by hand.

In the form of spinning tool shown in the patent, there are two rolls pressed toward each other by springs and operating upon both sides of the tire at the same time. There is, thus, an automatic feature to the pressure with which the spinning rolls are applied; but this does not show the existence of any combination with the remainder of the machine. A hand tool with two oppositely spring-pressed rolls would work in the same way if it were hung from any support, or held only by the workman; and there is no relation of dependency between the automatic action of the springs and the automatic action of the revolving core. They both affect the material at the same time, and that is the most that can be said. The fabric reel and the tension device have finished their function when the first revolution is completed and when the strip of fabric has passed once around the core and has been cut and the pasted-on joint made. They have no further office in the building of the tire than if they did not exist. The tread-forming roller then is brought into play and finishes its function and drops out of action. Then, and only then, the operator brings the spinning roll to bear. It performs its work precisely as it would if the fabric strip had been stretched and attached wholly by hand; and the sides of the tire, the tread of which has been formed by the aid of the machine, may be spun down and attached by hand operation just as they are by State's device. We do not intend to deny that a true combination may sometimes be found where the same underlying mechanism operates all parts of the machine and where different elements separately act in successive steps upon the raw material as it is being transformed into the ultimate product (though the latest decision of the Supreme Court, Grinnell Co. v. Johnson Co., 247 U. S 426, 38 Sup. Ct. 547, 62 L. Ed. 1196, perhaps tends to the contrary); but the trouble here is more vital. State's spinning tool has no operating connection whatever with the remainder of the mechanism. Each part performs its own work in its own way, and no new result flows from bringing the two into juxtaposition. We may find further illustration in the familiar turning lathe. If the cutting tool is carried in a holder which

automatically travels along a line parallel to the axis of the revolving chucks which hold the material being shaped, we can see the combination between the chucks and the cutting tool; but not so, if the tool holder is moved along its path by the operator's hand—even though the path be upon a fixed guide.

In Gas Co. v. United Co., 228 Fed. 684, 143 C. C. A. 206, we considered the distinctions between aggregation and combination. Applying to the present case the principles there developed and the authorities there cited, we are satisfied that there is no true combination between State's revolving core and his independent spinning tool, or bebetween such core and his independent tread-forming roller, or between such roller and such spinning tool. The Grinnell Case, supra, may involve the difference between that putting of old elements into a coacting relationship which is invention as distinguished from a similar putting together which is merely skill, rather than involve the distinction between elements which form a composite as distinguished from an aggregate; but, however that may be, that decision fortifies the result which we reach here. It is not easy to see any difference in principle between a device which first washes a garment, and then, by separate mechanism, dries it, and a device which first shapes and attaches the tread of the tire, and then, by separate mechanism, attaches the sides.

This conclusion invalidates, because of mere aggregation, claim 4 [1] and all the other claims of the State patent sued upon (except the fifteenth, seventeenth, and perhaps the eleventh). We might safely rest our decision thereon; but plaintiff really presents his case on the theory that State discovered a new method of making tire casings or a new set of functions to be performed by associated mechanism. Although a mechanical patent may not be granted for a function (Westinghouse v. Boyden Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136), yet it is now settled that a method patent may be granted for an association of successive mechanical steps (Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034), and to hold a mechanical patent void for aggregation, when the same monopoly sought by the patent might have been obtained through a method patent, seems somewhat artificial; hence, we prefer to point out also that State had nothing broadly new either in his method or in his selected tools; and that so far as some details may be new, they are not used by defendant.

[4] The art of shaping a flexible sheet of metal down over irregular forms or dies, circular in cross-section, was very old and was known as "spinning." This was done by clamping the metal sheet upon the form, revolving both together rapidly upon the axis of the circular cross-section, and then with a tool—which might be a narrow or sharp-edged roller or disc held in a yoked handle—pressing the metal

[1] Claim 4. An open tire shoe making machine, comprising the combination of a sheet fabric supply, a power driven ring core, a radially moving support laterally spring-pressed toward the core, and a spinning roll mounted on the support, for passing radially along the sides of the tire shoe, to shape the sheeted fabric on the core, substantially as described.

down against the form. The spinning disc, being held in a plane substantially tangential to the circumference of the form at the point of contact, would itself be caused to revolve; and, if it were slightly inclined inwardly from this tangential plane, it would gradually move down along the side of the form and its path thereon and upon the metal would be helical. The successive coils of this travel might be so close together that they practically touched each other, and so the whole surface of the sheet and of the form would be covered by this travel and the sheet would be stretched and shaped to the form. If State had been the first to observe that this spinning process could be applied to shape a tire upon its core as well as to shape a bottle cap upon its core, the question of whether there was invention in the transfer would have required consideration; but he was not. The evidence that this identical spinning operation was performed upon tire casings by hand tools before State's invention is sufficiently satisfying to meet all the requirements of the situation.

One witness testified that this spinning operation with a hand tool was common practice for smoothing down the sides of tires at a date three years earlier than the building of the first State machine; one told of the same practice in use at Detroit the same year State was constructing at Akron; and one seems to refer to it as a common practice in the Goodyear shop in 1903. Considered critically, all this testimony might not be sufficiently definite and positive to prevail by itself against circumstances tending to throw doubt upon it; but there are no such circumstances. When defendant's proofs closed, this proposition would ordinarily be taken as fairly established; Messrs. State and Seiberling were called as witnesses on the rebuttal; both were familiar with the history of the art; neither one denied or questioned this proposition; nor did any other witness for plaintiff. More than this, State, in his specification, speaks of this spinning operation as if it were well-known hand practice, and seems to rely upon the advantages of his tool over the existing hand method. This is not all: The Seiberling and Stevens patent shows what it calls creasing or stitching rollers. Each one is undoubtedly an effective spinning tool and capable of use as such; their edges, as shown, may be sharp enough to cause some danger of cutting the fabric, but the spinning would be done by the side bevels, not by the extreme edge; and plaintiff's theory that defendant's spinning roll is so far the equivalent of the Seiberling and Stevens stitching rolls as to make out infringement of the claim based thereon goes far to persuade that they are, in a broad sense, an anticipation of State's spinning roll. There seems no sufficient reason to doubt that Stevens used them for spinning in 1903 or 1904. The Moore patent shows what is, essentially, a spinning roll for operating against a revolving core in making a tire casing. It was intended to and did smooth down the Moore tire from the center of the tread only part way, and not much further than may be done by the typical tread-forming roll; but the operation is substantially spinning, as far as it goes, and involves, in some degree, the characteristic relocation of the threads of the fabric, even though it may only put them back where they were before the casing was distorted by placing it on the core. In

the Moore patent, the handle of the spinning roll was so attached to its frame that the roller could not effectively travel radially of its core down as far as the bead, but if its attaching staple is made larger, the whole tire can be formed thereby, as demonstrated. Further, there is no reason to doubt that State and Seiberling were familiar with the character of patent protection, and were advised by competent counsel. If they had thought that State was the first to shape the sides of the tire by the spinning operation, it is highly improbable that he would have omitted to apply for a method patent. Still further, it is conceded that the Belgian patent is a complete anticipation of State as to the matter of employing a radially-moving spinning roll in this type of tire-making machine for shaping the side of the tire, unless plaintiff is right in his contention that in the Belgian patent the fabric was first partially attached to the side by a device resembling Seiberling and Stevens' jigger fingers, that this operation left wrinkles and puckers, and that the spinning roll was used only to remove these wrinkles and perfect the attachment. We do not see that this alleged distinction is very important. No matter if the fabric has been already partially attached—as much as is consistent with any reasonable theory of operation—the tool of the Belgian patent is a spinning roll, and performs a spinning operation; and, if we are right in what we subsequently say regarding the "centrifugal force" theory, the Belgian tool in its radial progress was bound to stretch and reshape the fabric in substantially the same way that is done by State. Putting all these things together, State cannot be considered as the inventor of the method; and hence there is no reason to hesitate at the result which was reached because of aggregation.

One group of State's claims is distinguished by the call for shifting the revolution of the core from a slow speed while the fabric strip is being put on to a high speed while the spinning is to be done. Seiberling and Stevens did the same thing, so far as concerns any broad idea, and the particular devices by which alone State distinguishes this part of his action from Seiberling and Stevens are not employed by defendant.

Another group of claims is characterized by the requirement that the spinning roller should be set in a plane at "a receding angle" to the plane of the core. It is not clear that this thought imparts any novelty to the claims. The same angle is shown by the Seiberling and Stevens stitching rollers, and it was certainly open to the user of any hand tool to apply it in this specified plane. However, the defendant does not do this; the claim of infringement in this is based upon a confusion of thought. If we picture the spinning roller as a disc—whereby its plane is more sharply conceived—and if we assume that the core is vertical and its axis horizontal, and that the disc is to be applied to the core midway from top to bottom, we observe that the plane of the core and the vertical plane of the axis are at right angles to each other, and that the relationship of the plane of the spinning roll to the plane of the core, and its relationship to the plane of the axis, are independent of each other. The plane of the spinning roll may be at right angles to the plane of the core and at the same time at any selected angle to

the plane of the axis. So far as concerns the first relationship above stated, defendant's spinning roll is normally set with its axis horizontal and parallel with the core plane, and therefore operates in a plane at right angles to the plane of the core; but it is capable of adjustment to, and is intended sometimes to operate in, a plane not at a receding angle to the plane of the core, but at an angle which, as compared with that shown by State, is more than ninety degrees—an advancing angle. In other words, its carrying yoke, normally at a right angle to the core plane, may be swung slightly on its pivot toward the outside of the core. The only purpose and utility indicated by State for his receding angle are that the disc may not become entangled with the out-flying skirts of the fabric, and the angles adopted by defendant, for normal use or for special setting, tend to produce the very result shunned by State. In the machines used by defendant the spinning roll may be manually placed at the "receding angle," but in operation it will not stay there, but returns at once to the right angle position. Defendant did at one time make some use of a machine embodying this "receding angle," but it was not practically more than experimental and has been abandoned, and was too negligible to justify any judicial action based thereon. The defendant does set its disc at an angle, which may be called "receding," to the vertical plane of the core axis; the disc axis (in the form assumed) ceases to be horizontal, being shifted perhaps ten degrees; but this is a different matter. This setting is for a purpose different, and causes a result different from anything found in State. It brings a constant radial slip or wipe of the roller upon the fabric, and directly causes a radial stretch. The claims of this group are not infringed.

If the "forming roll" of claim 11 is the spinning roll, the claim is invalid for aggregation; if this "forming roll" is the tread roller, then the claim is anticipated by the Seiberling and Stevens machine.

Claim 15 suggests nothing new over Seiberling and Stevens, excepting a yieldingly mounted take-up roll for receiving a layer of muslin, or thin cloth, which is upon one face of the rubber-impregnated fabric as it is rolled upon the supply reel. Precisely the same take-up roll is shown in older machines for feeding similar rubber-impregnated fabric to make rubber belting. It cannot be important that the fabric in this case is received by a revolving core, rather than by the receiving mechanism of the old machines. The take-up roll does its old work in its old position and for its old purpose. Its transfer from the old machines to Seiberling and Stevens discloses no inventive novelty. Claim 17 also reads upon Seiberling and Stevens, save for the addition of "a stretching roller between the tension device and ring core whereby the longitudinal creases are taken out of the fabric and it is smoothly and evenly supplied to the ring core." This also discloses the adoption of a device in common use for the same purpose in analogous situations; but its declared purpose and effect are to avoid the very operation which defendant employs. This stretching roller is for the purpose of delivering the fabric to and upon the ring core in a smooth and flat state. Defendant interposes a convex shoe which delivers the fabric strip to the core in a curved or U-shape. The

curved shoe or form which gets the latter result could not be considered the equivalent of the flat rollers which get the former without a much greater degree of liberality than is—at the best—permitted by the state of the art.

Claim 14 is not sufficiently typical to justify using it as the criterion of infringement, as plaintiff would have us do; but, if it were, it shows still another reason why plaintiff must fail. It calls for a stock roll, a ring core, "a radially and transversely movable support, a tread forming roll and a laterally yielding spinning roll for passing radially over the sides of the tire shoe mounted thereon," etc. The tire shoe is not mounted on the spinning roll; the clause "for passing * * * tire shoe" is parenthetically descriptive, and the claim must be considered as specifying a radially and transversely movable support having mounted thereon a tread roll and a spinning roll. Defendant has no one support carrying these two rolls, but has two independent supports. One is movable radially, neither transversely. The claim plainly refers to the revolving turret, when it says "support," and defendant has nothing equivalent.

The argument for plaintiff takes the Seiberling and Stevens invention of 1903 and the State improvements of 1908 and puts them together as constituting one pioneer patent dated in 1903; or, stated in another way, it takes the large public acceptance and use of the State patent and thereby attributes merit to the Seiberling and Stevens patent, overlooking the undoubted fact that the first reasonably successful commercial machine was that of Vincent, who intervened between the two. It goes without saying, that the Seiberling and Stevens patent is just as effective in denying to State the position of pioneer as if it had not happened that both have been controlled by the same interests.

We are told that the centrifugal force disclosed by State's operation caused the unattached skirts of the fabric to fly out at right angles to the plane of the core, and that the effect of the spinning tool slowly advancing against this skirt was to produce a "hinging and folding action" which was novel and important. We are not impressed by this claim. These words do not seem very appropriately descriptive, but the action which takes place not only pertains to a method or process rather than to any particular mechanism, but it was more or less inherent in the rapid revolution of the core effected by older means, and in the use of any spinning, stitching or creasing rollers. It is not the "hinging and folding" but the radial stretching, and the resulting circumferential contraction, that bring about the desired smoothness. It is possible that in State's particular form of device, with his spinning disc at its "receding angle," and practically tangential to the core circumference at the point of contact, there will be enough "hinging and folding" back over his tool to produce a friction which would cause more stretch than could the mere rolling advance of the disc in its helical path; but if there is an appreciable effect of this kind, defendant does not have it. Defendant gets its stretch from the slip or wipe which is compelled by the fact that the spinning disc cannot roll unobstructedly in its own plane—which fact results from its inclination

toward the plane of the core axis. This very inclination puts part of the disc out beyond the supposed line of "hinging and folding," and prevents a fold at the point of contact. Centrifugal force is not mentioned, in State's specification, save as creating an obstacle to be avoided. Perfectly successful spinning performed in court, upon a slowly revolving core, demonstrates that the outflying skirts are not essential. To make centrifugal force an effective basis of validity in the State's patent would be to give a monopoly of the spinning process or of rapid core rotation; and each was old.

We are also told, and upon this plaintiff seems to place great reliance, that Seiberling and Stevens or State—we are not sure which, but apparently by some kind of joint action—discovered and accomplished for the first time such a distortion of the fabric meshes as gave great strength to the built-up casing. This result plaintiff's counsel denominates "the rearrangement of the reticulations" and "placing the threads in geodetic lines." There was nothing new about this. On the contrary, it had been present in every smooth fabric tire casing that had ever been made by anybody. As we pointed out in the early part of this opinion, it is inherent in shaping a fabric to an irregular surface. It consists in the fact that when the rectangular mesh is expanded on one diagonal axis it will contract upon the other. Outside of tire casings themselves, a familiar instance is the shaping of canvas to cover the hull of a canoe. Still more familiar is the handkerchief or the collar, unevenly ironed. This discovery by plaintiff or his counsel was in the realm of nomenclature, not of mechanics.

The decree must be reversed, and the record remanded, with instructions to dismiss the bill.

TAGGART BAKING CO. v. GREEN et al.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919. Rehearing Denied March 4, 1919.)

No. 2520.

1. PATENTS ⊂=102—APPLICATION—VERIFICATION OF CLAIMS.
Claims 40 and 41 of the Green patent, No. 1,180,030, inserted after the original application on request of the examiner for the purpose of interference, were within the drawings and specifications of the original application, so that no additional verification thereto was necessary.

2. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—BISCUIT CUTTER.
The Green patent, No. 1,180,030, claims 29, 30, 40–45, inclusive, for a biscuit cutter, especially relating to pan carrier with automatic skip, which could be adjusted without stopping the machine, *held* valid, as disclosing invention and infringed.

Appeal from the District Court of the United States for the District of Indiana.

Suit by Thomas L. Green and another against the Taggart Baking Company for infringement of patent. Decree for complainants, and defendant appeals. Affirmed.

James Love Hopkins, of St. Louis, Mo., for appellant.

Laurence A. Janney and Osgood H. Dowell, both of Chicago, Ill., for appellees.

Before BAKER, MACK, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. The patent in suit deals with a complicated biscuit cutting machine, claims 29, 30, 40–45, inclusive, being involved. The defenses to all claims are invalidity and noninfringement. An additional defense is made to claims 40 and 41, appellant contending that these claims were improperly allowed: (a) Because applicant's oath thereto is lacking; (b) because they are not supported by the specifications. These objections will be first considered.

[1] Green's application was filed February 20, 1909, but patent was not issued until April 18, 1916. During that time Allison and Pinkney filed application for patent (August 3, 1912) and letters patent were issued September 29, 1914, the subject-matter being a cracker-cutting machine. Its claims one and two are the same as claims 40 and 41. Originally, Green asked for the allowance of a claim numbered 56, covering generally the same matter as claims 40 and 41. Upon an interference being declared, Green was required to present his interfering claim or claims in the identical words of Allison and Pinkney. Patentee therefore inserted claims 40 and 41, corresponding to claims 1 and 2 of Allison and Pinkney. His statement in support thereof was duly sworn to, and the Patent Office ruling went to Green. Allison and Pinkney appealed to the Court of Appeals of the District of Columbia, and their appeal was later dismissed.

An examination of the drawings and the description as well as the proceedings in the Patent Office and other evidence convince us that a sufficient disclosure to support these claims 40 and 41 appeared in the original application, that no additional verification was necessary, and the interference proceeding was properly decided in Green's favor.

Since this appeal was argued our attention has been called to a decision of the United States District Court for the Eastern District of Tennessee in a case entitled J. H. Day Co. v. Mountain City Mills Co. et al., 257 Fed. 561. Complainant in that case was the manufacturer of the machine used by the Taggart Baking Company in the instant suit, while defendant was the user of the machine manufactured by appellee. The Allison and Pinkney patent, heretofore referred to, was under consideration and the judge in disposing of the suit said:

"Allison and Pinkney patent, No. 1,112,184. The proof was, in my opinion, beyond reasonable doubt that Allison and Pinkney were not the first and original inventors of the differential pan-skip mechanism disclosed in claims 1 and 2 of the Allison and Pinkney patent on improvements in cracker-cutting machine; that the first and original inventor thereof was Thomas L. Green, * * * who as early as 1909 invented this mechanism, constructed a machine, and successfully operated it at Cardiff, Wales. The result thus reached is in accordance with the action of the Patent Office in awarding the claims in suit of the Allison and Pinkney patent to Green in the interference proceeding," etc.

It also appears that, after the ruling of the Patent Office in the interference proceeding, Allison and Pinkney filed a disclaimer in the Patent Office, but limited in its scope. We therefore reject appellant's special attack upon these two claims.

[2] *Invention.*—Machines such as described in the patent are used in the manufacture of biscuits and crackers. Speed and avoidance of waste are their chief objects. In other words, bakers require a machine that will turn out as many biscuits as possible, all of any type being as nearly uniform as possible.

The patent citations contain many illustrations of machines designed to accomplish this result, some of which have been used with more or less success. Green attacked the problem by providing means to avoid stops and delays for adjustments.

The ordinary biscuit cutting machine requires a continuous sheet of dough, carried upon a driving apron under a reciprocating cutter which at every reciprocation cuts out a row of biscuits. As the apron advances, the scraps are dropped into a scrap carrier, and the biscuits are conveyed by the apron to a point called the delivery end of the apron, and there dropped or deposited into pans which are successively moved under the apron, each pan coming into place immediately upon its predecessor being filled.

It is with the operation of this pan carrier that the patent in suit primarily deals. The pan carrier advances each pan at a regular rate and receives the successively dropped rows of biscuits until the pan is full. A momentarily accelerated movement of the pan carrier then occurs so that the succeeding pan is brought into position to receive the succeeding row of biscuits. This acceleration of motion is termed by the witnesses, "skipping." It is highly important that the skipping should occur at the right moment; otherwise, there will be "crippled" biscuits, resulting in waste, etc.

Patentee well says that the capacity of a machine depends upon the speed and accuracy of accomplishing the panning operation.

"For the biscuits must not pile up; they should be produced and delivered no faster than the pans can take them, and they should be panned properly to avoid cripples and wastes."

Green's machine employs a continuous pan feed, and counsel claims that it was the first high speed continuously operating machine capable of panning the entire product known to the art. Its asserted novel features are:

(a) Continuous pan feed, with a positive gear transmission and an automatic skip means in the transmission.

(b) Its automatic pan skip is provided with means for adjusting the skip relative to the pans without stopping the machine.

(c) The use of speed change gears in the pan feed transmissions, so as to adjust the panning speed to the rate of production of variously sized biscuits.

If Green's machine lives up to the asserted claims of counsel, there is no question of invention involved, and we need only consider infringement, and whether the claims in the patent cover the novelty asserted, and no more.

Appellant, however, denies that Green is the first to produce a machine having an automatic pan skip with means for adjusting the skip relative to the pan without stopping the machine, and cites Appleton's Cyclopædia of Applied Mechanics, volume 1, pages 7–10, patent to Bleile, No. 863,349, patents to Carlson, No. 661,008 and No. 670,383, and to Ward, No. 865,461, and others.

While we may well take notice of actual disclosure appearing in Appleton's Cyclopædia of Applied Mechanics, published in 1899, the particular pages dealing with bread and biscuit machinery, we cannot agree with appellant in the conclusion that a machine anticipating Green's machine is disclosed. It is conceded that there were intermittent feed types of pan carriers with a ratchet and pawl drive in existence prior to 1909. There were also machines having continuous dough feed arrangements. There also may have been a machine in existence capable of pan skipping and employing an intermittent pan feed. But we conclude that the article referred to in the Cyclopædia referred to a continuous sheet of dough fed to the rollers, and not to a machine for a continuous pan feed.

The Bleile patent discloses a pan-skipping device for a biscuit machine, but it is clear to us that no machine is described, and patentee did not intend to describe a machine, wherein a readjustment of the position of the pans with the dough might occur while the pan carrier machinery was in motion. Bleile says in his specifications:

"The face of the accelerating device is made the full width of the pulley face in order to insure the friction clutch between the parts, and the length of time this clutch shall continue can be very readily and easily adjusted by the set screws 27 to correspond with the space between the rear edge of one pan and the front edge of the next succeeding pan."

Of course, it is apparent that this set screw, when adjusted, may well have the effect of registering the skip with the pans; but it utterly fails to provide the means Green claims to have provided, namely, an automatic pan skip with means for adjusting the skip relative to the pans without stopping the machine. The set screw was not adjustable when the machine was in motion. We likewise think Green's claim that Bleile's machine did not possess any speed change gears is well taken.

Ward's machine does not possess a pan-skip mechanism, within the meaning of the word "skip" as here used, nor is the speed of the carrier relatively adjustable while the machine is in motion. Carlson's patent differs from the machine in question for the added reason that the pan feed transmission is not provided with speed change gears.

Appellant likewise confidently relies upon a machine known as the Cincinnati machine. Green charges that this machine is a fiction. The court heard the testimony and was in a better position than we to determine the weight to be given to the testimony bearing upon this machine. The sole witness who testified concerning it stated that it had been installed some 13 or 14 years previously, that it had remained complete for about a year, and that some parts had been taken off "because the witness had a man who did not know how to run and operate the machine. He got used to running the machine without

any pawls but one." After a lapse of many years, and shortly before this suit was tried, parts were put back or attached, and defendant's expert witness examined it, testifying on direct examination to its complete anticipation of Green's machine. There is certain testimony tending to show that this machine was not adapted to skipping, because of the absence of lugs on the carrier chains. Nor does the statement of the original operator coincide with the theory of the expert as to the purpose or use of a hand wheel by which the carrier was relatively adjusted forward or backward while in motion. While witness seemed to recognize the presence of a hand wheel such as was referred to by the expert, it is doubtful if it served or was capable of serving the purpose ascribed to it by the expert.

We cannot say upon this testimony the court erred in not recognizing this machine as an anticipation of the claims of the present patent.

Claim 29 probably best describes, element for element, the entire combination representing appellee's contribution to the art. We conclude the combination is supported by the description, involves novelty, and is valid. Claim 30 covers in the combination the continuous pan carrier, together with the specific pan-skipping mechanism and driving means. The other claims, 40–45, cover in combination the means for setting the pan carrier relatively forward or backward. Claim 44 was not included in the bill, but we see no error in including it in the decree.

While counsel attacks these claims individually, he fails to view each combination as an integer. Some of the patents relied on as an anticipation contain only single elements found in the combination. We find the combination contains elements which are new, and, as combinations, spell invention.

Infringement.—Little need be said on this question. The contest was really determined in the Patent Office between Allison and Pinkney and Green. Noninfringement, if it exists at all, must be due to the difference in means adopted by appellant to register the pan carrier to the skip while the machine is in motion. Each machine is provided with a hand wheel adjustment in the transmission between the skip mechanism and the pan carrier. The sole difference is found in the mechanism that intervenes between the hand wheel and the pan carrier. Appellant claimed that Green's wheels must be disconnected from his driving means to effect an adjustment, and, so disconnected, independent power transmission means, operable and driven by hand only, are provided, while in defendant's machine the manually operated means consist of bevel gears, whose rolling motion around the gear *60* is produced by the hand wheel *80*, the gears being in the power transmission.

To answer this contention, we must examine the claims, where we find no such limitation to the element there described as would defeat infringement because of this difference. This element in claim 40 reads:

"Means for setting said conveyer relatively forward or backward while in motion."

In claim 41 it reads:

"Manually operated means for accelerating or retarding the movement of said conveyer for the purpose of registering the pans with the skip."

As the examiner in the Patent Office well observed:

"Counts 1 and 2 (being claims 40 and 41 in the Green patent) are not necessarily limited to a construction where the normal driving mechanism for the conveyer continues in action after the means are put into operation."

"While in motion" refers generally to the machine. True, the pan carrier, too, is in motion. To advance the carrier, the "manually operated means" are used—simply by causing the "spring-pressed pawl" to engage the teeth of the gear. The operator turns the hand wheel and causes the carrier to move faster than it ordinarily drives when acceleration is desired, and slower if the operator wishes to retard the movement of the carrier. Nor does the use, in the specifications, of the word "independently," referring to this motion, limit appellee in construing these claims. The manual means act "independently" so far as acceleration or retardation is concerned, even though the driving means of the machine be attached or unattached. Acceleration as such is obtained independently of the machine provided means for driving the pans. It is obtained by the man-operated hand wheel. This is so in Green's patent machine, and it is true of the infringing machine. In both instances a continuously running machine is provided with a hand wheel, by which the operator can quickly adjust the pan carrier forward or backward without stopping the machine.

The defense of noninfringement of these claims really goes to the question of the ruling of the Patent Office in allowing Green to insert them in his patent rather than to the question of examining appellant's machine to ascertain whether it comes within the language of the claims. Appellant constructed its machine under the Allison and Pinkney patent. Claims 1 and 2 of that patent are identical with claims 40 and 41 of Green's patent. If Green was entitled to these two claims, it would ordinarily follow that a machine constructed under the former patent would infringe the latter.

Such differences as appear do not, we think, avoid infringement. Concluding, as we do, that the Patent Office was correct in its ruling, we also conclude there was infringement.

The decree is affirmed.

UNITED STATES SLICING MACH. CO. v. WOLF, SAYER & HELLER, Inc.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2611.

PATENTS ⟸328—INFRINGEMENT—SHARPENER FOR MEAT-SLICING MACHINES—SUCCESSIVE MOVEMENTS.

The Stuckart patent, No. 1,039,210, for a sharpening device on meat-slicing machines, by "successive" movements to bring one grinder against the bevel edge, which requires more sharpening, and then to take such grinder out of engagement with such edge and bring the other grinder against the flat edge, *held* not infringed by a sharpener to grind both edges at the same time, with a stronger spring against the grinder for the bevel side, though the grinder for the bevel edge comes in contact slightly before the other, and can be stopped there.

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

Suit by the United States Slicing Machine Company against Wolf, Sayer & Heller, Incorporated. Decree for defendant (243 Fed. 412), and plaintiff appeals. Affirmed.

Frank T. Brown, of Chicago, Ill., for appellant.

Max W. Zabel, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Appellant's suit on the Stuckart patent, No. 1,039,210, September 24, 1912, for a sharpening device on meat-slicing machines, was dismissed on the ground that appellee's sharpener does not infringe.

Slicing machines and various sharpening devices were old. In the standard machine a rotary steel disk, slightly dished, is the slicer. The concave side terminates in the flat face of the cutting edge; the convex side, in the bevel face. The bevel face requires more grinding, as the flat face should be kept flat. On the flat face nothing is required but grinding away the burr or wire edge caused by grinding the bevel. Prior machines had sharpening means consisting of two grinders which normally were held away from the knife and which by movement of a lever were thrown into contact with the bevel and flat faces at the same time. Stuckart described an improved means in which one grinder was brought against the bevel face first, and then, after the bevel face was ground and while the grinder on that side had no farther movement toward the knife, the other grinder was independently brought against the flat face. In the Patent Office Stuckart distinguished his device from the prior art by pointing out that the movements of his grinders were "individual and successive."

On this disclosure Stuckart claimed:

"In a device for sharpening the rotary circular knife of a slicing machine, the combination of a sharpener movable into and out of engagement with the back of the knife, a sharpener movable into and out of engagement with the front of the knife, and means for causing such movements to be successive."

Appellee's sharpener, like those of the prior art, has two grinders on one support. When the lever is in one of its locked positions, the grinders are held away from the knife. When the lever is in the only other locked position that is provided, the grinders come into contact with the two faces with intended and practical simultaneity. On the bevel side a strong spring gives hard grinding, and on the flat side a weak spring gives light grinding; but both at the same time. Thus used, appellee's device obviously does not infringe.

But appellant proved a use in a meat shop wherein the lever of appellee's sharpener was stopped at a point between the "off" and "on" notches. When the lever is at such intermediate point one grinder contacts with the bevel face while the other is still away from the flat face, and when the lever is moved farther to the "on"" position both grinders are in contact with the knife. No evidence was offered that appellee advised or knew of such use, which is contrary to its witnesses' sworn statement of intended operation. But even such use cannot, in our judgment, be counted as an infringement.

When appellee's lever is stopped at an intermediate point, the strong spring holds one of the grinders against the bevel face. When the lever is moved farther on, so that the other grinder contacts with the flat face, the first grinder is still strongly held against the bevel face. Thus the first and solitary grinding of the bevel face is ground over, and the actual sharpening is the result of the joint and synchronous action of the two grinders.

Appellee's sharpener is that of the prior art, with the addition of the contrastingly tensioned springs. Probably no sharpener of that type was ever built, or ever could be, in which the two grinders would touch the sides of the knife with exact mathematical simultaneity So every owner of an old sharpener would be found guilty of infringement on proof that in use the one grinder bore against the bevel face before the other touched the flat face, if such "successive" movements were within Stuckart's monopoly. Of course the claim cannot be allowed to have that retroactive grasp. "Successive," in Stuckart's combination, must be held to apply to those movements of the two grinders that are separate and independent of each other in time and place.

The decree is affirmed.

JOSEPH HALSTED CO. v. UNITED STATES FIRE ESCAPE COUNTERBALANCE CO.

(Circuit Court of Appeals, Seventh Circuit. January 8, 1919.)

No. 2571.

PATENTS ⊂=328—INFRINGEMENT—FIRE ESCAPE.

The Cowles patent, No. 705,042, claims 1 and 2, for improved fire escape, *held* infringed by ladder which used the same means to effect one of the several purposes which it affected in the patented ladder; but claim 3 of the same patent *held* not infringed.

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

Suit by the United States Fire Escape Counterbalance Company against the Joseph Halsted Company for infringement of three claims of a patent. Decree for complainant (246 Fed. 947), and defendant appeals. Decree modified, so far as it adjudged infringement of claim 3, and, as modified, affirmed.

John W. Hill, of Chicago, Ill., for appellant.

Frank T. Brown, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. A statement of the character and scope of this patent and a description of the infringing fire escape, as well as a carefully prepared opinion by Judge Sanborn, appears in 246 Fed. 947. In view of the description there appearing, it is unnecessary for us to deal with more than one question, that of infringement by the Smyth fire escape.

Appellant's principal attack on the decree arises out of the defense of noninfringement, so far as it relates to the ladder which it built on the Smyth building. Agreeing, as we do, with the conclusions of the District Judge, we will briefly consider this phase of the case. Much of the difficulty in determining this question is due to the use, by expert witnesses and others, of the words "torsional" and "rigidity." Appellant claims that its ladder has no torsional member, such as is referred to in claim No. 3. In fact, it claims its ladder is rigid, and a torsional member is required only in a flexible ladder. In other words, appellant claims that the Cowles patent does not cover a ladder that is braced or stayed so as to be rigid.

It seems to us too much emphasis is placed upon the strict definition of words used by witnesses, as distinguished from the real meaning of the witnesses who testified. For example, rigidity in a ladder is necessarily a relative term. The longer the ladder, and the fewer and less effective the braces, the greater the flexibility, the less the rigidity. The size and character of the material may also affect its rigidity. Likewise the "device for aiding in the support of the other side thereof and mechanism co-operating with said last-mentioned supporting device" may well be said to describe a "torsional member,"

as well as "means for twisting the rod," and this member would nevertheless add to the ladder's rigidity.

Appellant's "sleeve," which passes from the outside to the inner side of the ladder and constructed in the manner disclosed by the testimony, appears to us to be the mechanical equivalent of element 3 in claims 1 and 2, regardless of whether the witness calls it "a torsional member" or "an anti-torsional rod." It is worthy of notice that nowhere in the claim does patentee refer to this element as a "torsional rod." The only place where the word "torsional" appears is in claim 3, and there patentee speaks of a "rod subject to torsional strain." The Patent Office, speaking of the Seymour patent, which appellant claims it followed, and referring particularly to this sleeve says: "It is rather the rigidity of the sleeve which is its distinguishing character." Of course, the sleeve itself was rigid, and it imparted to the ladder added rigidity. Each step in the ladder contributed likewise to its rigidity.

But appellant trespassed on patentee's rights when it adopted the means that, incidentally perhaps, added rigidity to its ladder, but clearly, and as we think purposely, provided a supporting device for the other side of the ladder, just as was described by Cowles in his patent. Rigidity as such was obtainable in many ways. If it was rigidity alone that appellant sought, it was most unfortunate in adopting the means pre-empted by appellee. Results, other than rigidity, which the testimony indicated were extremely desirable, were accomplished by these means which Cowles covered by his patent, and appellant cannot well complain when adjudged a trespasser for using this one "means" or its equivalent, out of the dozens that were open to him.

The experiments made by plaintiff's expert witnesses with the Smyth structure prove only too conclusively that the "sleeve" which appellant used served the same object and was for the same purpose as the "means for supporting the other side thereof" described and defined in the Cowles patent.

By reason of the particular "means for supporting the other side thereof" described in the third claim of the patent, we conclude there is no infringement thereof disclosed by appellant's fire escape constructed on the Smyth building.

The decree is modified, so far as it adjudges appellant to have infringed claim 3 of the patent by the so-called Smyth structure, and, as modified, is affirmed, with costs.

HEYL & PATTERSON, Inc., v. M. A. HANNA COAL & DOCK CO.

(District Court, W. D. Wisconsin. April 14, 1919.)

1. PATENTS ⟸157(1)—CONSTRUCTION—RULE OF EQUIVALENTS.
Where the field of a patent is important, and has presented difficulty, the primary patent should receive a liberal construction, and also a liberal range of equivalents; but even a pioneer patent is subject to the rule of equivalents.

2. PATENTS ⟸246—INFRINGEMENT OF COMBINATION—OMISSION OF ELEMENT.
Since infringement of a combination claim depends on defendant's using or vending an article having all the patented elements, failure to employ a certain element or its equivalent avoids infringement.

3. PATENTS ⟸243—INFRINGEMENT—COMBINATION—IDENTITY OF MEANS, OPERATION, AND RESULT.
Though a patent is of a primary character, entitled to liberal treatment, it is not infringed if defendant's machine lacks the identity of means and identity of operation, which must be combined with identity of result, to constitute infringement of a combination claim.

4. PATENTS ⟸328—INFRINGEMENT—RAIL CLAMP FOR BRIDGES.
The Brown and Gaines patent, No. 1,153,672, of September 14, 1915, for a rail clamp for traveling bridges, *held* not infringed by a device substantially different in the means and operation for applying the clamps.

In Equity. Suit for infringement of patent by Heyl & Patterson, Incorporated, against the M. A. Hanna Coal & Dock Company. Bill dismissed.

E. F. McCausland, of Superior, Wis., and Bakewell & Byrnes, of Pittsburgh, Pa., for plaintiff.

Lyman T. Powell, of Superior, Wis., Parkinson & Lane, of Chicago, Ill., Boyesen & Flor, of St. Paul, Minn., and Emery, Booth & Janney, of Boston, Mass., for defendant.

SANBORN, District Judge. This is an infringement suit on patent 1,153,672 of September 14, 1915, issued to Raymond E. Brown and Edward C. Gaines, for a rail clamp for traveling bridges. The chief question is one of equivalents, as the validity of the patent is not contested, though it is contended that its scope is greatly narrowed by the prior art.

Traveling bridges are used on coal docks to load and unload boats and cars, running back and forth on railway tracks to place the loading apparatus in proper position. The bridges vary in height, some being upwards of 100 feet, and, being built often on the Great Lakes, are peculiarly exposed to windstorms. The patent apparatus is designed to hold the bridge securely on the rails whenever not in use, or when a severe wind is anticipated. The bridge which was blown over, as described in Niagara Transit Co. v. Northwestern Fuel Co., 258 Fed. 893, — C. C. A. —, was equipped with the patent rail clamp, which failed to hold in an extraordinary storm.

The claims which are in suit are:

Claim 1: "In a rail-clamping device for traveling bridges, the combination, with a frame, of an electric motor, a shaft driven thereby, weight-ap-

plied clamping devices, connections between said shaft and clamping devices, a means for operating said clamping devices by making and breaking the circuit to said motor."

Claim 2: "In a rail-clamping device for traveling bridges, the combination, with the frame, of an electric motor, a shaft driven thereby, clamping devices, a weight connected to said shaft, and means for breaking the circuit to said motor whereby said weight is lowered to apply said clamping devices, and means for raising said weight by making the circuit to said motor whereby said clamping devices are released."

In the electric wiring of the respective devices of plaintiff and defendant there is no great difference. In plaintiff's the weight is sustained by the motor running as a dynamo to create enough E. M. F. to sustain the weight in its elevated position. For this defendant substitutes a solenoid energized by the current on the line to apply a brake to the weight drum, and thus holding the weight. If this were the only substantial difference between the two there would be no question of infringement.

But in setting the clamps in the respective constructions there is marked difference in operation. In this respect Mr. Sessions thus compares the two:

"Should the rope of one of defendant's devices break, that clamp would set, regardless of the position of the other clamps. Should the rope of plaintiff's device break, the clamps would not set at all. In plaintiff's device there is a long shaft *10* extending something like 20 feet, in those devices which I have inspected, along the sill of the leg. This shaft is threaded at either end, at one end with a right-hand thread, and at the other end with a left-hand thread, engaging threaded nuts for applying and releasing the clamps. In defendant's device there is no such shaft, no element which corresponds to this shaft in its physical structure or in its functions. The nuts *13* upon the shaft are pivoted to bell-crank levers which in turn are pivoted to the frame of the sill. There is nothing of this sort in defendant's structure. That is an essential part of plaintiff's structure, in order to transmit the effect of the rotating screws of the clamps. Defendant's clamps are applied by a simple pair of toggle links. There is nothing of this sort in plaintiff's structure. The force, instead of being multiplied through the mechanical advantage of a toggle—which by the way was long known and used in rail clamps before the date of the patent in suit—plaintiff's device employs nothing but lever mechanical advantage, together with the advantage of the threaded screw. It is well known that the efficiency of screw threads is very small, consequently it is necessary that the motor in plaintiff's structure and the weight which operates the screw be made powerful: that is, that the motor must be of large capacity and the weight heavy. There are many friction joints in plaintiff's structure, which consume the effort of the motor and of the weight, making it necessary to carry a much greater weight upon the sill of the bridge leg than in defendant's structure.

"Defendant's weights are not supported by a shaft *10* which operates the clamping device. Defendant's weight is, on the contrary, directly connected to a rock shaft or fulcrum of a lever, which, when the weight descends, operates through the toggle links which I have mentioned to set the clamps into position, where when the bridge starts to move the self-tightening feature becomes operative, and the clamps grip the rails with an enormous gripping power. In plaintiff's clamps the gripping effect upon the rails is due solely to the pressure which is applied to them by the actuating weight. In defendant's structure the clamps are set into position through the medium of a leaf spring, which is attached to one of the clamp levers. This spring is marked with the red pencil letter *S* upon the blueprints, Exhibits 21 and 39. As the weight of defendant's device descends and spreads the toggle links, which are marked *11* upon the blueprint, defendant's Exhibit 39, the springs *S* are flexed and they separate; the clamp levers *10* producing pres-

sure between the rail clamps and the rail sufficiently to raise the cam, which is marked with a red pencil letter *C* in the blueprint, defendant's Exhibit 21, to grip the rail upon any movement of the bridge thereafter. The weight of the defendant's device thus applies only a spring pressure to the clamping device, which of itself would not create enough friction to set the clamps to be of any practical use whatever in anchoring the bridge.

"The weight in defendant's device, after it has descended to put pressure upon the springs *S*, rests upon the top of the bridge sill; there being wooden buffer blocks upon the weight for this purpose. After the weight has descended to rest upon the top of the sill, it can have no further effect upon the tightening of the clamps. The toggle links *11* at this time are so nearly straight that any reaction from the clamps would not straighten them, except under very extreme conditions, which probably would not exist. A comparison of the sizes of the weights used upon plaintiff's and defendant's structures is one of the best illustrations of the fact that defendant's weight is entirely insufficient to apply the clamps for direct braking or clamping effect upon the rail. At the Northwestern Fuel Company's docks the other day I measured one of these weights, and it was something like 30 inches by 33 inches by 40 inches; making a conservative estimate of its weight it must have been between 9,000 and 10,000 pounds. Defendant's weight is about a foot in cross-section by 14 inches long, as I recall it—I did not measure it—and would weigh in the neighborhood of 400 pounds, I should estimate; the difference between 9,000 or 10,000 pounds for operating two clamps on plaintiff's structure, as compared to 800 or 900 at the most for operating two clamps on defendant's structure.

"The cable drum *27* of plaintiff's device is located upon the shaft *10*, being secured to it by keys or other fastening device. This is absolutely essential, as the clamps are operated through screw thread and nut transmitting devices by the shaft. In defendant's structure there is nothing of this sort. This shaft of the patented structure could not be applied to operate defendant's weight. There is no occasion for it, and I cannot conceive how a designer could apply it to the clamping device of defendant's structure. The screw of plaintiff's device is obviously employed for the mechanical advantage it gives in applying the clamps by means of the weight and in releasing the clamps by means of the motor."

The force of both weights is increased by the fact that plaintiff's weight operates the shaft *10* on a drum of larger diameter than the shaft, and defendant's is attached to the end of an arm, giving it about four times the power of its weight.

The only vital question is whether the two devices have equivalent means and modes of operation. Plaintiff sets the clamps by a weight turning a shaft which by means of threaded ends straightens a toggle to spread the clamp arms and thus grip or pinch the rail head, and the weight continues to hold the toggle in operative position by its gravity until it is desired to disconnect the clamps. On the other hand, defendant's weight descends, and itself alone, without any shaft turning, straightens a toggle joint and brings the clamps into close relation with the rail, so that they can be pressed against it by springs. If, then, the bridge continues to move, the cam jaws of the clamps press against the rail with greatly increased force. Plaintiff strengthens the toggle by a weight, a shaft, and a screw; defendant by a weight, springs, and cams. Plaintiff's weight is always operative; defendant's out of operation as soon as it has placed the jaws in close relation to the rail head. Enormous pressure is applied to the rail head by plaintiff's weight alone as the initial force; like pressure is applied to the rail head by the springs and cams alone, the weight

merely serving to bring the clamps into position to be operated by the springs, moving bridge, and cams.

A comparison of the clamp-setting operation shows the following elements in the two constructions:

Patented.	Defendant's.
1. Breaking the circuit.	1. Same.
2. Driving clamp motor for brake resistance to steady weight lowering.	2. Equivalent construction by solenoid.
3. Resetting limit switch for later weight-raising operation, by means of descending weight.	3. Equivalent construction by mechanical brake.
4. Weight lowering by unwinding wire rope on shaft.	4. Same.
5. Applying clamps by a weight turning a shaft and straightening a toggle.	5. Applying clamps by the weight straightening toggle and applying leaf springs and cam jaws.
6. Locking clamps by toggle and screw ends of shaft.	6. Locking clamps by toggle leaf springs and clamps.
7. Preventing movement of bridge by continuous operation of gravity of the iron weight.	7. Preventing movement by cam jaws.

[1, 2] It is obvious that we have here two distinct modes of operation. Are they sufficiently different to negative infringement? Plaintiff's discovery is meritorious, and is not materially limited by the prior art, because a combination having weight-applied, power-released claimps had never before been used. The field is also an important one, it having been found extremely difficult to find any device which will hold large bridges against the enormous power of the wind. The patent should receive a liberal construction; also a liberal range of equivalents. But even a pioneer patent is subject to this rule of equivalents. Paper Bag Case, 210 U. S. 405, 415, 28 Sup. Ct. 748, 52 L. Ed. 1122. And since infringement of a combination claim depends on the defendant using or vending an article having all the patent elements, it follows that the failure to employ a single element or its equivalent avoids infringement. Eames v. Godfrey, 1 Wall. 78, 17 L. Ed. 547; Electric Signal Co. v. Hall Signal Co., 114 U. S. 87, 5 Sup. Ct. 1069, 29 L. Ed. 96; Dryfoos v. Wiese, 124 U. S. 32, 8 Sup. Ct. 354, 31 L. Ed. 362; Gordon v. Warder, 150 U. S. 47, 14 Sup. Ct. 32, 37 L. Ed. 992; Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136; Leeds & Catlin v. Victor Talking Machine Co., 213 U. S. 325, 29 Sup. Ct. 503, 53 L. Ed. 816; Standard Computing Scale Co. v. Computing Scale Co., 126 Fed. 639, 61 C. C. A. 541; Burroughs Add. M. Co. v. Felt & Tarrant Mfg. Co., 243 Fed. 861, 156 C. C. A. 373.

[3, 4] While the patent is of a primary character, entitled to liberal treatment, it is not infringed if defendant's machine "lack that identity of means and identity of operation which must be combined with identity of result to constitute infringement." Kokomo Fence Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689. The substi-

tution of mechanical means for electrical by using a solenoid, instead of a motor or dynamo to hold up the weight or to regulate its fall, is simply an equivalent or identical means and operation. But there is a substantial difference in the means and operation for applying the clamps. Plaintiff's invention should be given its full scope, but without allowing protection to different machines producing the same result.

Finding no infringement, the bill should be dismissed, with costs. Appeal allowed in open court; bond fixed at $200.

ODELL v. F. C. FARNSWORTH CO. et al.*

(District Court, S. D. New York. April 5, 1917.)

No. 70.

COURTS ⊂=290—JURISDICTION OF FEDERAL COURTS—SUITS ARISING UNDER PATENT LAWS.

A suit for an accounting for royalties under a contract granting an exclusive license to manufacture a patented device is not one arising under the patent laws, and where the sum involved is less than $3,000 a federal court is without jurisdiction.

In Equity. Suit by William H. Odell against the F. C. Farnsworth Company and the Farnsworth Manufacturing Company. On motion by defendants to dismiss for want of jurisdiction. Motion granted.

Samuel E. Darby, of New York City, for plaintiff.
Rogers, Kennedy & Campbell, of New York City, for defendants.

MANTON, District Judge. When this case was reached on the calendar for trial, counsel for the defendants moved to dismiss the bill, claiming that the court was without jurisdiction. It appears from an examination of the bill that the plaintiff is a citizen and resident of this district, that the defendant F. C. Farnsworth Company is a Delaware corporation, and the defendant Farnsworth Manufacturing Company is a Massachusetts corporation. The suit is for an accounting.

The bill alleges the plaintiff was the inventor of a new and useful invention in steam traps, and that by an instrument in writing dated September 8, 1914, the plaintiff granted unto the defendant F. C. Farnsworth Company the sole and exclusive right to manufacture and sell the apparatus; that he was to receive $100 within six months from the date of the execution of the instrument and $5 upon each apparatus sold by said company, until he had received the sum of $1,800 in royalties. Thereafter the Farnsworth Manufacturing Company took over the assets and liabilities of the F. C. Farnsworth Company. The bill further alleges that the defendants have sold a large number of steam traps covered by the patent, and on which royalties, as aforesaid, have accrued, and have not been paid, except that the defend-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Decree affirmed 250 U. S. —, 39 Sup. Ct. 516, 63 L. Ed. —.

ants did account and pay for five steam traps. An accounting is then prayed for.

The motion to dismiss the bill must be granted. While there is a diversity of citizenship, the amount involves appears to be less than $3,000. Counsel argues, however, that the question of liability involves the infringement of plaintiff's patent. I differ from this view. The action is really one for breach of contract, and in no way involves a determination of whether the patent has been infringed. The recent authority of Briggs v. Shoe Co., 239 U. S. 48, 36 Sup. Ct. 6, 60 L. Ed. 138, is controlling, and I must follow it. There it is said:

"The bill shows that its dominant and ultimate object is to enforce payment of royalties reserved to the plaintiff by contract and whereby he sold to the defendant certain * * * patents."

It was held merely a suit under a contract, and not a suit arising under the patent laws. The case not being one under the patent laws, and the sum involved being less than $3,000, this court has not jurisdiction. Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. § 991). A defense of jurisdiction may be raised at the trial or at any time before the trial. Judicial Code, § 37 (Comp. St. § 1019).

The case of Albright v. Teas, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295, is also an authority which requires the dismissal of this action for want of jurisdiction.

The bill is dismissed, with costs.

Ex parte RISSE.

In re STALLFORTH.

(District Court, S. D. New York. February 17, 1919.)

1. HABEAS CORPUS ⟸85(1)—APPREHENSION OF ALIEN ENEMIES—BURDEN OF PROOF.
   Under Rev. St. § 4067 (Comp. St. 1916, § 7615), authorizing the apprehension of alien enemies in time of war, the proceedings are necessarily summary, and on habeas corpus by one apprehended thereunder on a presidential warrant the burden is on petitioner to show illegal restraint, by satisfying the court that he is not a "native, citizen, denizen, or subject of a hostile nation or government."

2. HABEAS CORPUS ⟸85(1)—APPREHENSION OF ALIEN ENEMIES—EVIDENCE.
   Evidence in a habeas corpus proceeding *held* insufficient to establish the claim of petitioner, apprehended as an enemy alien, that he was a citizen of Mexico, where he was born, of German parents, and not a German subject.

Application of Estabana M. Risse for writ of habeas corpus for release of Federico Stallforth. Writ denied.

Max D. Steuer, of New York City (Theodor Megaarden, of New York City, of counsel), for relator.

Francis G. Caffey, U. S. Atty., and Rufus W. Sprague, both of New

York City (Robert P. Stephenson, Asst. U. S. Atty., of New York City, of counsel), for the United States.

MAYER, District Judge. This is a writ of habeas corpus to inquire into the cause of the restraint of Federico Stallforth, to which a return has been made alleging that Stallforth is held in custody pursuant to a warrant dated January 18, 1918, issued by the Attorney General by order of the President. Stallforth is held by virtue of this warrant, issued under rules and regulations made by the President in his proclamation of April 6, 1917, regarding alien enemies, pursuant to section 4067 of the Revised Statutes (Comp. St. 1916, § 7615). The traverse to the return denies that Stallforth was arrested pursuant to such warrant, and alleges that he is not an alien enemy, but a citizen of Mexico.

Testimony has been taken on the issues raised by the return and traverse. It is contended by the government that the writ should be dismissed upon the return, the traverse, and the production in evidence of a certified copy of the warrant issued in this case, marked "Exhibit 6," (1) under the authority of United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; and (2) because Stallforth (hereinafter called relator) has not shown by the evidence that he is not a German alien enemy.

The statute under which Stallforth is held was passed July 6, 1798 (1 Stat. 577, c. 66), and is as follows:

Rev. St. § 4067: "Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upward, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed, as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety."

The only change made in the statute, since its adoption, was on April 16, 1918 (40 Stat. 531, c. 55 [Comp. St. 1918, § 7615]), when the word "males" was eliminated.

The purpose of this (to us) ancient statute is clear and simply expressed. During the present war it has been found a necessary and effective aid to the arm of the executive; and the plenary and comprehensive character of the executive's power is interestingly discussed by Mr. Justice Washington in Lockington v. Smith, 15 Fed. Cas. 758, No. 8,448. Curiously, few cases interpreting the statute are to be found, and therefore this case in some aspects is one of first impression.

Because the case can be disposed of on other grounds, I pass by the

first point of the government; i. e., that, as the executive officers, acting under the direction of the President, have jurisdiction to determine who is an alien enemy, their decision on any question of fact relating thereto is final.

[1] At the outset, it is important to determine whether the burden is on the relator or the government, the one of proving that he is not an alien enemy, the other that he is. The statute was enacted to safeguard the country in war time. It was necessarily summary. It would have been ineffective if, prior to apprehension, the fact as to enemy alienage were made the subject-matter of judicial proceedings or determination.

It must be presumed that the President has acted lawfully and that the relator is properly in custody; and, of course, as the President cannot himself physically act in every case, those who act for him represent him. Hence the warrant of arrest is the presidential warrant, and the arrest is the presidential act. The burden is therefore on relator to show illegal restraint, and, on habeas corpus, he must satisfy the court that he is not a native, citizen, denizen, or subject of the hostile nation or government. In this case, the question is not whether Stallforth is a subject of the republic of Mexico, but whether he is not a native, citizen, or subject of Germany.

[2] Concededly, Stallforth was born in Parral, Mexico, on April 4, 1882, where his parents were then residing. His father, Bernardo Stallforth was born in Germany, but went to Mexico in 1861, where he established a banking and mercantile business in 1862, which is still in existence. When Stallforth was 5 years old, his mother died, and later his father married again. Of the two marriages there were in all eight children, six of whom are living. In 1893, when Stallforth was 11 years old, his father, stepmother, and the children started from Mexico for Germany. The father died at Chicago en route, and thus never reached Germany. The stepmother and children, however, proceeded in due course with the journey, arrived at Wiesbaden in Prussia, and the stepmother established her domicile there, and has continued that domicile to the present time. Stallforth went to school in Germany until 1901, and then went to Bremen, being employed in the mercantile house of Stallforth & Eggers, to obtain a mercantile training; his stepmother and brothers and sisters remaining in Wiesbaden. The Stallforth of Bremen was his father's second cousin.

After remaining in Bremen for about half a year, Stallforth became ill and returned to Wiesbaden, where he was operated upon. Thereafter he attended the Universities of Bonn and Munich until he was about 23; i. e., 1905. Prior to 1907, Stallforth married a woman of German birth, but, according to his testimony, he could not marry in Germany, because he was not a German subject, and could not produce papers to show citizenship elsewhere, and therefore he was married in England. The visit to England was brief, and he returned with his wife to Munich (which was her home), and he made his home there. In 1907 he went with his wife to Mexico, via New York, and took over his father's business at Parral. He returned to Munich, and was there in 1908, when his first child was born. Between 1907 and 1910, he

seems to have gone back and forth between Europe and Mexico, going to Germany, France, and England. During that period he was also in the United States on a number of occasions. He has not been abroad since the spring of 1910. From that time, until late in 1912 or early in 1913, he was at Parral, but left because of the revolution in the state of Chihauhau, and went to El Paso, Tex., where he remained for a year. In 1913 he came to New York City, where he established his business office and took up a residence, first in New Jersey, and later in Westchester county. On April 6, 1917, he was taken into custody and has thus remained, except while at large on parole from the spring of 1917 until January, 1918. Other acts and statements of Stallforth will be referred to in the relevant connection.

It is contended for Stallforth, inter alia: (1) That he is a citizen of Mexico, because he was born in Mexico of Mexican parents; and (2) that, because of his birth in Mexico, he is a citizen of Mexico, even though his father may have been a German subject.

1. It will be assumed, for the purpose of the argument, that Stallforth's father acquired real estate in Mexico, and it is not controverted that he had children born to him in Mexico. It may also be assumed, for the purpose of argument on this point only, that under the German law, because of more than 10 years' continuous residence, Stallforth, Sr., had lost his German citizenship. The Constitution of Mexico provides as follows:

"Art. 30. The following are Mexicans:
"I. All those born, within or without the republic, of Mexican parents.
"II. Foreigners who are naturalized in conformity with the laws of the federation.
"III. Foreigners who acquire real estate in the republic, or have Mexican children, provided they do not declare their intention to retain their nationality."

In conformity with these constitutional provisions, the Congress of the United States of Mexico decreed the following as part of the law concerning aliens and naturalization:

"Chapter I.—Mexicans and Aliens.

"Article I. The following are Mexicans: * * *
"X. Aliens acquiring real estate in the republic, provided they do not declare their intention of retaining their nationality. At the time of making the acquisition the alien shall declare to the officiating notary or judge whether he does or does not wish to acquire Mexican nationality as granted him by section III of article 30 of the Constitution, and the alien's decision on this point shall appear in the document.
"If he chooses Mexican citizenship, or if he omits making any declaration on the subject, he may, within one year, apply to the department of [foreign] relations, in order to comply with the requirements of article 19, and be deemed a Mexican.
"XI. Aliens having children born in Mexico, provided they do not prefer to retain their alien character. At the time of registering the birth, the father shall declare his decision on this point before the judge of civil registration, and such decision shall appear in the document itself; and if he elects to acquire Mexican citizenship, or if he omits making any declaration on the subject, he may, within one year, apply to the department of [foreign] rela-

.tions, in order to comply with the requirements of article 19, and be deemed a Mexican.

"XII. Aliens serving the Mexican Government in an official capacity. * * *"

This section is immaterial to the controversy, but is mentioned, so that references infra to this pararaph XII will be understood.

Chapter III, art. 19:

"Art. 19. Aliens who come under the provisions of sections X, XI, and XII of article 1 may petition the department of [foreign] relations for their certificate of naturalization within the period fixed by those sections. They shall annex to their petition a document proving that they have acquired real estate, or that they have had children born to them in Mexico, or that they have accepted some public position, as the case may be. They shall present, moreover, the renunciation and promise required by articles 14 and 16, as a preliminary to naturalization."

Articles 14 and 16: These provisions require renunciation of foreign allegiance and promise of obedience to the laws of Mexico.

Chapter V, art. 1:

"Art 1. Aliens who have acquired real estate, who have had children born to them in Mexico, or who have held any public office, being those referred to in sections X, XI, and XII of article 1 of this law, are bound to declare within six months after the promulgation of this law, provided they have not done so previously, to the civil authorities of their place of residence whether they wish to acquire Mexican citizenship or to retain their own. In the former case they must immediately ask for their certificate of naturalization in the form prescribed in article 19 of this law. If they fail to make the declaration in question, they shall be considered Mexicans, except in those cases where there has been an official declaration on this point."

The law referred to supra was promulgated by President Diaz on May 28, 1886.

There is no evidence that Stallforth's father made the declarations required by (a) chapter I, art. 1, pars. X and XI; or (b) submitted the petition referred to in chapter III, art. 19; or (c) failed to make the declaration provided for in chapter V, art. 1.

Possibly this proof can be supplied by testimony on a commission to Mexico; but this record is barren of such proof. It cannot, therefore, be assumed or presumed that Stallforth's father was a citizen of Mexico.

The following certificate is in evidence:

"[Seal of Secretary of Foreign Relations of Empire of Mexico.]

"The citizen general of division Candido Aguilar, Secretary of State, and the office of foreign relations: Certifies that Mr. Federico Stallforth has duly proved before this office to be the son of foreign parents, to have been born in the territory of this nation and as it is embodied in the subsection 2 of the second article of the existing law of foreigners and naturalization, and therefore conforming with the said law, the mentioned Mr. Stallforth has the Mexican nationality.

"The present has been given out at the request of the interested party, and for the legal uses for which he may need it, in the city of Mexico on the 28th day of February, 1918. G. Aguilar.

"[Seal of Secretary of Foreign Relations.]

"The undersigned, the Mexican ambassador, certifies that the above signature is the one of General Candido Aguilar, who was the secretary of foreign relations of my government the 28th day of February of last year.
"Washington, D. C., Jany. 9th, 1919. G. Bouillas.
"[Seal of Mexican Embassy at Washington, D. C.]"

From the foregoing, it appears that relator was the son "of foreign parents." On its face, this means that the parents were not Mexican citizens. It may mean parents of foreign birth who have become Mexican citizens, but it does not so state, and this court cannot speculate. If anything, the inference is that the parents were still foreigners under the Mexican law, and that the father had not complied with the provisions of the Mexican law above quoted. It must therefore be concluded that the evidence fails to show that Stallforth's father was a Mexican citizen.

2. Chapter I, art. 2, par. II, of the Mexican law provides:

"II. The children of an alien father, or of an alien mother and unknown father, born in the national territory, until they reach the age at which, according to the law of the nationality of the father or of the mother, as the case may be, they become of age. At the expiration of the year following that age they shall be regarded as Mexicans, unless they declare before the civil authorities of the place where they reside that they follow the citizenship of their parents."

From 11 up to at least 22 years of age, relator lived in Germany. Whether or not he made the declaration necessary to retain the German citizenship of his parents rests on his unsupported testimony. In effect, his testimony is that he did not, although statements he made, as will appear later, create a doubt as to credibility. In justice to relator, I do not characterize his testimony as not true. I shall simply point out contradictions which prevent the court from being fully satisfied. What is meant by "civil authorities of the place where they reside"—i. e., whether in this case in Germany, where relator physically was, or in Parral, which had been his home—does not appear.

Foreign laws are facts, which must be proved, like other facts. Ordinarily their meaning is elucidated by the decisions of courts, or the practice of administrative officers, or the testimony of experts learned in the law; but there is no such enlightenment in this case, and in such circumstances this court cannot construe the law of Mexico.

If Parral is meant, then proof on this point may be obtainable by commission. If Germany is meant, then relator confronts difficulties of proof at this time for which our government is not responsible.

The law of June 1, 1870, of the North German Confederation provides:

"Sec. 3. The legitimate children of a North German acquire the citizenship of the father by birth, even when they are born abroad. * * *"
"Sec. 13. Citizenship shall henceforth be lost only: * * * (3) By ten years' residence abroad. * * *"
"Sec. 21. North Germans who leave the territory of the Confederation and reside abroad ten years uninterruptedly lose their citizenship thereby. The aforementioned period is to be calculated from the date of leaving the territory of the Confederation, or, if the emigrant is in possession of a passport or certificate of nativity, from the time of the expiration of these papers. The period is interrupted by registration in the register of a consulate

of the Confederation. It begins anew from the day following cancellation from the register. * * *

"North Germans who have lost their citizenship by a ten years' residence abroad and have acquired no other citizenship may recover their citizenship in their former native state even without settling there."

Except for the 10-year provision, it is plain that Stallforth, under section 3, was born a citizen of the North German Confederation. Up to 22 years of age he might, as between him and Mexico, become a Mexican citizen; but, as between him and the North German Confederation, he could only lose his German citizenship if, at the time of his birth, his father had lost his citizenship in the North German Confederation.

If the law of the North German Confederation supra operated on Stallforth, Sr., then there is no proof as to the date of the expiration of his passport or certificate of nativity; but, more important, there is no proof that he did not recover his citizenship as he was privileged to do "without settling" again in his native state.

But, whatever may be the correct construction of the law of June 1, 1870, it is probably true that as to those who left Germany before 1871 (when the law became effective) there were in addition laws containing provisions as to citizenship which might require consideration with the aid of expert testimony, in order to determine whether or no Stallforth, Sr., was a citizen of Germany in 1882 when relator was born. This is demonstrated by section 25 of the Law of June 1, 1870, which draws a distinction between two classes of citizens of the North German Confederation, as follows:

"With regard to the citizens of those states of the Confederation according to whose laws citizenship was lost by a residence abroad of ten years or longer, and who are residing abroad at the time this law is enacted, the period in question shall not be interrupted by this law.

"With regard to the citizens of the remaining states of the Confederation the period mentioned in section 21 shall begin on the day this law goes into effect."

The result of all the foregoing is: (1) That, on the facts, this court cannot conclude that Stallforth, Sr., as a fact had lost his German citizenship prior to his son's birth; and (2) that this court, in the absence of German court or administrative decisions or expert testimony, cannot determine the status of relator's father in respect of his German citizenship as of April 4, 1882, the date of relator's birth. The fact that relator's younger brother, Alberto, became naturalized in Prussia, is no proof that he or relator was not a German citizen. The certificate of naturalization merely recites that Alberto was born in Parral, Mexico, and there is no evidence that all of the facts as to the birth and citizenship of Stallforth, Sr., were laid before the official body—Vormundschaftgericht—having jurisdiction over naturalization. Indeed, all that Alberto stated to the naturalization court was that he "wanted to become a German," and, in the absence of other data, it might very well follow that the naturalization court or official would assume that a man born in Mexico was a foreigner and a proper applicant for naturalization.

There are some further interesting questions of law, discussion of which would seem academic, in view of what has been pointed out supra. That some state of facts existed which resulted in relator's belief that he was a citizen of Germany is well suggested by his own acts. Of course, his own belief that he was a German subject or citizen would not make him one; but a man's conduct may be such as to lead fairly to the inference that there must be facts in existence which form the basis of his belief.

Every act of relator shows that up to and after April 6, 1917—the date of the declaration of war by the United States against the Imperial German government—he assumed to be a German subject.

(a) In a letter to Col. Robertson, a friend of his, dated October 27, 1917, written in order to place facts before the American officials, he explained that in 1905 (when 23 years of age), on his return from Switzerland, he "made claims to exemption from military service" in Germany, "which was granted me, although the ground on which it was granted was stated by the authorities simply to be that of my ill health."

In his testimony before this court, he stated that he was informed by his physician that he would not be subjected to military service because of his physical condition. No claim was made by him that he was a citizen and subject of Mexico, and therefore not subject to military service under the German government.

(b) On two occasions, one in 1907 and one in 1910, when arriving in this country from abroad, the records of the immigration officials show that he was recorded in one instance as from Bavaria and in the other as from Germany. These entries are susceptible of explanation, and are not necessarily significant as part of the history of the case.

(c) On February 21, 1916, before our entry into the war, he was asked before the United States grand jury of this district, "Of what country are you a citizen?" and he answered, "German citizen, born in Mexico." On April 22, 1917, when being interrogated by then Assistant United States Attorney Sarfaty, he was asked, "By the way, you are a German citizen, are you not?" and he answered, "A German citizen, born in Mexico." His explanation of these answers is that the revolutionists in Mexico were then in control of the territory in which Parral is situated, and that they respected the property of foreigners, but not of Mexicans, and that, therefore, he felt that by asserting German citizenship his property in Parral would be protected.

These contradictions, however, make it difficult for the court to conclude that there are not in existence some facts upon which relator based his claim to German citizenship. It is not easy to understand how a statement made to an American grand jury or an American prosecuting officer would protect relator's property in a foreign country, and it is significant that the first of these statements was made in February, 1916, over a year before war was declared by the United States against Germany, and at a time when it must be assumed that relator in his intra-Mexican relations, wished to assert, as against Mexicans, his rights as a German subject.

In such circumstances, and on all the facts, it must be decided that, whatever may be relator's status, he has not satisfied the court that he

is not a German citizen or subject. To safeguard his rights (which may become important in some property or other relation), such is all that is necessary for the purposes of this writ. I do not find affirmatively that he is not a citizen of Mexico, nor do I find affirmatively that he is a citizen or subject of Germany. He may be one or both. But I do find that he has not shown that he is not a citizen or subject of Germany.

The writ will be dismissed.

Ex parte GILROY.

(District Court, S. D. New York. February 29, 1919. On Motion for Reargument, March 31, 1919.)

1. HABEAS CORPUS ⟸13—APPREHENSION OF ALIEN ENEMIES—REVIEW.
   Where a person is apprehended on a presidential warrant in time of war as an alien enemy, under Rev. St. § 4067 (Comp. St. § 7615), a court may inquire on habeas corpus whether or not he is in fact a "native, citizen, denizen, or subject of a hostile nation or government," since the statute provides for no preliminary hearing; but the proceeding is not further reviewable, being essentially an executive function, within the discretion of the President.
2. CITIZENS ⟸13—EXPATRIATION—NATURALIZATION—ABANDONMENT BY RETURN TO NATIVE COUNTRY—TREATY.
   Under the treaty of 1868 between the United States and the North German Union, providing in effect that, if a native of one country naturalized in the other shall renew his residence in the country of his birth without intent to return, he shall be held to have renounced his naturalization, and that "the intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country," as construed by the State Department a two-year residence in Germany of a former German naturalized in this country is only prima facie evidence of abandonment of his American citizenship.
3. WAR ⟸11—APPREHENSION OF ALIEN ENEMIES—EVIDENCE OF CITIZENSHIP CONSIDERED.
   Petitioner, born in Germany, his father being a German, but a naturalized American citizen, *held* not subject to apprehension as an alien enemy, or a "native, citizen, denizen, or subject" of Germany, on the evidence, which included proof of his registration under the Selective Draft Act, his acceptance and classification as a citizen by boards which had knowledge of the essential facts, and his induction into the army, where he served until honorably discharged in December, 1918.

Application by Thomas F. Gilroy, Jr., for writ of habeas corpus on behalf of Walter Alexander. Writ granted.

Thomas F. Gilroy, Jr., of New York City, for the writ.

Francis G. Caffey, U. S. Atty., of New York City (Rufus W. Sprague, Jr., Sp. Asst. Atty. Gen., and Robert P. Stephenson, Sp. Asst. U. S. Atty., of New York City, of counsel), opposed.

MAYER, District Judge. This is a writ of habeas corpus to inquire into the cause of the detention of Walter Alexander (hereinafter called relator, or Alexander), granted upon the petition of Thomas F Gilroy, Jr., as a friend of Alexander. The return states that Alexander is

held in custody as a German alien enemy, pursuant to the presidential warrant duly issued under section 4067 of the Revised Statutes of the United States (Comp. St. § 7615) and the rules and regulations duly promulgated thereunder. A traverse was filed, verified by Alexander, in which he denies that he is an alien enemy as defined in section 4067, supra, and alleges that since his birth he has been a citizen of the United States and that his detention is in violation of his constitutional rights as such citizen.

At the opening of the hearing, and at its conclusion, respondent moved for a dismissal of the writ on the ground of lack of jurisdiction in the court to entertain it, and upon the ground, further, that the petition was insufficient upon its face, in that it did not state that the action of the President and of the Attorney General, acting under the executive order of the President, was arbitrary, illegal, and not in good faith, and also that on the face of the petition it appeared that Alexander is a native of Germany, not naturalized in the United States, and therefore an alien enemy, within section 4067, supra. The case is of great interest, not merely as affecting this particular relator, but as involving important questions and principles, the determination of which may prove of service some time hereafter, more especially because of the fact that the books are singularly lacking in precedents as to the construction of a statute now in existence for over 120 years.

The three main questions are (1) whether the act of the executive is reviewable; (2) whether, on the facts, relator has shown that he is not a native, citizen, denizen, or subject of Germany; and (3) whether the holding of a local board and district board that relator was eligible for service under the Selective Service Law (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2044a–2044k]) is a binding adjudication.

The failure of the traverse to allege in words that the act of the executive was illegal or arbitrary is of small consequence. If such an allegation is necessary, as matter of law, leave to amend accordingly is herewith given. The petition and traverse, in effect, allege illegality, and the case is quite different in that regard from Cohen v. Edwards, 256 Fed. 964, recently decided by this District Court and filed February 7, 1919. Further, the traverse, by adopting the petition, alleges that relator's father was American-born, whereas the testimony showed that the father was a naturalized American citizen; but the circumstances as disclosed by the testimony are such that, if this involves any technique, leave is also granted to amend appropriately. In other words, it is desirable (both in the interest of the government and the relator) to decide the case on the merits, and thus avoid, if possible, further extended proceedings to correct merely formal deficiencies.

[1] 1. Section 4067 of the Revised Statutes of the United States was enacted as Act July 6, 1798, c. 66, § 1. Except for an amendment on April 16, 1918 (chapter 55), which eliminated the word "males," the statute has continued unamended and is now as follows:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President makes public proc-

lamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed, as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety."

The history of the enactment of this statute (too long to recite here) is interestingly and ably set forth in a document entitled "Supplemental Brief of the United States in Support of the Plenary Power of Congress over Alien Enemies and the Constitutionality of the Alien Enemy Act (Revised Statutes, §§ 4067–4070)," by Mr. Charles Warren, a former Assistant Attorney General of the United States and printed by the government printing office under date of 1918.

The purpose of the statute is self-evident and it is a necessary aid to the executive arm in case of war. The authority to the President to promulgate by proclamation or public act "the manner and degree of the restraint to which they (alien enemies) shall be subject, and in what cases," is, of course, plenary and not reviewable. Once the person is an alien enemy, obviously the course to be pursued is essentially an executive function, to be exercised in the discretion of the President. De Lacey v. United States, 249 Fed. 625, 161 C. C. A. 535, L. R. A. 1918E, 1011; Ex parte Graber (D. C.) 247 Fed. 882; Minotto v. Bradley (D. C.) 252 Fed. 600; Ex parte Fronklin (D. C.) 253 Fed. 984.

But the proposition advanced by the government is that, even though it can be shown beyond question that an error has been made, and that one alleged to be an alien enemy is, in point of fact, an American citizen, there can be no review, and that the decision of the executive is final. Such a contention proceeds upon a misunderstanding of the nature of the statute, and the power, extent, and limitations of review by the courts of acts done thereunder.

The statute relates to the civil power of the executive. It has no relation to the military arm, except in so far as the exercise of the civil power adjectively aids the military arm. The statute does not provide for any hearing, and necessarily so. To have required that there should have been a hearing before the executive could seize or detain an alien enemy would have defeated the protective and safeguarding objects of the enactment at the threshold. If a hearing had been provided, and the executive, after a hearing in accordance with law, had decided as a fact that a person was an enemy alien, then, of course, under abundant authority, the court would not have power to oppose its own conclusion as to the fact against that of the executive. The decisions in which the courts have declined to review the determination of executive officials have been in cases where the executive

or administrative act followed as the result of some hearing, sometimes formal, sometimes informal, but nevertheless a hearing.

The case most relied upon by the government is United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. The argument is that the statute under which Ju Toy was excluded did not provide for a hearing, and therefore that this case is precedent for the proposition that the decision or determination of the executive branch of the government cannot be reviewed by the courts.

Counsel, however, have misapprehended the Ju Toy Case. In Act Aug. 18, 1894, being chapter 301, § 1, 28 Stat. 372, 390 (Comp. St. § 4325), it was provided:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

The word "decision" was clearly construed as meaning some kind of hearing. On the return to the writ, the district attorney, in behalf of the United States, answered, setting up, among other things, a hearing and denial thereof by the immigration officer, an appeal to the Secretary of Commerce and Labor, and his action approving that of the immigration officer, and, in addition, the return by the district attorney, exhibited a copy of all the evidence offered upon the hearing and the orders by the immigration officer and the Secretary. Both the opinion of the court and the dissenting opinion in the Ju Toy Case clearly assume a decision after a hearing.

If there remain any doubt upon this point, that doubt was settled in Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, in an opinion by Mr. Justice Holmes, who had also delivered the opinion of the court in United States v. Ju Toy, supra. It is unnecessary to cite other cases, such as those which arose under the Selective Service Law, wherein it has uniformly been held that there must be a hearing and that the refusal to review occurs only in certain circumstances in those cases where there has been a hearing.

The point is so strongly pressed, however, that brief references should be made to three cases referred to in behalf of the government.

In Ex parte Graber (D. C.) 247 Fed. 882, it appeared from relator's petition that he was an alien enemy. Relator sought release by habeas corpus on the ground that he had done nothing and contemplated doing nothing forbidden by the President's proclamation. In other words, Graber, an alien enemy, sought to review the executive decision that he should be confined or restrained. The court held that such decision was not reviewable, and with this conclusion I fully agree; but no question was involved as to whether or no relator was, in point of fact, an alien enemy.

In Minotto v. Bradley (D. C.) 252 Fed. 600, the court, inter alia, held to the same effect as in Ex parte Graber. In the Minotto Case the status of relator was involved and the court examined the question and decided upon the issues thereby presented. There was no suggestion that the court had not power to review this question as distinguished

from a review of the executive discretion in determining whether the alien enemy should be confined.

In Ex parte Fronklin (D. C.) 253 Fed. 984, the court examined into the question of fact as to whether the relator was an alien enemy, and indeed took testimony upon a hearing as in the case at bar.

Vital as is the necessity in time of war not to hamper acts of the executive in the defense of the nation and in the prosecution of the war, of equal and perhaps greater importance, is the preservation of constitutional rights. The writ of habeas corpus is in such a real sense, one of the protections of civil rights and liberties, that it is not lightly to be laid aside. Indeed, the fact that the writ has not been suspended during this war will no doubt stand as an enduring memorial of the calm and orderly restraint of the American people, during a period of great strain and stress.

As I read Lockington's Case (1813) Brightly (Pa.) 269, and the comments of Mr. Justice Washington in Lockington v. Smith, 1 Pet. C. C. 466, Fed. Cas. No. 8,448, no question arose as to the applicability of a writ of habeas corpus to inquire; and it is sufficient to refer to Angelus v. Sullivan, 246 Fed. 54, 159 C. C. A. 280 (and many more cases could be cited), as to the view entertained in this circuit that the writ of habeas corpus is available to inquire into a detention caused by executive act.

As, therefore, the statute did not provide for a hearing, and as no hearing (quite properly) was had by the executive officials in Alexander's case, it becomes necessary to determine whether he has shown that he is not one of those who can be detained under section 4067.

[2] 2. Preliminarily, it should be pointed out that the burden is on Alexander to show that he is not an enemy alien, and not upon the United States to show that he is. This question of the burden of proof was fully discussed in a recent opinion of this court, and need not be repeated here. In re Stallforth, 256 Fed. 102, opinion filed February 17, 1919.

In considering the facts, it may be observed that, in order to arrive at the truth, each side was permitted to adduce testimony with a good deal of liberality. Some of the testimony is irrelevant upon the basic facts which determine citizenship, but is relevant upon questions of credibility.

Alexander was born on October 23, 1893, in Berlin, Germany, a son of Otto Alexander (sometimes called Otto H. or Otto Henry Alexander) and Henriette Landau. His parents were married in Germany about Christmas time in 1890, and there are now living five children of that union, all born in Germany, being Leo Willie Alexander, born September 17, 1892, Walter Alexander, the prisoner, born October 23, 1893, and three daughters, born respectively 1894, 1895, and 1897. The couple also had a son born in 1891, who died in infancy. Otto Alexander died in Berlin on April 18, 1914, and his widow and three daughters are now living there.

Alexander and his brother Leo arrived together in the United States on December 4, 1915, on the steamer Nieuw Amsterdam from Rotterdam, Holland, having reached the latter city from Berlin by way of

the Dutch border. They traveled with American passports, which had been issued to them in November, 1915, by the American ambassador in Berlin, and which before their departure from Berlin were examined and stamped by the German authorities in Berlin, both at the local police precinct, which included their residence, and at the general police headquarters in Berlin. The passports were also examined by the German military and customs authorities at the Dutch border and again upon their arrival in New York by the American authorities.

Prior to December 4, 1915, both Leo Alexander and Walter Alexander, accompanied by their father, had visited the United States—Leo once and Walter twice; Walter being here when he was a young child of 6 or 8 years of age (about 1899 or 1901), and again when he was 10 or 12 years of age (about 1903 or 1905), staying only a short time on the first trip, of which the young men remember little or nothing, and on the second trip (when Walter Alexander came with his father, but apparently without his brother) staying for about one month, during which time they visited the father's brother Richard at his home in Kingsbridge, New York. Beyond these trips they had never been in the United States until their arrival on December 4, 1915. Their father, Otto Alexander, was born in Breslau, Germany, on October 24, 1858, and came to the United States in 1870, residing in San Francisco from 1870 to 1880 and in New York City from 1881 until 1887, when he went to Germany. On November 17, 1879, being then 21 days over 21 years of age, Otto Alexander was naturalized as a citizen of the United States in the district court of California for the Fifteenth district, covering the city and county of San Francisco, by Judge Samuel H. Dwinnell.

The fact as to naturalization of the father was satisfactorily proved. Leo Alexander impressed me as a truthful witness. Owing to the San Francisco fire, the records were destroyed in 1906, and this record of the naturalization of Alexander, Sr., was never restored, and therefore is not available to relator. Before leaving Berlin, Leo Alexander, however, copied the capiton of his father's naturalization certificate of 1879 and the clerk's certification of 1901 in a small red-covered book in evidence. These papers were kept in a safe at the Alexander home in Berlin, and it would have been practically impossible for Leo Alexander in Berlin in 1915 to know, in any other way, the name of the judge of the California court who officiated in 1879, or the names of the clerk and deputy clerk who certified in 1901. This testimony, together with other testimony, establishes beyond doubt the fact that Alexander, Sr., was naturalized in 1879, as above stated.

In December, 1888, Otto Alexander instituted in the Supreme Court of New York County an action for absolute divorce against his wife, Bertha, whom he married in Hoboken, N. J., in 1886, and a decree of absolute divorce was entered therein in his favor in April, 1889. During the pendency of this action, in February, 1889, he was in Berlin, Germany, and his testimony was taken there by a commission before the United States consul, in which he testified, among other things, that he had resided with his wife in New York City until June 26, 1888, that he left the United States on September 22, 1888, that he was

then temporarily visiting his sister at No. 15 Bluecher street, Berlin, and intended to return to America.

On October 22, 1908, Otto Alexander applied to the State Department at Washington for and obtained a passport as an American citizen, No. 63410 of that date. In his verified application he stated, among other things, that he was born in Breslau on October 24, 1858, was naturalized as a citizen of the United States in San Francisco on November 7, 1879, before the district court of California, and that for 38 years, from 1870 to 1908, he had uninterruptedly resided in the United States in San Francisco and New York; that he was domiciled in the United States, his permanent residence being in New York City; that he intended to go abroad temporarily, and intended to return to the United States within two years.

While his petition for a passport confirms the conclusion that he was naturalized in 1879, his statements as to residence and permanent residence were not correct in a physical sense, but he may have very well intended to claim New York as his domicile, as distinguished from his physical residence.

On December 22, 1882, and again on December 21, 1892, he obtained life insurance from the Equitable Life Assurance Society of the United States, and his applications therefor show his birthplace and his various domiciles between his birth and December 21, 1892.

Including his trips to the United States with his sons, above mentioned, he seems to have been here for short periods at various times, the dates of some of which cannot be definitely fixed, but including, probably, various times between 1889 and 1912. He traveled about a good deal, and had been at Algiers, South and Central America, Honolulu, and many places on the North American continent.

The first step is to determine relator's citizenship as of the date of his birth; i. e., October 23, 1893. His father subsequently might have lost his American citizenship by reason either of treaty provisions or the act of March 2, 1907; but nothing which relator's father did or did not do after that date could deprive relator of his rights. Under section 1993 of the Revised Statutes (Comp. St. § 3947) it is provided as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States. * * *"

Under this act, it is entirely clear that Alexander was born an American citizen if, at the time of his birth, his father was still an American citizen. Under the treaty between the United States and the North German Union of 1868 (2 Malloy's Treaties, etc., pages 1298 and 1299), by article 4 (15 Stat. 616) it is provided:

"If a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization in the United States. Reciprocally: If an American naturalized in North Germany renews his residence in the United States, without the intent to return to North Germany, he shall be held to have renounced his naturalization in North Germany. The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country."

This treaty continued in force after the formation of the German Empire in 1871, and at least up to the declaration of war between the United States and Germany on April 6, 1917.

Otto Alexander was a native of Prussia, in North Germany, and thus, at the time of relator's birth, the father, Otto Alexander, had lived within the territory covered by the treaty, supra, for some three or four years. The treaty was a recognition of the right of expatriation on the part of both the United States and the North German Union. There had been a considerable amount of discussion between the United States and other countries upon this subject, and the question was definitely disposed of in the United States by Act July 27, 1868, 15 Stat. 223, c. 249; section 1999 of the United States Revised Statutes (Comp. St. § 3955) being part of this act. Its enactment followed shortly after the ratification of the treaty above referred to.

Moore, in his Digest of International Law, sets forth a number of instances and some diplomatic correspondence, which, briefly stated, demonstrates the purpose of the United States government to protect its citizens, whether American-born or naturalized, as against the acts and demands of foreign governments. Sections 2000 and 2001 of the United States Revised Statutes (Comp. St. §§ 3956, 3957), which are parts of the act of July 27, 1868, provide:

"Sec. 2000. All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this government the same protection of persons and property which is accorded to native-born citizens.

"Sec. 2001. Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

The treaty above referred to, and similar treaties with German states, are considered in section 471 of Moore's Digest, supra.

Quite a number of instances are cited where our Department of State was called upon to construe the status of some person, and the general trend of the decisions of the State Department is one of great caution in determining whether a naturalized American citizen loses his citizenship by absence from the United States and presence in the country of his birth for more than two years. In communications from Mr. Fish, Secretary of State, to Mr. Davis, the minister to Germany, dated July 30, 1875, and June 26, 1876, the position was taken that two years' residence in North Germany was merely prima facie proof of abandonment of nationality. In a communication between the same officials, dated November 5, 1875, Mr. Fish said:

"The Department has not doubted that the construction given to article 4 of the treaty by both Mr. Bancroft and yourself, viz. that a residence of two years did not of itself forfeit naturalization, but that the question of

the intent of the persons was then presented and to be decided according to the facts, was the correct one, and you are to be congratulated that a result has been reached which, if it does not concede all you have claimed as to the proper construction of this article, at least abandons a practice of enforcing the opposite construction which has been insisted on by the German military authorities."

Mr. Evarts, Secretary of State, in a communication to Mr. Williams, of the House committee on foreign relations, dated February 5, 1879, stated:

"While the intent to remain in the country of birth may be held to exist after two years' continuous residence, it is in reality not so held without special circumstances showing either an intent to remain permanently or the absence of all intent to return to the United States."

It must always be remembered that cases must be decided, if possible, on principle, and not to meet a particular situation. There can be no doubt that one of the principal issues with which the North German Union was concerned in the treaty above referred to was the eligibility of persons of German birth for military service, while, on the other hand, the American government was keen to protect its naturalized citizens against subjection to that or any other laws of the North German Union which, in any manner, invaded the rights of American citizens.

Mere residence in the place of birth, therefore, as amply appears from the face of the treaty, as well as from its practical construction, is not enough to cause loss of citizenship by a naturalized American citizen.

The facts in the case must satisfy the court that the intent not to return exists, and such result, according to Mr. Evarts, must be demonstrated by special circumstances, showing either an intent to remain permanently or the absence of all intent to return to the United States.

In the case at bar, relator's father's second wife, the mother of relator, was German-born. It is also true that relator's father represented a German insurance company; but, on the other hand, it is apparent that his business was of a character which caused him to travel to a considerable degree in various parts of the world.

Relator's father had shown his keen desire to become a citizen of the United States by becoming naturalized within a few days after he attained his majority, instead of waiting for a considerable period. Further, he had lived continuously in this country for about 17 years, during his earlier manhood, and was too young to have participated in the Franco-Prussian war.

It must also be remembered that in 1893, when relator was born, his father was 35 years of age, and therefore, if a German citizen, still subject to certain military service. It is certainly most unlikely that relator's father wished to lose the protection of his American citizenship as against subjection to military service in Germany. It is true that, after relator's birth, his father continued to live in Germany. A man might very well have the intention of returning to this country after he had been abroad 3 or 4 years, and then find that his business affairs kept him in a foreign land. While the declarations of rela-

tor's father in 1889, in the papers in the divorce suit against his first wife, are self-serving, nevertheless those declarations indicated an insistence by relator's father upon the proposition that he resided in this country. It is peculiarly significant, also, that he obtained a certificate of his naturalization from the clerk of the California court as late as 1901. The application by relator's father for a passport in 1908 is also of much weight. If his statement as to continuous residence in the United States is to be construed synonymously with domicile, then, in his application for a passport, he clearly showed that he considered the United States as his domicile. If, on the other hand, Alexander, Sr., in making the statement as to residence in his application for a passport, stated what was not true, in that he meant physical residence as distinguished from legal residence; then all the more is this evidence of the fact that it was his intention to hold his American citizenship; because, with that construction upon the language of the application, it is plain that Alexander, Sr., desired to retain his American citizenship, even at the expense of making a false statement.

Therefore, passing the testimony as to the statements to his family to the effect that he was an American citizen, all of the record acts of relator's father fail to show the intent, in October, 1893, not to return, within the principles laid down by Secretaries of State such as Mr. Fish and Mr. Evarts.

It is therefore decided that relator was born a citizen and subject of the United States.

[3] 3. It now becomes necessary to examine the acts and conduct of relator himself. Relator, with the exception of brief visits abroad, lived in Berlin from his birth. At the time of the declaration of war between Germany and Russia, he was a member of the Imperial Automobile Club, evidently a social organization. In September, 1914, he volunteered with other members of the club, in a volunteer body called "Imperial Volunteer Motor Corps," and, according to his testimony, he received no pay and furnished and maintained his own car and uniform—which latter was not the uniform of the German army. While in Berlin, he drove nurses and women of the Red Cross, and occasionally officers, about the city.

In this regard, he did no differently than many young Americans who performed similar services and works of aid and mercy in the countries of the Allies. Until October 23 or 24, 1914, when relator became 21 years of age, he was not competent to renounce his allegiance to the United States of America. In November, 1914, however, he went to Galicia, near the Eastern front. The testimony that he was on the Western front is not credited. While in Galicia he stayed at the hotel which was German Army Division headquarters and usually drove Red Cross women and nurses, and took wounded from the field to the base hospitals. On several occasions he drove the German general, who was the divisional commander, to field headquarters and carried provisions. According to his testimony, he took his orders from a member of the Automobile Club, who, in turn, received his orders from the motor corps headquarters, but he occasionally also took orders from the general. Late in December, 1914, or early in Jan-

uary, 1915, relator returned to Berlin and was dismissed from the corps because, according to his testimony, he was an American citizen.

Relator testified that in February, 1915, he went to the American embassy in Berlin, and on the first or second visit he took the oath of allegiance to the United States; but, as there is no record of that oath on file in the State Department, his testimony in that respect is disregarded.

Between February, 1915, and November, 1915, relator remained in Berlin. During that period he received a letter from the police authorities requesting him to call on them at Charlottenburg. On his visit there they requested him to join the German army, offered him German citizenship, and to promote him to a commission if his work justified it. He refused.

Early in November, 1915, he and his brother, Leo Alexander, applied to Ambassador Gerard, at Berlin, for passports to America, and after several visits obtained them. His application therefor was made out by one of the secretaries of the embassy in English, typewritten on a printed form, and contained an oath of allegiance to the United States. Upon his application, the ambassador issued a passport, No. 5609 of November 8, 1915, which was in the same form as the passport issued to his brother Leo.

He made several visits to the embassy before he obtained this passport, during one of which the secretary opened a drawer containing cards (evidently part of the embassy's card index filing system), and relator saw therein a card containing his name. His application states that he resided in the United States, "in the ——— state, ——— county, ——— City." It also states that his father was naturalized as an American citizen in the district court of California on November 17, 1879; "certificate of naturalization being herewith produced." Ambassador Gerard stated that he did not recall the production of that certificate; that he talked with Alexander and his brother at the time the passports were issued; that the conversation was in English; that he made it a rule to ask all applicants whether they had been connected with the German army, and that his rule was to refuse passports to all who had been so connected. He stated that he would have refused to issue the passport to relator, had he been informed that relator had been so connected. The ambassador also stated that he issued passports freely to those who satisfied him of any reasonable claim to American citizenship, because Germany was seizing for her armies all men who were Germans, or "stadtlos"—that is, without nationality. The ambassador also stated that he required some evidence of American citizenship, even if slight, and that the fact that he issued this passport indicated at the time that he had some slight evidence at least of relator's American citizenship. As above stated, after this passport was issued, it was viséd by the German authorities both at Berlin and at the border.

The conduct of relator before leaving Germany must be tested and understood as of its date. The instances are numerous where children of an American father are born and brought up abroad, where the American parent lives for business or personal reasons. It was

but natural, when the European war broke out, that a young man should take on the color of his surroundings. It would, indeed, have been difficult for any American youth, brought up and educated in France or in England, not to believe that those countries were right. It would be equally difficult for a young man, brought up as relator was, to suppose, in the early days of the war, that the country in which he lived was wrong. In such circumstances, young men were animated either by high purposes, or by a spirit of sportsmanship, or both, to render useful service in the way of helping the sick and wounded, by driving ambulances and motorcars, and doing similar useful acts. In the performance of such work and duties, especially in the field, it would be natural that they would come in contact with the military authorities and be called upon or requested from time to time to render volunteer service of the character described by Alexander. There was nothing in Alexander's conduct in the early part of the war—i. e., the fall of 1914—inconsistent with his American citizenship, unless it was necessary to take an oath of allegiance to the German government under the rules and regulations of the German government or the German army. Although Alexander entered upon this volunteer work prior to his majority, he continued in it for some two or three months thereafter, and, if he took an oath of allegiance, it would be assumed that the oath would be a continuing oath, which attached to him when he reached 21 years of age.

There is no testimony in the case, adduced either by relator or the government, to inform the court whether an oath of allegiance to the German government was required of one who rendered volunteer service such as Alexander did. There are, however, two considerations which are in relator's favor, viz.: (1) The action of the German authorities; and (2) the proceedings before the local and district boards, to be referred to infra.

To any one familiar with the complete system of registration which obtained under the Imperial German government, with the arrest and detention of men claiming to be American citizens who were in Germany on visits to their relatives or trips of recreation at the outbreak of the war, it seems almost inconceivable that the German authorities would have permitted Alexander to leave their country if they had regarded him as a German citizen or subject. If it were to be assumed that at the outbreak of the war the German authorities were less rigorous toward those claiming American citizenship than perhaps to subjects of some other foreign countries, it may at least be fairly presumed that in the late fall of 1915, when Alexander and his brother left Germany, the German authorities were anxious to impress into their military service any young men of the age of these brothers, who were German citizens or subjects, and, indeed, according to Ambassador Gerard, they were seizing even those whom the German authorities regarded as without nationality.

There can be no question that the police military and customs authorities duly examined as well as stamped the passports of the brothers, and satisfied themselves that they were not German citizens or subjects. The testimony of the ambassador to the effect that Alex-

ander was regarded by the German authorities as without nationality is strong evidence of the fact that, whatever his status might be, he was, in any event, not regarded by the German authorities as a citizen or subject of the German Empire.

At this point it is desirable to call attention to the fact that relator has made some conflicting statements, principally in regard to the point as to whether he understood that his father was American-born or was a naturalized American citizen. But the somewhat unsatisfactory testimony in this regard is quite immaterial to the questions of status here under consideration.

Alexander testified that he always supposed that his father was American-born. It would be quite likely that a young man should so suppose, if his father always referred to himself as an American citizen, without further detail; but in the application to the American embassy for his passport, his father's naturalization was set forth, and therefore his testimony on this point is unsatisfactory, unless it can be presumed that in the files of the embassy office there was some record to that effect copied into the application by some embassy clerk in routine, and such presumption cannot be indulged in, in the absence of evidence in support thereof. On the other hand, there is no reason why he should not have stated the exact facts in this regard to his attorney, Mr. Gilroy, and it may be fairly inferred, as Mr. Gilroy contended, that Alexander did not know that his father was a naturalized citizen until Mr. Gilroy gave Alexander the information which he (Gilroy) had acquired in that regard. The point, however, is of no importance, except as bearing upon questions of law, especially in connection with the proceedings before and the action by the local and district boards.

This view is stated preliminarily to the recital of some facts connected with the arrival and stay of Alexander in this country. Opposite Alexander's name on the ship's manifest, the immigration inspector indorsed in pencil, "9 yrs. in U. S.; father born U. S." The inspector testified frankly and truthfully to the effect that he had no recollection of the case, and that an error might be made in an entry of this character, while an inspector was examining a large number of passengers. Alexander undoubtedly told the inspector that his father was born in the United States, but there is no basis for supposing that he stated that he himself had lived for 9 years in the United States. In October, 1916, Alexander registered as a voter at the polling place in his district. Under the column headed "Country of Nativity," opposite Alexander's name, appears the letters "U. S." From the testimony of the inspector it is plain that this entry was perfectly proper, in accordance with the practice of election officers, if Alexander stated that his father was an American citizen. Alexander evidently was not entitled to register or vote at that election, because he had not been in the state of New York for one year; but if, through ignorance of the law in that regard, which, in the circumstances, might be very likely, Alexander improperly registered, that fact has no relation to the question as to whether or not he is a German, and not an American citizen.

In due course Alexander registered under the Selective Service Law

with local board No. 159, the chairman of which was Mr. Bronson Winthrop and the secretary Mr. George Gordon Battle, both well-known and experienced members of this bar, and later Alexander verified and filed his questionnaire with the board, in which he stated that he was born in Germany and that his father was an American. He set forth fully his service in the Imperial volunteer motor corps. He did not claim any exemption on the ground that he was a German subject, but claimed deferred classification as being physically unfit because of kidney trouble.

Under date of January 24, 1918, Mr. Gilroy wrote a frank and comprehensive letter to the local board, which, in part, is as follows:

"As an associate member of the legal advisory board for district No. 120, I advised the above-named registrant in regard to his questionnaire and prepared the same in my own handwriting, and he verified it before me. He has not yet been officially classified by your board.

"This case is unique so far as I know, for which reason I call your special attention to it.

"I understand that under the Selective Service Regulations and the rulings of the Provost Marshal General, alien enemies, and even alien enemies who have taken out their first papers, are not desired in the army, no matter how long they have been residents of this country. The above-named registrant is technically and legally a citizen of the United States, having been born in Berlin, Germany, of an American father and a German mother. However, in every other aspect of his case, he is German.

"He came to the United States in December, 1915, for a temporary purpose, and has been unable to return. His mother and three sisters now reside in Germany. His father died there in 1914 or 1915, and all of his property is located there, as well as the property of his mother, brother, and sisters. He personally served in the German army for three or four months at the outbreak of the war as a volunteer auto driver, during which time he drove ambulances and staff cars for the German army in Galicia.

"At or about the time he arrived at the age of 21 years I understand he made a declaration before the United States ambassador in Berlin of his intention to retain his legal right to American citizenship. That is as near as he can tell me about it, for he has no copy of the paper he signed, and, of course, I am only stating what he tells me. In the latter part of 1915 he applied for and received from Ambassador Gerard, based upon the above declaration, a passport as a citizen of the United States, upon which he journeyed here.

"I happen to know the young man personally, and know that all his sympathies, prior to the entrance of the United States into the war, were for Germany. I know that he is sincerely desirous of not being drawn, for fear he may have to fight against his friends and his people in Germany, although he has no hesitation in saying that he would not object to being in the American army if his duties lay in some other direction. * * *

"I confess that I know of nothing in the Selective Service Regulations fitting this exact case, and that from the answers in his questionnaire, unless he is found to be physically incapacitated, he would probably be classified in class A-1; * * * but, if the theory of the Provost Marshal General's Bureau is that Germans and those of German affiliations are not desired in the American army, it seems clear to me that this young man comes within that ban for the reasons stated, and I therefore desire to submit those matters to you and to call your special attention to this peculiar situation."

In the files of the local board is a memorandum initialed by Mr. Battle, dated January 31, 1918, as follows:

"In this case the registrant and appellant is an American citizen, who lived in Germany until 1915 and served in the German army in 1914. (See letter Thomas F. Gilroy, Jr., filed herewith, dated January 24, 1918.)

"And, as will be seen from Mr. Gilroy's letter, he served in the German army for four months at the outbreak of the war as a volunteer auto driver, during which time he drove ambulances and staff cars for the German army in Galicia.

"By the time he was 21, Mr. Gilroy states he made a declaration before the American ambassador in Berlin to retain his rights of American citizenship. Under the circumstances, he is clearly an American citizen.

"He has stated to the clerk of the board that he would like to serve in the American army if his status was made clear. It seems to the board that we have no alternative but to classify him in 1-A, and leave to the military authorities what disposition shall be made of his services if he should be inducted into the military service."

The local board decided that relator was subject to the Selective Service Law and placed him in class 1–A, the class first liable for service. On appeal to the district board, the decision of the local board was sustained. Thereafter, in due course, on May 26, 1918, relator was inducted into the American army and entrained for Camp Wadsworth, where he served until he was honorably discharged in December, 1918. In his certificate of honorable discharge, his commanding officer characterized his conduct as "excellent."

From what has been set forth supra, it is apparent that two further questions require consideration: (1) Whether, because of the doctrine of so-called double allegiance, relator so acted, after attaining majority, as to select Germany, instead of the United States, as the country of his allegiance; and (2) whether the action of the local and district boards is a binding adjudication upon the government.

(a) The question of double allegiance is well and briefly stated in Moore's Digest, vol. 3, p. 518, as follows:

"The doctrine of double allegiance, though often criticized as unphilosophical, is not an invention of jurists, but is the logical result of the concurrent operation of two different laws. In the absence of a general agreement for the exclusive application, according to circumstances, of the one or the other of such laws, the condition that actually exists is described by the terms 'double allegiance.' An undisputed example of it is furnished by the case of a child who, by reason of his parents being at the time of his birth in a foreign land, is born a citizen of two countries—a citizen of the country of his birth jure soli, and a citizen of his parents' country jure sanguinis. It is true that in such a case a double claim of allegiance potentially may not arise. For instance, the country of birth may not claim the allegiance of children born on its soil to alien parents; or the country to which the parents belong may not claim the allegiance of the foreign-born children of its citizens; or the laws of the two countries, while recognizing both sources of allegiance, may coincide in giving a preference, at least during the infancy of the child, to the one or the other source. But, if the conditions be otherwise, and the double claim actually exists, it is conceded to have a valid foundation. A conflict, however, is obviated by the rule—which is, indeed, but the practical formulation of the doctrine itself—that the liability of the child to the performance of the duties of allegiance is determined by the laws of that one of the two countries in which he actually is."

When Alexander became 21 years of age, he lived in Germany, and therefore, if Moore is right, his allegiance to Germany, because of his German birth, would be determined by the German law. It is entirely plain that the German authorities did not regard him as a German citizen, but, if anything, as a man without nationality. It is by no means clear that a person must affirmatively select his allegiance when he be-

comes of age. In questions which might arise as to property, the inquiry would doubtless be as to the conduct of a person after he became of age, and that inquiry might cover a considerable period. So, in the case at bar, where the question might arise as to which country could claim him as a subject, unless Alexander did something which indicated allegiance to Germany, between October 23, 1914, and November 8, 1915, when he swore to his application for a passport, and took the oath of allegiance to the United States, he neither lost his American citizenship nor elected German citizenship. During that period there is only one act which Alexander might have done which would have amounted to a renunciation of American citizenship and allegiance to the Imperial German government, and that was, if an oath of allegiance, contrary to his testimony, was required of him in connection with his service in the volunteer motor corps. On the contrary, every act of relator indicated his desire to avoid German military service. He must have so stated to the embassy, in view of the notation on the application for the passport:

"He and his brother have recently been notified by the German military authorities to report for service."

His coming to this country and his constant insistence that his father was a native-born American (whether in this regard he was truthful or not), his failure to claim exemption, although asking for deferred classification, and, in brief, all of his conduct, indicates the very contrary of election of German allegiance.

It is argued that his effort to escape from German military service and his claim for deferred classification, which would have resulted, in effect, in his escaping American military service, are indications of an attitude and disposition far from commendable; but we are not concerned in this case with the moral quality of relator's acts, but with his rights. The reference in Mr. Gilroy's letter that Alexander came to the United States in December, 1915, for a temporary purpose and was unable to return, is probably a correct statement of fact, but, nevertheless, not inconsistent with his American citizenship. The German authorities, to repeat, although not regarding him as a citizen or subject, had nevertheless notified him to report for military service, doubtless upon the theory that he was without nationality. To avoid this situation he left Germany and came to the United States at a time when there was no war between the United States and Germany, and with the intention, no doubt, of returning to Germany, where by appropriate action and conduct he had the right to retain his American citizenship. If it be assumed that his testimony as to registration at 18 years of age at the consulate must be disregarded, nevertheless, failure so to do did not result in loss of citizenship.

The executive order issued by the President of the United States on April 6, 1907, amending paragraph 138 of the Instructions to the Diplomatic Officers of the United States and the Regulations Prescribed for the Use of the Consular Service of the United States, reads as follows:

"*Children of Citizens Born Abroad.*—All children born out of the limits and jurisdiction of the United States, whose fathers were at the time of their

birth citizens thereof, are citizens of the United States; but the rights of citizenship do not descend to children whose fathers never resided in the United States. All children who are, in accordance with this paragraph, born citizens of the United States and who continue to reside outside of the United States are required, in order to receive the protection of this government, upon reaching the age of 18 years to record at an American consulate their intention to become residents and remain citizens, and upon reaching their majority are further required to take the oath of allegiance to the United States. (R. S. § 1993; Act March 2, 1907, § 6.)"

The sole purpose of the requirements as to registration and the oath of allegiance, supra, is to enable a person to receive the protection of the United States government. In other words, if Alexander had been impressed into the German military service, he could not have expected the protection of this government; but the foregoing provision does not deprive an American citizen of his citizenship because of failure to comply therewith. It follows that, on the facts and the law, Alexander did not become a German citizen or subject.

(b) Certain essential facts are before the court which were not before the local and district boards. Before these boards the claim was, in effect, that Alexander's father was a native-born American, and also that, when he arrived at his majority, "he made a declaration before the United States ambassador in Berlin of his intention to retain his legal right to American citizenship." These boards, therefore, did not in any manner decide the citizenship of Alexander from the standpoint of his status as the son of a naturalized American of German birth, who might or might not have lost his citizenship by the time Alexander was born; and, further, it may fairly be assumed that these boards considered that Alexander, when he became 21, had taken the necessary formal steps to retain his American citizenship. What, however, was decided upon a state of facts identical with those presented to this court was that Alexander's service in the volunteer motor corps and within the German lines had not resulted in his loss of American citizenship. Under the Selective Service Law and the rules and regulations duly made thereunder, a German or other alien enemy subject could not be classified in class 1–A and inducted into the American army. Sections 70 and 79 are as follows:

"Section 70.—*Reasons for and Effect of Classification.* * * *—The effect of classification in class V is to grant exemption or discharge from draft."

"Section 79.—Class V.—*Miscellaneous.* * * *

"Rule XII.—In class V shall be placed any registrant found to be * * *

"(2) an alien enemy. * * *

"Note 4.—No alien enemy residing in the United States, whether he has taken out his first papers or not, will be accepted for service. When, in the opinion of the local board, any person to be classified is an alien enemy, whether he has or has not declared his intention to become a citizen of the United States, or whether he, or some other person in respect of him, has or has not indicated a claim of exemption, he shall be placed in class V."

No matter what the conduct of an American citizen might have been, and no matter in what expressions he had indulged, he was, nevertheless, subject to military service under the Selective Service Law. On the other hand, it was obvious, and so provided, that an alien enemy was exempt from service.

With all the facts, therefore, before the local and district boards, those responsible bodies decided, in effect, upon the assumption of Alexander's citizenship, that there was nothing which he had done to forfeit that citizenship. We therefore have the unusual situation of a man being inducted into the army because he is a citizen of the United States, serving therein so as to gain an honorable discharge, and then being arrested and detained because he is an alien enemy, and one of the grounds for detention being that he had so acted in his relation to a foreign enemy government as to lose his American citizenship, and that ground having been definitely rejected by the executive authorities charged by statute, inter alia, with the duty of determining this very point.

Whether the determination of the local and district boards is in the first place an adjudication, and, secondly, a binding adjudication, is a novel question. Under section 4067, the executive is empowered to apprehend and detain alien enemies. Under the Selective Service Law, the executive, in raising an army from civil life, is empowered to appoint boards, who must determine, among other things, whether a person is or is not an alien enemy.

In so far as concerns the relation of the United States to an individual as to citizenship status for war purposes, I am of opinion that the decision of the local board, affirmed by the district board, is an adjudication. In so far as the same facts are before the local board as are before the court on a review of the action of the executive authorities under section 4067, I am of opinion that the adjudication is binding. Of course, there are no parties, but the determination is the same in both cases, and, although by different agencies of the executive, it is upon the same question; i. e., whether a person has shown that he is not an alien enemy subject or citizen.

It is concluded, therefore, that the question of fact as to whether Alexander swore allegiance to the German government was decided in the negative by the local board and is now conclusive. Any other conclusion would mean that the executive power with one hand could subject a man to military service with the attendant possibilities of death or injury, and with the other hand could detain and imprison him on the ground, as to status, which it rejected in requiring him to serve in its armed forces—a result which would be reached by the court only with great reluctance.

4. *Native and Denizen.*—It is further contended that Alexander was a native of Germany, within the language of section 4067, because he was born there. Such cannot be the meaning of "native," nor do I read any such definition in Minotto v. Bradley, 252 Fed. 600. In that case the court gives several illustrations of the word.

Another instance is where a man leaves the country of his birth, and by reason of absence loses his citizenship under some statute, but does not acquire citizenship in the new country. Such a person is a native of the country of birth, although no longer a citizen or subject.

A perfect illustration would be the case of a North German, who, if living here and absent from North Germany for 10 years, might, under the law of June 1, 1870, of the North German Federation, lose his

German citizenship, and, nevertheless, not have become an American citizen. Such a person would be a native of Germany, but not a citizen or subject. In re Stallforth, supra.

A child, however, protected by section 1993 of the Revised Statutes, is in no sense a native of the foreign land in which he is born for the purposes of section 4067.

As to denizen, an apt definition is found in the Century Dictionary, as follows:

"A stranger admitted to residence and certain rights in a foreign country; in English law an alien admitted to citizenship by the sovereign's letters patent, but ineligible to any public office. The word has a similar meaning in South Carolina. * * * 'Hereupon all Frenchmen, in England, not denizens, were taken prisoners and all their goods seized for the king.' Baker, Chronicles, p. 306."

13 Cyc. 784, defines denizen as "a person in a middle state between an alien and natural born," and cites, among others, Fries' Case, 9 Fed. Cas. 825, No. 5,126, 3 Dall. 515, and Levy v. McCartee, 6 Pet. 102, 8 L. Ed. 334. It is quite evident that there is no proof that Alexander was a denizen of Germany, if such there can be.

Some other points of discussion must be passed by in this opinion, already too long; for, on the facts and the law, I hold the view that Alexander is a citizen and subject of the United States, and, in any event, that he is not a native, citizen, denizen, or subject of Germany.

Writ sustained, and relator will be discharged.

On Motion for Reargument.

The respondent has moved for a reargument in order to present "for the consideration of the court certain facts in evidence in relation to the residence of Otto Alexander, father of the relator, Walter Alexander, in Berlin, Germany, prior to the birth of Walter Alexander, which may not have particularly come to the notice of the court."

Otto Alexander's application for insurance was before the court and no facts are now presented which were not heretofore in the record. It is true that special attention was not called to certain of the provisions of Otto Alexander's application dated November 1, 1892, to the Equitable Life Assurance Society. If I held the view that the application in question would change the result, even if construed with the translation suggested by respondent, I would, of course, hear a reargument; but there is nothing in the application which leads to a different conclusion than that heretofore announced.

The application was made in Germany on a printed form of the Equitable in the German language. In answer to the printed question, "Wohnort Stadt?" Alexander answered, "Berlin. Blumenhof 2." In the medical examination, dated November 2, 1892, there were questions on the printed form in German, and the answers of Alexander were in German. The translation of the questions and answers, as suggested by respondent, is as follows:

"I–D: Q. "Do you contemplate a change of business or occupation, and, if so, is the business of the same character?" A. "No."

"I–E: Q. "Do you contemplate a change of residence; if so, to where and for what reason (that is to say, on account of business, health, or pleasure)?" A. "No."

"I–F: Q. "How long have you lived at your present residence?" A. "Five years."

"I–G: Q. "Where have you elsewhere lived and when? (Give the place of residence and time of duration in each according to years.)" A. "Eleven years in Breslau, ten years in San Francisco, seven years in New York."

The words translated, supra, as "residence" are: In I–E, "Wohnsitzes"; in I–F, "Wohnorte"; in I–G, "Wohnort."

In Adler's German-English Dictionary, published by Appleton & Co. in 1884 (a work practically contemporaneous for translation purposes), occur the following definitions:

"Wohnort. Dwelling place, abiding place, habitation."

"Wohnsitz. Domicile, abode, residence; 'seinen wohnsitzen aufschlagen,' to settle at a place."

In this connection, the verb "wohnen" is defined as "to live, dwell, abide, reside, lodge." Examples given are: "Auf dem Lande wohnen," to live in the country. "In der Stadt wohnen," to reside in town. The noun "wohnen" is defined as "living, dwelling, lodging."

Apparently, therefore, the words used in the Equitable forms were as elastic as the English word "residence" when used by laymen; i. e., the place where a person physically lives for the time being, or the permanent abode or domicile, depending on context and circumstances.

When a person is applying for insurance, he is thinking in terms of insurance. He cannot change the printed form. He is justified in assuming, as in this case, that he is asked where he physically lived or lives, and whether he intends to make any change in his physical residence. Americans representing our business interests abroad at this very moment, who have no intention of giving up their American citizenship, would necessarily answer precisely the same way, in the same circumstances. Such persons would not think of complicated legal questions bearing on domicile and affecting their status as American citizens.

There is nothing in this insurance application which changes the essential facts as fully set forth in the record and the opinion herein, nor the law as then understood, construed and applied by the Department of State.

It is suggested that the reference in the opinion to visits to the United States, "including probably various times between 1889 and 1912," should be from about 1899, instead of 1889; but this is a point of no importance, because the status of Alexander, Sr., did not turn on the date of his subsequent visits to this country, but, to some extent, on what he did in that connection, as fully considered and stated in the opinion of the court.

Motion denied.

THE SOERSTAD.

(District Court, S. D. New York. March 28, 1919.)

SHIPPING ⟸208—SINKING TOW—LIMITING TUG OWNER'S LIABILITY.

A tug owner, who has agreed to tow a vessel, may under Act June 26, 1884, § 18 (Comp. St. § 8028), limit his liability to the tug's value, when, in performance of that contract, the tug through her master's negligence collides with and sinks the tow; the breach being without the owner's knowledge or privity.

In Admiralty. Libel of the Skibsakties Soerstad, owner of the bark Soerstad, against the Moran Towing & Transportation Company. Decree for libelant, with right of limitation of liability.

Charles S. Haight, of New York City, for libelant.
Samuel Park, of New York City, for respondent.

LEARNED HAND, District Judge. The bald question raised by this case is whether a tug owner, who has agreed to tow a vessel, may limit his responsibility under section 18 of the Act of June 26, 1884, c. 121 (Comp. St. § 8028), when in performance of that contract the tug negligently collides with and sinks the tow. The libelant's position depends upon what it supposes to be the effect of Pendleton v. Benner Line, 246 U. S. 353, 38 Sup. Ct. 330, 62 L. Ed. 770, and Luckenbach v. McCahan Sugar Co., 248 U. S. 139, 39 Sup. Ct. 53, 63 L. Ed. ——. In each of these cases the owner was held liable without limitation for breach of a covenant of seaworthiness in a charter which he personally signed. Hence it is reasoned the breach of any stipulation in a contract made by the owner personally must result in unlimited liability, whether or not the act which causes the damage be done with the privity of the owner.

A warranty is a promise that a proposition of fact is true. Theoretically it is extremely difficult to interpret it otherwise than as a promise to make whole the warrantee, if the warranty turns out to be false, since a promise is normally a stipulation for some future conduct by the promisor. If it is so regarded, then clearly the breach of warranty is with the warrantor's privity, for by hypothesis he has deliberately refused to make whole the warrantee. However, it must be conceded that the law regards the breach as arising at once if the warranty be false, and the warrantee's loss as damages, not as a condition for the warrantor's performance. So viewed, the warrantor has misled the warrantee by falsely assuring him of the truth through the warranty, and the wrong consists of the assurance, the warrantee's reliance upon it, and his loss; just as in cases of deceit, except that no scienter is necessary. And so the action on warranty was originally "a pure action of tort" (Ames, History of Assumpsit, 2 Harv. L. R. 1, 8), and arose a century before action on the case for assumpsit. The action sounded indeed in deceit (Y. B. 11 Ed. IV, 6, plac. 11), and it was not till 1778, in Stuart v. Wilkins, 3 Doug. 118, that assumpsit appears to have been used on a seller's warranty.

Regarded in this way, which is probably the correct way historically, it follows inevitably that a breach of warranty should be held to be with the warrantor's privity, because all the elements of the cause of action are "done, occasioned, or incurred" by him personally; that is to say, he personally gives the false assurance, he intends the warrantee to rely upon it, and the loss arises from the mistaken reliance, as he knows it will. Thus he personally occasions the loss. It is impossible to see how the Supreme Court could have held that knowledge of the falsity of the warranty was an element in the cause of action to which the warrantor must be privy. To have done so would have been in effect to treat the action as limited to one in fraud, not an action in warranty at all. The decisions, therefore, give no color to the libelant's position.

Where, however, the promise, as a promise to tow a boat, involves the future conduct of the promisor, the loss is "done, occasioned, or incurred," not by the promise and the promisee's reliance upon it, but by the failure to perform the act stipulated; and if that failure results without the knowledge or privity of the promisor, he is entitled to the immunity of the statute. It will so result when he delegates that performance, provided he selects such delegates as the contract permits, and the miscarriage results from their failure. Now the contract here obviously permitted the respondent to select for the towage any master whom he had good reason to suppose capable, and the breach occurred because that master did not do what the respondent promised to do. This breach was not "done, occasioned, or incurred" with the respondent's privity, and its liability is limited.

Perhaps all this analysis is unnecessary, for the opinion in Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110, presupposes throughout that the act of 1884 includes contracts, and the logical consequence of the libelant's position is that no promisor can limit his liability. I have thought it, nevertheless, better to show just where the distinction lay, for the Supreme Court in Pendleton v. Benner Line, supra, certainly had no such far-reaching purpose as the libelant supposes, and there is not the faintest reason in principle to confuse that case, which follows necessarily upon an analysis of warranty, with the case at bar, which does not.

Decree for libelant, with right of limitation allowed to respondent, the Moran Towing & Transportation Company, to the extent of respondent's interest in the tugboat Joseph H. Moran on January 12, 1918.

THE CHARLES MULFORD.

(District Court, S. D. New York. January 21, 1916.)

NAVIGABLE WATERS ⇐20(8)—BRIDGES—NEGLIGENT OPERATION OF DRAW.

The operators of a drawbridge *held* negligent for failure to hear or answer the signals of a tug with a tow of 25 barges, approaching the bridge on the flood tide, and the tug *held* not negligent in attempting to turn her tow, there being no time to affix hawsers to hold it back, so that the owners of the bridge are liable for injuries to a barge, with which one of the barges of the tow collided while the turn was being made.

In Admiralty. Libel by Owen McCaffrey's Sons, as owners of the barge Charles Mulford, against the Staten Island Rapid Transit Railway Company, in which the Lehigh Valley Railroad Company was impleaded as respondent. Decree for libelant against the Staten Island Rapid Transit Railway Company, and petition against the Lehigh Valley Railroad Company dismissed.

Park & Mattison, of New York City, for libelant.

Cravath & Henderson, of New York City, for Staten Island R. T. Ry. Co.

Harrington, Bigham & Englar, of New York City, for Lehigh Valley R. Co.

AUGUSTUS N. HAND, District Judge. The pilot and engineer of the steam tug Ganoga, the deckhand on the Ganoga, and the deckhand and engineer of the Genesee, as well as the watchman, Donovan, who was employed by the Pennsylvania & Delaware Oil Company, substantially agreed that the tug Ganoga, with her tow of 25 barges, approached the drawbridge of the Staten Island Rapid Transit Company and blew numerous blasts for the drawbridge to open, and that it was not opened for a very long time. As the Ganoga was proceeding towards the bridge with a flood tide, and the bridge blew no answering whistle, and there was no sign that the bridge would open, the pilot of the Ganoga attempted to turn the tow around and go back against the flood tide. The channel of the Staten Island Kill at the point where the tug attempted to turn was not wider than the length of the tug and tow. Only by a turn in a circle with the shortest possible radius could the maneuver be made with such a long tow against a flood tide. If the tug had not attempted to make this turn, however, she would have been swept along by the tide under the drawbridge, her smokestack carried away, and some of her crew in all probability killed or injured. In making the turn, the starboard hawser barge collided with the barge Charles Mulford (belonging to the libelant) on the New Jersey shore and was damaged.

The engineer in charge of the drawbridge testified that he heard four whistles from the Ganoga and blew two whistles in response. These two whistles he insisted meant to stay back until the bridge was opened, and he said he proceeded to open it promptly. He was corroborated by a watchman on the end of the drawbridge, whose duty it was to remove the fastenings on that end of the draw in order that the drawbridge might be rotated by the engine. This watchman was a very ignorant man and unsatisfactory witness. The conductors of two trains were also produced on behalf of the Staten Island Rapid Transit Railway Company to corroborate the engineer of the drawbridge. They swore that their trains were held in the early morning of March 6th, when the accident occurred, to enable the tow to pass through the drawbridge. They did not see the accident, however, and I am of the opinion that it had occurred before these trains arrived. The tow passed through the drawbridge, but after the accident had happened.

I find that the Ganoga received no answering signal from the drawbridge. I further find that it did not open promptly, and that the predicament in which the tug and tow found themselves was due to the negligence of the persons in charge of the bridge in failing to hear or reply to signals. Under these circumstances the Ganoga was justified in attempting to turn her tow, and she cannot be said to have turned it in a negligent manner, in view of the narrowness of the channel. I do not think the Genesee could have held back the tow in any way, except by a hawser attached to the outer and inner rear barges, which there was apparently no opportunity to affix. I do not think, therefore, there was negligence in failing to do this.

Judge Veeder, in the case of Dillon v. Pennsylvania R. R. Co. No. 32 and Staten Island Rapid Transit Co., held in an unreported oral opinion that this very bridge was at fault under similar circumstances for failing to answer signals. The case of Clement v. Metropolitan West Side El. Ry. Co., 123 Fed. 271, 59 C. C. A. 289, decided by the Circuit Court of Appeals for the Seventh Circuit, is also in point.

A decree is granted for the libelant, with costs, against the Staten Island Rapid Transit Railway Company, and the petition against the Lehigh Valley Railroad Company is dismissed.

BRYCE et al. v. KEITH, Collector of Internal Revenue.

(District Court, E. D. New York. March 26, 1919.)

INTERNAL REVENUE ⟸7—INCOME TAX—DEDUCTIONS—"LOSS INCURRED IN TRADE."

Loss of the value of corporate stock, acquired by numerous transfers of property to the corporation and payment of corporate debts, transactions carried on for a considerable period, complicated in character and involving large sums of money, so that they must have required much time and attention, is a loss incurred in trade, which can be deducted from the gross income under Income Tax Act, § 2, par. "b."

In Equity. Suit by Peter Cooper Bryce and another, as executors of the will of Edith C. Bryce, deceased, against Henry P. Keith, Collector of Internal Revenue for the First District of New York. On plaintiff's motion for judgment on demurrer to complaint interposed by defendant. Demurrer overruled, with leave to answer.

Parsons, Closson & McIlvaine, of New York City, for plaintiffs.
Melville J. France, U. S. Atty., of Brooklyn, N. Y., for defendant.

GARVIN, District Judge. Plaintiffs move for judgment upon the demurrer to the complaint interposed by the defendant. The complaint sets forth the following facts: That plaintiffs are the surviving executors of Edith C. Bryce, deceased, who died April 29, 1916. That on various dates between October 6, 1908, and February 4, 1910, inclusive, she had traded certain glue and gelatine, glue and gelatine stock, and machinery worth $225,000 for 2,250 shares, of the par value of $100 each, of the capital stock of Peter Cooper's Glue Factory, a

corporation, and had sold to said corporation other similar materials worth and at an agreed value of $471,594.72. That she had eventually accepted in payment of the agreed purchase price therefor, and of other indebtedness of the corporation to her for rent, interest, and insurance premiums, amounting to $28,405.28, 5,000 other shares of said stock, making 7,250 shares thereof altogether, which 7,250 shares were all so acquired by her on and prior to February 4, 1910, at a total cost to her of $725,000 as aforesaid. That on or about June 10, 1914, all of the assets of said Peter Cooper's Glue Factory were sold for a sum insufficient to pay its debts, and said stock thereupon became entirely worthless, and the said sum of $725,000 was thereupon and during the year 1914 actually charged off as a loss on the books of said Edith C. Bryce. That prior to March 1, 1915, and on or about February 27, 1915, under and pursuant to the provisions of the statute known as the "Federal Income Tax Law," to wit, section 2 of the Act of Congress, approved October 3, 1913, c. 16, 38 Stat. 114, entitled "An act to reduce tariff duties and to provide revenue for the government and for other purposes," she duly made to and filed with the defendant as collector of internal revenue of the United States of America for the First district of New York a return of her gross income during the year 1914 and of certain items claimed by her to be properly deductible therefrom in order to determine her net income for that year subject to the tax imposed by said statute. The said return stated her gross income to be, as in fact it was, $428,071.67, and claimed as an item properly deductible, the said sum of $725,000, as a loss actually sustained by her during 1914, incurred in trade and not compensated for by insurance or otherwise. That thereafter the Commissioner of Internal Revenue assessed a tax against her in the sum of $12,336.44, which amount was fixed without allowing any deduction whatever for the said sum of $725,000. That the plaintiffs paid this tax involuntarily, under protest, under duress, under threat of distraint against their property, and after the defendant, as collector as aforesaid, had demanded the same.

From the complaint it cannot be determined what proportion of the loss sustained by the decedent occurred between March 1, 1913, and June 10, 1914 (that being a matter of proof), and as the only question raised by the demurrer is whether the plaintiffs are entitled to any relief whatever, it is proper to consider at once whether any part of such a loss as the decedent sustained may be deducted.

The return was made for the year 1914 under the act of Congress approved October 3, 1913, paragraph "b" of section 2 of which provides:

"That in computing net income for the purpose of the normal tax there shall be allowed as deductions: * * *

"Fourth, losses actually sustained during the year, incurred in trade or arising from fire, storms, or shipwreck, and not compensated for by insurance or otherwise."

The defendant claims that no part of the stock loss was a loss "incurred in trade," within the meaning of the act.

The transactions by which the decedent became the owner of the

stock were carried on over a considerable period, were complicated in character, involved a very large sum of money, and must have required much of her time and attention, and I am of the opinion that they were of the character contemplated by Congress as "incurred in trade."

The wording of Treasury Decisions, T. D. 1989, dated June 2, 1914, bears out this view:

"Losses actually sustained during the year incurred in trade are limited by the language of the act itself. In trade is synonymous with business; business has been defined as that which occupies and engages the time, attention and labor of any one for the purposes of livelihood, profit, or improvement; that which is his personal concern or interest; employment, regular occupation, but it is not necessary that it should be his sole occupation or employment. The doing of a single act incidental or of necessity not pertaining to the particular business of the person doing the same will not be considered engaging in or carrying on the business. It is therefore held that no losses are deductible in a return of income save and only those losses permitted and provided for by the statute, viz. those actually sustained during the year, which are incurred in trade."

In overruling the demurrer, the question of the amount of, or method of arriving at, the proper deduction, is not decided.

Demurrer overruled, with leave to answer in 20 days from the service of the order to be entered herein.

In re FRANKLIN BREWING CO.

(District Court, E. D. New York. March 26, 1919.)

1. BANKRUPTCY ⟸293(4)—JURISDICTION OF COURT—ESTOPPEL.
Parties denying a bankruptcy court's jurisdiction over them and answering to the merits at the same time are estopped from raising the jurisdictional question.

2. BANKRUPTCY ⟸288(1)—MOTION—WHEN PROPER.
A motion is not the proper procedure for a bankruptcy trustee to recover mortgage interest payments made by the bankrupt before the mortgage was set aside, where various defenses are made to the recovery.

In Bankruptcy. In the matter of Franklin Brewing Company, bankrupt. On motion by the trustees in bankruptcy for an order directing the payment of certain moneys to the trustees. Motion denied without prejudice.

See, also, 254 Fed. 910.

Samuel Evans Maires, of Brooklyn, N. Y., for trustees.

Conrad S. Keyes, of New York City, for respondent People's Trust Co.

Cullen & Dykman, of Brooklyn, N. Y. (Edward J. Byrne, of Brooklyn, N. Y.), for respondent Engel.

Henry F. Cochrane, of Brooklyn, N. Y., for other respondents.

GARVIN, District Judge. This is a motion by Louis Karasik, Christopher L. Meyerdirks, and Thomas W. Maires, as trustees in bankruptcy, for an order directing John, Henry, and Charles Doscher, Gesine Engel, Mathilda C. Behre, and Caroline Candidus, all of whom are children of Claus Doscher, deceased, and hereinafter for conven-

ience described as the Doschers, to each pay over to said trustees the sum of $3,000, making $18,000 altogether, and for a further order directing the People's Trust Company to pay over to said trustees so much of the said sum of $18,000 as the said Doschers shall fail to pay over to the said trustees.

The Franklin Brewing Company, bankrupt herein, on August 10, 1915, made an instrument in writing, purporting to be a trust mortgage, for $450,000, designating the People's Trust Company as trustee, securing a bond issue of $450,000, consisting of 450 coupon bonds, of $1,000 each. The holders of these bonds were the said Doschers who held 75 each. On January 23, 1917, an involuntary petition in bankruptcy was filed against the Franklin Brewing Company, it was adjudicated a bankrupt by this court March 5, 1917, and thereafter the trustees were duly elected and appointed. Subsequently the trustees brought an action against the said People's Trust Company, individually and as trustee under said mortgage, to set aside and cancel the mortgage on the ground that the same was illegal, invalid, and void as against the trustees in bankruptcy of the Franklin Brewing Company, bankrupt, and the creditors of the said bankrupt, represented by the said trustees. As a result of said action the court set aside the mortgage. Thereafter the trustees made a motion in this court for an order directing the said Doschers to surrender and deliver for cancellation to said trustees the said 450 bonds. The motion was granted, and the bonds surrendered accordingly.

On August 8, 1916, the Franklin Brewing Company delivered to the People's Trust Company $18,000 in cash as and for interest from August 10, 1915, to August 10, 1916, upon the said 450 bonds, which sum the People's Trust Company paid over in amounts of $3,000 each to the said Doschers.

The trustees claim that the payment of this $18,000 to the People's Trust Company and the distribution of that sum by the latter in the manner described were illegal, because the mortgage has been set aside and the bonds canceled, and they have therefore made this application.

[1] The Doschers and the People's Trust Company challenge the jurisdiction of the court to compel them by summary order to turn over this money; but, inasmuch as they have at the same time answered to the merits, they are estopped from questioning the court's jurisdiction over them. In re Kornit Mfg. Co. (D. C.) 192 Fed. 392. This makes it unnecessary to pass upon various other questions involving jurisdiction raised by the parties.

[2] It is the contention of the Doschers, however, that the trustees should have included the present demand in their action to set aside the mortgage, and they allege that they, the Doschers, have a counterclaim, and that the trustees have another proceeding pending in which they seek to have allowed the same payment here attempted to be recovered, and the People's Trust Company alleges that it acted in good faith as a mere banker, and without notice of any fraud, when it received and paid out the money. Claims of this character should not be disposed of on a motion.

The motion is therefore denied, without prejudice to a plenary action or actions by the trustees.

In re BASS et al.

In re TRIANGLE CLOAK & SUIT CO.

(District Court, E. D. Pennsylvania. April 10, 1919.)

No. 5267.

1. BANKRUPTCY ⟸136(2)—SHORTAGE OF ASSETS—BURDEN TO EXPLAIN.
Where the books of a bankrupt firm showed a credit balance of over $29,000, the burden of proof shifted to the bankrupts to present some evidence beyond the vague statements of one of the firm as to how such an amount dwindled to the $50 worth of merchandise which came into the hands of the receiver.

2. BANKRUPTCY ⟸228—FINDINGS OF REFEREE—REVIEW.
Where the referee has considered carefully the evidence on the issue of whether the bankrupts are concealing assets, his findings should not be disturbed, in the absence of a demonstration that a plain mistake has been made.

3. BANKRUPTCY ⟸136(2)—CONCEALMENT OF ASSETS—SUFFICIENCY OF EVIDENCE.
Evidence *held* to sustain the findings of a referee in bankruptcy that the bankrupts were fraudulently concealing and withholding some $17,000 of assets; he having allowed a reduction of $12.000 from the value of goods on hand, as shown by the firm's books at a prior date.

In Bankruptcy. In the matter of Isaac B. Bass, Herman M. Bass, and Louis Abramowitz, individually and trading as the Triangle Cloak & Suit Company, bankrupts. On certificate of review. Petition for review dismissed, and order of referee affirmed.

Harry S. Mesirov, of Philadelphia, Pa., for trustee.
William M. Lewis, of Philadelphia, Pa., for bankrupts.

THOMPSON, District Judge. A petition in bankruptcy was filed against the present petitioners on October 17, 1914, and on November 25, 1914, they were adjudged bankrupts.

The record shows that the merchandise which came into the hands of the receiver did not exceed in value $50. The receiver was elected trustee, and, as a result of an examination of the books of the bankrupts, presented a petition to the referee for an order upon the bankrupts to turn over to him the sum of $32,107.87, alleging that they were fraudulently concealing and withholding the same from him. The referee examined Herman Bass, one of the partners, and an accountant who had made an examination of the firm's books. From the evidence derived from the books, the accountant found that, on January 1, 1914, only nine months before the petition was filed, the firm had on hand merchandise valued at $20,267.37. Adding to that the cost, as shown by the books, of merchandise purchased from January 1 until October 1, 1914, and the amounts expended for labor upon the goods purchased in making it up into salable merchandise, and giving credit for the sales, less goods returned, and less 10 per cent. for overhead expenses, 10 per cent. for discounts and commissions, and 10 per cent. for profits, the accountant showed there was unaccounted for upon the firm's own books a balance of $29,442.79.

The accountant, in making the 30 per cent. charge for the items above referred to, based his calculations upon experience in the cloak and suit trade for 20 years, as well as his experience as an accountant. The bankrupts attacked the item of $20,267.37; Herman Bass testifying that in his opinion the value of merchandise on hand on January 1, 1914, did not exceed $8,000. The referee accepted this testimony on behalf of the bankrupts as an admission upon their part that they had merchandise of the value of $8,000 on hand at that date, and found, making a liberal allowance in their favor, that at the time of the filing of the petition in bankruptcy they had in their possession or under their control the sum of $17,000 belonging to the estate in bankruptcy. No explanation of the disposition of the money since the filing of the petition having been made, he found that it was still in their possession or under their control, and entered an order that it be paid over to the trustee.

[1-3] I fail to discover any error in the findings of fact of the learned referee. He resolved the doubt in favor of the bankrupts in allowing a reduction of over $12,000 in the value of the merchandise which their books showed was on hand on January 1, 1914. He allowed every other item actually proved in favor of the bankrupts. Surely the books upon which a merchant relies in the case of original entries to prove his account against his debtor, and which show upon their face that they are kept in a regular way, present the strongest kind of evidence against the party for whose benefit the accounts are kept. The burden of proof was shifted to the bankrupts to present some evidence beyond the vague statements of one of the firm to explain how an apparent balance on their books of over $29,000 dwindled to the paltry $50 worth of merchandise which came into the hands of the receiver. If there was any error in the case, it was in favor of the bankrupts in accepting as credible their contention that the books were in error in showing the value of merchandise on hand on January 1, 1914. The referee has considered the evidence carefully, and his findings ought not to be disturbed, in the absence of a demonstration that a plain mistake has been made. Epstein v. Steinfeld, 32 Am. Bankr. Rep. 6, 210 Fed. 236, 127 C. C. A. 54.

The petition for review is dismissed, and the order of the referee affirmed.

SOUTHERN COTTON OIL CO. v. ATLANTIC COAST LINE R. CO.

WADE v. SEABOARD AIR LINE RY. CO.

(District Court, S. D. Georgia, E. D. May 2, 1919.)

Nos. 1116, 1108.

RAILROADS ⊂=5½, New, vol. 6A Key-No. Series—SERVICE OF PROCESS—CONTROL BY GOVERNMENT.

Under the presidential proclamation assuming control of the railroads and the general orders of the Director General, the employés of the railway companies who continued in the service became the employés of the gov-

ernment, and service cannot be made on them as agents of the corporation in actions for injuries caused while the railroads were privately operated.

At Law. Separate actions by the Southern Cotton Oil Company against the Atlantic Coast Line Railroad Company, and by W. H. Wade, as administrator of James Henry Petit, against the Seaboard Air Line Railway Company. On traverse of the entry of service. Entries of service set aside.

Geo. W. Owens, of Savannah, Ga., for plaintiff Southern Cotton Oil Co.

Oliver & Oliver, of Savannah, Ga., for plaintiff Wade.

Osborne, Lawrence & Abrahams, of Savannah, Ga., for defendant Atlantic Coast Line R. Co.

Anderson, Cann, Cann & Walsh, of Savannah, Ga., for defendant Seaboard Air Line Ry. Co.

BEVERLY D. EVANS, District Judge. These cases were heard on the same day, and, as the point for present decision is identical, they will be considered together. That point arises on a traverse of the entry of service, wherein service on the defendant corporation is stated as having been made by serving a designated individual as an agent of the defendant corporation. I find as a conclusion of fact, based on an agreement in the first case and upon a consideration of the evidence submitted in the other, that the cause of action in each case originated prior to the Act for Federal Control of Railroads (Act March 21, 1918, c. 25, 40 Stat. 451 [Comp. St. 1918, §§ 3115¾a to 3115¾p]), and each suit was brought after the passage of that act and the taking over of the railroads thereunder by presidential proclamation, and service was had on an agent in the employment of the government of the United States at the time of the service. The legal question presented is whether service on the agent of the government, engaged in the operation of the railroad of the carrier, under the facts stated above, constitutes service on the defendants, because of their former employment by them.

Under the presidential proclamation of December 26, 1917, the possession, control, and operation of the railroads shall be exercised by and through William G. McAdoo as Director General. When the Director General assumed control, the acts of the former officers and employés, who retained their positions and conducted the details of operation of the railroads, were the acts of the Director General. Rutherford v. Union Pac. R. Co. (D. C.) 254 Fed. 880. Their employment by the Director General made them exclusively the servants or agents of the employer. There could be no divided allegiance as agents of the railroad corporation and of the Director General, so as to accomplish the purpose of Congress. The acts of Congress, the proclamation of the President, and the general orders of the Director General neither expressly nor by implication contemplated a dual agency of employés engaged in the operation of the railroads. All moneys derived from the operation of carriers during federal control was declared to be the property of the United States. Act March 21,

1918, c. 25, 40 Stat. 457, § 12 (Comp. St. 1918, § 3115¾*l*). In suits arising on causes of action occurring since December 31, 1917, and growing out of the possession, control, and operation of any railroad by the Director General, service of process is made "upon operating officials operating for the Director General of Railroads." General Orders No. 50 and 50–A. These orders in effect designate the officials of a railroad company engaged in the operation of the railroad as the agents of the government.

It has been held by the Supreme Court of Georgia that an agent employed in the operation of a railroad under a receiver, who has possession of the road, in consequence of a seizure by the Governor for nonpayment of interest on bonds which the state had indorsed, is not the agent of the corporation. Cherry v. North & South Railroad Co., 59 Ga. 446; Steamship Co. v. Wilder, 107 Ga. 226, 33 S. E. 179.

The agents sought to be served in these cases had ceased to act for the corporation in the operation of the railroad. The corporation was out of control of the railroad, was out of possession, and had nothing for a superintendent or station agent to do. The former agents had ceased to be agents of the corporation pending federal control, and had become agents of the government. Hence service on the government's agents was not service on the corporation's agents, and the corporation has not been served under the Georgia statute, which permits service on a corporation by serving its agent.

An appropriate order will be taken in each case

In re THOMPSON.

(District Court, W. D. Washington, S. D. September, 1918.)

BANKRUPTCY ⟸320—CLAIMS PROVABLE—CONTINGENT CLAIM—SUBSCRIPTION FOR CORPORATE STOCK.

Where a corporation had made an assignment for benefit of creditors before the petition in bankruptcy was filed against a stockholder, the latter's liability for the difference between the amount of his stock subscription and the value of property transferred in payment thereof had ceased to be contingent, though not yet liquidated, since the corporate debts for which a subscription would be a trust fund were then capable of determination, and the receiver of the corporation can prove a claim for such liability against the bankrupt's estate.

In Bankruptcy. In the matter of the bankruptcy of Peter Thompson. On petition to review referee's order sustaining a demurrer to a claim. Order reversed, and demurrer overruled.

See, also, 242 Fed. 602.

Leopold M. Stern, of Seattle, Wash., for receiver.

W. W. Keyes, of Tacoma, Wash., for trustee.

CUSHMAN, District Judge. Proof of debt was offered on account of the unpaid stock subscription of the bankrupt in Peter Thompson Company, a corporation, as evidenced by an order in the state court, making a call and assessment upon Peter Thompson

in the receivership proceeding, pending in that court, of Peter Thompson Company, a corporation.

The order shows that Peter Thompson appeared at the hearing, which consummated in the court's finding his stock subscription unpaid in that company to the amount of $8,500.00, for which the receiver of that company now makes claim against the bankrupt estate of Peter Thompson. No question is made of the method pursued in the state court in determining the question of liability on such stock subscription. The referee, upon demurrer of the trustee to the proof of debt, concluded:

"That Thompson's contract for his subscription was complete, that his contract was fully executed, and that this claim must rest upon the judgment of a court declaring the contract of subscription not performed. When a claim must depend upon the action of a court for its very existence, as this does, the referee was of the opinion that it fell within the rule of contingent claims and was not provable against this estate. On the point that a claim must be owing at the date of adjudication or of filing the petition in bankruptcy, trustee's counsel cites Zavelo v. Reeves, 227 U. S. 627, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664, 29 Am. Bankr. Rep. 493, which holds that the claims must be in existence at that time to be provable under section 63 (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. § 9647])."

The subscription of Peter Thompson for stock in the Peter Thompson Company, a corporation, prior to his bankruptcy, was the creation of a debt. Whether it was fully paid or not by the property which he turned over to the corporation was a question to be determined upon the liquidation of the claim on account of the stock subscription, and the only thing in the nature of a contingency involved would be the amount, if any, of the debts of the corporation, for the payment of which the stock subscription would be a trust fund. This, as shown by the referee's certificate, had ceased to be a contingency incapable of determination prior to Peter Thompson's going into bankruptcy—ceased by reason of the assignment for the benefit of creditors of Peter Thompson Company, a corporation, which assignment was, without interruption, followed by the receivership proceeding, all antedating the bankruptcy of Peter Thompson. It had ceased to be "contingent," in the sense of liable to occur, at the time of filing the petition. It had occurred, and already had come to pass, and all that was left was to determine that which had already occurred.

The referee is reversed, and the demurrer overruled.

In re BIG PINES LIME & TRANSPORTATION CO.

(District Court, S. D. California, S. D. March 3, 1919.)

No. 3264.

1. BANKRUPTCY ⟸60—ACT OF BANKRUPTCY—"APPLIED" FOR RECEIVER—CONSENT TO APPOINTMENT.

Under Bankruptcy Act July 1, 1898, § 3a, cl. 4 (Comp. St. § 9587), making it an act of bankruptcy that one, being insolvent, has applied for a receiver, "applied" cannot be construed to mean applied for or consented to, so

as to authorize bankruptcy proceedings against one who stipulated that a receiver might be appointed in a suit brought against him by creditors.

2. EVIDENCE ⟸318(8)—HEARSAY—STATEMENTS IN PLEADINGS.

Allegations of insolvency in a complaint by creditors for the appointment of a receiver, not admitted to be true by the defendant, though he consented to the appointment of the receiver, are hearsay, and not competent to establish insolvency in bankruptcy proceedings against defendant.

Proceeding to have the Big Pines Lime & Transportation Company adjudicated an involuntary bankrupt. On exceptions to the report of the special master. Exceptions sustained, and petition dismissed.

Gale & Cobb, Norman A. Bailie, and Thomas A. Sanson, all of Los Angeles, Cal., for alleged bankrupt.

Alfred Wright and Ovila N. Normandin, both of Los Angeles, Cal., for petitioning creditors.

John O. Bender, of Los Angeles, Cal., for intervening creditors.

TRIPPET, District Judge. [1] This case requires an interpretation of subdivision 4, par. "a," § 3, Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 546 (Comp. St. § 9587). That provision provides that a person "being insolvent, applied for a receiver. * * *" In this case the alleged bankrupt did not apply for a receiver. A suit was instituted against the bankrupt by one Rickershauser, in which the appointment of a receiver was prayed. Other creditors came in and then all parties stipulated that a receiver might be appointed. No receiver, however, was appointed. So the case cannot fall under the latter part of said subdivision 4.

The petitioning creditors desire the court to hold that the word "applied" means applied for or consented to the appointment of a receiver. The alleged bankrupt here did nothing in that case but consent to the appointment of a receiver. If Congress meant that, if a person consented to the appointment of a receiver, it should be made an act of bankruptcy, it might easily have so stated. The cases relied upon by the creditors are cases wherein the application for a receiver was made on behalf of the bankrupt, or where the bankrupt actually petitioned for the appointment of a receiver.

[2] The proof in this case, however, fails to show that the alleged bankrupt was insolvent. The only evidence offered of insolvency was the allegations in the complaint in the case of Rickershauser against the alleged bankrupt. There was no stipulation in that case that the allegations in the complaint were true. There was no answer confessing that they were true, and there was no finding of the court that they were true. They are, therefore, but the mere assertions of a third party, and are controlled by the rule concerning hearsay evidence.

The exceptions to the report of the special master will be sustained, the petition dismissed, the master allowed $35 for reporter's fees, and the special master allowed the sum of $200 for his services in this behalf, all to be taxed against the petitioning creditors.

NUECES VALLEY TOWN-SITE CO. v. McADOO, Director General of Railroads, et al.

(District Court, W. D. Texas. April 15, 1919.)

No. 215.

1. COURTS ⟸293—FEDERAL COURTS—SUIT UNDER FEDERAL CONSTITUTION AND LAWS—"ARISING UNDER CONSTITUTION AND LAWS OF UNITED STATES."
Suit against the Director General of Railroads and those under him, in control and operation of railroads pursuant to acts of Congress and proclamation of President, to enjoin change of location of certain of his employés, is one arising under the Constitution and laws of the United States, within the jurisdiction of federal courts.

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

2. RAILROADS ⟸5½. New, vol. 6A Key-No. Series—FEDERAL CONTROL—INTERFERENCE BY INJUNCTION.
Control of operation of railroad by restraining order or injunction is within the prohibition of Act March 21, 1918, c. 25, § 10 (Comp. St. 1918, § 3115¾j), against interference with the possession of the Director General of the property by any process.

3. RAILROADS ⟸5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—"INCONSISTENT" LAWS AND LIABILITIES.
Within Act March 21, 1918, c. 25, § 10 (Comp. St. 1918, § 3115¾j), providing that carriers under federal control shall be subject to all laws and liabilities as common carriers, except so far as inconsistent with the act or any order of the President, any law or asserted liability which would operate to take the possession and control of the railroad property out of the hands of the government would be so inconsistent.

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

4. RAILROADS ⟸5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—SUIT AGAINST DIRECTOR GENERAL.
A suit against the Director General of Railroads, involving his right to direct and control operation of the property in his possession, is not one against the carrier, permitted by Act March 21, 1918, c. 25, § 10 (Comp. St. 1918, § 3115¾j), while it is under federal control.

5. COURTS ⟸328(1)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.
That the amount in controversy exceeds $3,000 sufficiently appears by showing that the saving to the Railroad Administration by the acts sought to be enjoined will be $400 per month; government control, unless relinquished by the President, extending by provision of Act March 21, 1918, c. 25, § 14 (Comp. St. 1918, § 3115¾n), till 21 months after peace is declared.

6. EVIDENCE ⟸23(1)—JUDICIAL NOTICE—DECLARATION OF PEACE.
The court judicially knows that peace has not been declared.

7. RAILROADS ⟸5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—TRANSFERRING EMPLOYÉS.
Preventing the Director General of Railroads from transferring his employés from one point to another, and from regulating their duties, would to that extent be to take the control, possession, use, and operation of the properties out of his hands, in contravention of the terms of Act March 21, 1918, c. 25, §§ 10, 11 (Comp. St. 1918, §§ 3115¾j, 3115¾k), and of the entire spirit and purpose of the act.

8. RAILROADS ⊂=5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—STATE POLICE REGULATIONS.

Provision of Act March 21, 1918, c. 25, § 15 (Comp. St. 1918, § 3115¾*o*), that the act shall not be construed to impair lawful police regulations of states, means that ordinary police regulations shall remain effective, except in so far as they are in conflict with the express provisions of the act, and does not allow effect to any state regulation inconsistent with the control of railroads by the government, given it by the act.

In Equity. Suit by the Nueces Valley Town-Site Company against W. G. McAdoo, Director General of Railroads, and others. On motions to remand to state court and to dissolve state court's restraining order. Motion to remand overruled; motion to dissolve sustained.

On the 24th day of December, A. D., 1918, the Nueces Valley Town-Site Company, joined by certain residents and property owners of Atascosa county, Tex., filed suit in the state district court of that county against W. G. McAdoo, Director General of Railroads of the United States, H. F. Anderson, superintendent of the San Antonio, Uvalde & Gulf Railroad, F. L. Lewis, assistant superintendent of transportation, C. W. Ridenour, trainmaster and chief dispatcher, and M. J. Vaughan, W. W. Hoffman, and J. J. Kearns, dispatchers, alleging that during the period of war between the United States of America and the empire of Germany Congress had duly authorized the taking over and operating of the railroads under the direction of the President, and that pursuant thereto the United States Railroad Administration was organized; that the defendant W. G. McAdoo was appointed Director General of Railroads, and had taken over the operation and control of the San Antonio, Uvalde & Gulf Railroad, which railroad was being operated, managed, and controlled under the direction of the Director General; that the defendants were threatening to remove the permanent division headquarters of the San Antonio, Uvalde & Gulf Railroad from North Pleasanton, in Atascosa county, to some point outside of Atascosa county, or, if they were not threatening to remove the entire permanent division headquarters, they were threatening to remove an essential and important portion and part thereof from North Pleasanton, in Atascosa county, to some outside point, and that defendants were also threatening to remove the machine shops of said railroad from North Pleasanton to some point outside of Atascosa county.

It was alleged that at a date long prior to the assumption of control of said railroad properties, to wit, on November 18, 1913, the complainant Nueces Valley Town-Site Company had conveyed certain properties in the town of North Pleasanton to the San Antonio, Uvalde & Gulf Railway Company by deed of that date, copy of which is attached to the petition, which deed recites as a consideration: "The sum of ten and no/100 dollars to us in hand paid by the San Antonio, Uvalde & Gulf Railroad Company, and in consideration of the location and establishment of the permanent division headquarters of the San Antonio, Uvalde & Gulf Railroad system, and the permanent location and operation of machine shops adequate to the maintenance of said San Antonio, Uvalde & Gulf Railroad system as now operated, embracing approximately 320 miles of main line railroad." It was alleged that this deed constituted a contract between the Nueces Valley Town-Site Company and the San Antonio, Uvalde & Gulf Railroad Company to permanently maintain the division headquarters and machine shops of that company at North Pleasanton, and that under the provisions of article 6423 of the Revised Statutes of the state of Texas this contract was binding upon the Director General of Railroads and his agents.

It was further alleged that the state of war in existence at the time the railroad properties of the corporation were taken over for operation and management and control by the United States Railroad Administration and

the Director General thereof had been concluded, and that the taking over of said railroad and the authority to manage, operate, and control the same by the Railroad Administration of the United States and the Director General was limited to 21 months after conclusion of peace, and was not intended to be permanent in its nature, and that there had been no action taken by Congress looking to the permanency of such authority, and that to the contrary there exists chaos and uncertainty at the present time as to whether or not the railroad properties should be in the immediate future returned to their owners for their operation, management, and control, or whether the period of time now existing as fixed by Congress would be later extended.

A restraining order was asked, restraining the Director General, his servants, agents, and employés, from taking any steps looking to or from removing any part of the division headquarters or machine shops of the San Antonio, Uvalde & Gulf Railroad from the town of North Pleasanton, in Atascosa county, to any point outside of said town, and that upon hearing temporary injunction be awarded continuing such restraining order until final hearing, upon which hearing it was asked that the injunction be made permanent.

This petition was presented to the judge of the Eighty-First judicial district of Texas, who, on the 23d day of December, A. D. 1918, made his ex parte restraining order, restraining the Director General, his agents, servants, and employés, from taking any steps to remove any part of the division headquarters or shops of the San Antonio, Uvalde & Gulf Railroad as then maintained at North Pleasanton, Atascosa county, Tex., from said place to any other place, until the further orders of the court.

The defendants in due time filed their petition and bond for removal of the cause to this court, upon the ground that the suit was one against officers of the United States government, that it arises under the Constitution and laws of the United States, and that the matter and amount in dispute exceeds the sum of $3,000, exclusive of interest and costs.

A certified copy of the record in the state court having been regularly filed in this court, the Director General and his codefendants, his agents and employés, filed answer, admitting the allegations of the petition that defendants were in possession of the property of the San Antonio, Uvalde & Gulf Railroad Company under and by virtue of the acts of Congress and the proclamations of the President in that regard, and had been in such possession since the 1st day of January, A. D. 1918, and alleging that Walker D. Hines, the successor of W. G. McAdoo, Director General of Railroads under the United States Railroad Administration, is an officer of and in the employ of the government of the United States in charge of operating the railroad, and that the other defendants at the time of the filing of the suit and at the present time are employés of the United States under the Director General, and are engaged in the operation of said railroad properties, and that in the efficient and economic operation of said properties it was the intention of the Director General to remove certain employés of the Director General, to wit, his assistant superintendent of transportation and several telegraph operators, to the city of San Antonio, where they could work jointly in the operation of the San Antonio, Uvalde & Gulf Railroad properties and the properties of the San Antonio & Aransas Pass Railway Company, also in the possession and under the control and being operated by the Director General; that the consolidation of these duties would result in a saving of operating expenses of $400 per month, and promote the efficiency of such operation; that the employés of the Director General thus removed from the town of North Pleasanton constituted but a small part of the force of employés at the North Pleasanton division, and that it was not intended by the Director General to remove the machine shops from that point. It was further alleged that the relief sought would directly interfere with the possession, control, and operation of the properties by the Director General, and that the restraining order issued by the state judge operated to interfere with and impede the possession, use, operation, and control of the properties by the United States government under the Director General.

The answer is duly verified under oath, and an order was asked dissolving

the restraining order of the district judge of Atascosa county of December 23, 1918.

Subsequent to the filing of said answer in this court, plaintiffs filed motion to remand the suit to the state court, and the case is now before me upon plaintiff's motion to remand, and defendant's motion to dissolve the restraining order above mentioned.

W. W. Walling, of San Antonio, Tex., and J. D. Dodson, of Laredo, Tex., for complainant.

Mason Williams, of San Antonio, Tex., and Baker, Botts, Parker & Garwood, of Houston, Tex., for defendants.

WEST, District Judge (after stating the facts as above). [1] It is not seriously questioned that the suit arises under the Constitution and laws of the United States. It is brought directly against the Director General of Railroads, and the petition clearly alleges that the Director General, his agents and employés, acting in behalf of the government of the United States, pursuant to the acts of Congress and proclamations of the President, are in the actual control and operation of the properties. The petition alleges that the state of war which induced the passage of the acts of Congress had ceased, and that there is no further necessity for such control, alleging also that the acts of the Director General in undertaking to change the location of certain of his employés are not to the public interest and are in violation of a certain alleged contract made with the corporation owning the railroad properties, which it is contended is binding upon the Director General and has effect to limit his right of control of the railroad properties in his possession.

That such a suit is one arising under the Constitution and laws of the United States is clear. It has been often held that suit by or against a corporation of the United States is a suit arising under the Laws of the United States. Osborn v. U. S. Bank, 9 Wheat. 738, 6 L. Ed. 204; Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319. In these cases it is said that the charter of incorporation, not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by the charter, and that such charter is a law of the United States. All the faculties and capacities possessed by federal corporations are derived from their acts of incorporation, and all their doings arise out of those laws, and therefore suits by and against them are suits arising under the laws of the United States. Here the Director General, under the acts of Congress and the President's proclamations, is placed in the exclusive possession of, and is engaged, under the terms of the acts of Congress and the President's proclamations, in the direction, control, and operation of the properties. Every power which he exercises and every right which he has is derived from the laws of the United States.

The tenth section of the Act of March 21, 1918, c. 25 (Comp. St. 1918, § 3115¾j), specifically provides that no process, mesne or final, shall be levied against any property under federal control; and the

eleventh section (section 3115¾k) makes it penal for any person to interfere with or impede the possession, use, operation, or control of any railroad property taken over by the President. The petition unequivocally shows that the purpose of the suit is to interfere with the possession, control, and operation of the property by restraining the Director General from removing telegraphers and other employés from one place on the property to another place, and thereby take the management and control of the property out of the hands of the Director General and place it in the control of the district court of Atascosa county. In Bryant v. Robinson, 149 Fed. 321, 79 C. C. A. 259, it was held that a suit against a postmaster, growing out of his acts as a postmaster, arose under the Constitution and laws of the United States. In Bachrack v. Norton, 132 U. S. 337, 10 Sup. Ct. 106, 33 L. Ed. 377, an action on a marshal's bond to recover damages for wrongful levy of an attachment issued out of the Circuit Court of the United States arose under the Constitution and laws of the United States. See, also, Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984; Sonnentheil v. Moerlein Brewing Co., 172 U. S. 401, 19 Sup. Ct. 233, 43 L. Ed. 492. The underlying principles of the federal jurisdiction are clearly and ably discussed in Re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

In United States Railroad Administration v. Burch (D. C.) 254 Fed. 140, the proposition was directly involved and directly ruled upon. A judgment had been obtained against the Atlantic Coast Line Railroad Company in a state court of South Carolina, after assumption of government control, upon a cause of action arising prior to that period. It had been levied upon certain real estate, and the Director General brought suit in the District Court of the United States to enjoin further proceedings under the execution. The jurisdiction of the federal court was contested, but sustained; Judge Smith (page 145) saying:

"The defendant in his return to the rule has raised the question that this court has no jurisdiction of the cause, and cannot enjoin a sale under execution under a judgment in a state court. Inasmuch as this question is a question arising in a case which asks for the enforcement of a right claimed to exist and be given under the terms of an act of Congress, it is evidently an action of a civil nature in equity, brought by an officer of the United States authorized to sue, and arising under the laws of the United States, where it appears upon the face of the bill of complaint that the right claimed by the plaintiff and sought to be enforced arises by virtue of and under a statute of the United States. The question whether or not final process can be levied against this property is one that arises under the very terms of the act of March 21, 1918; nor is the position that this court has no jurisdiction to stay the execution of a judgment recovered in the state court well taken. It has been laid down that the United States courts, by virtue of their general equity powers, have jurisdiction to enjoin the enforcement of a judgment in the state court upon usual principles under which courts of equity will enjoin the enforcement of a judgment. Simon v. So. Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492. * * *

"Further, the special statutory exemption from process, created by the act of March 21, 1918, must be construed in connection with the provision of section 265 of the Judicial Code of the United States [Comp. St. § 1242], as modifying the language of that section, and creating another exception, under which the attempted enforcement of the mesne and final process from a state court may be restrained in proper cases."

While the relief sought in that case was denied upon the ground that the property levied upon was not in the possession of the Director General, the jurisdiction of the court to issue the injunction was clearly sustained.

[2] The act of March 21, 1918, specifically prohibits the interference with the possession of the Director General of the property by any process, mesne or final, and the control of the operation of the road by restraining order or temporary or permanent injunction is as much an interference with that possession and control as if the roadbed were levied upon by attachment or execution.

[3, 4] It is contended, however, that the provisions of section 10 of the act of March 21, 1918, to the effect that carriers 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 that act or any other act applicable to such federal control or any other order of the President; that actions at law or suits in equity may be brought by and against carriers and judgments rendered as now provided by law, and that in any action at law or suit in equity against the carriers 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 instituted by or against it which action was not transferable prior to federal control, etc., operate to change the rules heretofore established and indicate an intention upon the part of Congress to limit the jurisdiction of federal courts under pre-existing laws. It is sufficient answer to this contention to say that any law or liability or asserted liability which would operate to take the possession of the property out of the hands of the United States government would be inconsistent with the act of March 21, 1918, and inconsistent with the orders of the President by and under which he has assumed full possession and control of the properties. It is a further complete answer to this contention that this suit is not against the San Antonio, Uvalde & Gulf Railway Corporation, the owners of the properties, but is a suit direct against the agent of the President and of the Secretary of War. It is not a suit which involves any common carrier liability either of the owning corporation or of the Director General, but is a suit against the Director General directly involving his right to direct and control the operation of the property in his possession.

[5, 6] The proposition is made that the amount in controversy does not exceed $3,000. The petition for removal shows that the amount in controversy exceeds $3,000 exclusive of interest and costs. In addition to this, it is shown that the saving to the Railroad Administration by reason of the acts sought to be enjoined will be at least $400 per month. The act of Congress provides that the period of government control shall extend until 21 months after peace is declared. The court judicially knows that peace has not been declared and the fact that the President has power to relinquish any system from governmental control cannot affect the proposition that the period of control is fixed by section 14 (Comp. St. 1918, § 3115¾n)

for the period mentioned; that is to say, for 21 months after the termination of the war. It sufficiently appears, therefore, that the amount in controversy is in excess of $3,000, exclusive of interest and costs.

It follows from the foregoing that the motion to remand must be overruled.

[7] The allegations of the petition, the sworn statements of the answer which are not denied, and the evidence presented by affidavit show without controversy that the purpose of the Director General, the execution of which purpose is suspended by the restraining order, is merely to remove a division superintendent and several telegraph operators, on the railroad property involved, from North Pleasanton to San Antonio where they will engage in joint work for this property and another railroad property also under the control of the government, from which will result economy and increased efficiency of operation. Should the state court prevent the Director General from transferring his employés from one point to another, and from regulating their duties it would, to that extent, be to take the control, possession, use, and operation of the properties out of the hands of the Director General in contravention of the terms of both sections 10 and 11 of the act as well as the entire spirit and purpose of the act. No court, either state or federal, can interfere with or control the discretion of the Director General as to the operation of these properties, and any action directly interfering with his possession and control of the property is specifically forbidden by Congress.

[8] It is contended, however, that section 15 of the act (Comp. St. 1918, § 3115¾o) which is to the effect that it shall not be construed to impair the lawful police regulation of the state has the effect to subject the possession of the government to the operation of such state statutes as article 6423 which provides that the general offices of every railroad company chartered in this state shall be maintained permanently at the place named in its charter or at such place as it shall have contracted or agreed to maintain them. The proper construction of section 15 is that ordinary police regulations of the state shall remain effective, except in so far as the same are in conflict with the plain and express provisions of the act of Congress. Under that act, the possession, use, control, and operation of the railroad property is placed with the government and its officers, and no state regulation inconsistent with such evident purpose can be effective. It may be said, however, in this connection that article 6423 upon which complainant relies applies to the corporation which is not a party to this suit, and further that it has no application to divisional headquarters, and makes reference only to general offices and to machine shops, neither of which are involved in this case. As to whether a mere recitation in the deed to the San Antonio, Uvalde & Gulf Railroad Company as a consideration that that corporation agreed to permanently maintain its division headquarters at North Pleasanton is a contract which could be specifically enforced against the corporation, if it were in possession of the property itself is not decided. Article 6423 affords no justification whatever for the enforcement by

injunctive process against the Director General of a contract made with the corporation to maintain divisional headquarters at a particular point. The Constitution of the state of Texas forbids the consolidation of parallel and competing railways. This constitutional provision doubtless rests upon the broad police powers of the state. Nevertheless all of the railways of the state are, under the act of Congress, consolidated for the period declared in the act for the purpose of governmental operation, and it is not thought that the acts of the Director General in effecting this consolidation or otherwise in the control, use, and operation of these properties can be controlled by an appeal to the police powers of the state.

The motion to dissolve the restraining order must be sustained.

MUIR v. MORRIS et al.

(District Court, D. Oregon. April 21, 1919.)

No. 7413.

1. JUDGMENT ⟸828(1)—BAR BY PRIOR ACTION—NONSUIT.
   Since a judgment of nonsuit in a law action does not bar a subsequent suit or action for the same cause in the state court, a judgment of nonsuit in the state court does not bar a subsequent suit in the federal court for practically the same cause.
2. CONTRACTS ⟸28(3)—EVIDENCE TO ESTABLISH PAROL CONTRACT—SUFFICIENCY.
   Evidence *held* insufficient to establish a parol agreement by defendants, contingent upon the success of certain enterprises, to pay further compensation to complainant's testator for his services as their general counsel and confidential adviser, or a subsequent agreement under which they set aside and held in trust for him stock in a corporation as such further compensation.

In Equity. Suit by Jane W. Muir, executrix of the will of William T. Muir, deceased, against James H. Morris and Fred S. Morris, copartners as Morris Bros., and James H. Morris and Fred S. Morris. Decree for defendants.

Some time during the year 1901 Morris & Whitehead, Bankers, a corporation of Denver, Colo., doing business in Portland, Or., became interested in the promotion of a local corporation, known as the Portland City & Oregon Railway Company, and of the construction of a line of railway between Portland and Oregon City. The corporate name of this company was afterwards changed to the Oregon Water Power & Railway Company. James H. and Fred S. Morris and Julius Christensen were interested as stockholders in the Morris & Whitehead, Bankers, corporation. This company continued in business until about the 24th of November, 1902, when a copartnership was formed between James H. Morris, Fred S. Morris, and Julius Christensen, under the firm name of Morris Bros. & Christensen. The several interests of the parties in this copartnership and its properties were as follows: James H. Morris, 40 per cent.; Fred S. Morris, 40 per cent.; and Julius Christensen, 20 per cent.

This firm took over all the properties of Morris & Whitehead, Bankers, and assumed all its liabilities. The firm continued in operation until it was dissolved about July 1, 1905. The firm of Morris Bros., consisting of James H. and Fred S. Morris, was organized about this time, and took over.

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on dissolution of the firm of Morris Bros. & Christensen, part of its properties and assumed part of its indebtedness. All these corporations and firms were interested and had part in the promotion of the line of railway aforesaid in behalf of the Oregon Water Power & Railway Company. These concerns also engaged in the promotion of other corporations in this state and in Washington, and the enterprises for which they were organized, such as the Roseburg Water & Light Company, the Grants Pass New Water, Light & Power Company, and the Chehalis Water Company. They also engaged in the business of buying and selling stocks and bonds and other securities.

William T. Muir was employed by these concerns, namely, Morris & Whitehead, Bankers, Morris Bros. & Christensen, and Morris Bros., as their attorney and confidential adviser. Fred S. Morris was the manager in charge of Morris & Whitehead, Bankers, in Portland, when the employment was first agreed upon, and that employment was continued with about the same understanding with the succeeding firms, as they each came into existence.

Briefly stated, it is the theory of the bill of complaint, which is very lengthy, but skillfully drawn, that Muir was employed at a small, but inadequate, salary, with the understanding and agreement on the part of the employers that, as the several enterprises which these firms were engaged in promoting proved successful, he should become entitled to and receive an interest in the property, shares of stock, profits, and business of such concerns, and particularly in that of the Oregon Water Power & Railway Company, the particular interest in such property, profits, and business not being at the time of the employment expressly stated, specified, or agreed upon, but to be thereafter determined and fixed by the employers; that about November 7, 1904, or prior thereto, it was agreed by and between the members of the firm of Morris Bros. & Christensen, through an understanding that they then arrived at, that 1,000 shares of such stock should be issued to and become the property of Muir, but that the stock was not then issued; that some time prior to July 1, 1905, the said Morris Bros. & Christensen, acting at the time through the several members thereof, agreed upon such further compensation to be rendered Muir for his services as attorney for and confidential adviser of the said several corporations and firms, which was 1,000 shares of stock in the Oregon Water Power & Railway Company, to be and which was then set apart to James H. Morris and Fred S. Morris, to be held by them in trust for and for the use and benefit of Muir; that at the time this understanding was had and the agreement entered into by and between the members of the firm of Morris Bros. & Christensen, such members were contemplating and were then arranging for the final dissolution of the firm, a preliminary agreement looking to that end having been theretofore, to wit, on January 31, 1905, entered into, providing for the consummation of such dissolution on July 1, 1905, and that the consideration for the trust agreement moving to the parties was the division of the assets of the firm between the individual members thereof, and the assumption by the Morris Bros. of the payment of a portion of the indebtedness of the firm, and by Christensen of another portion of such indebtedness; that the agreement so entered into relative to the Morris Bros. holding the said 1,000 shares of stock in trust for the use and benefit of Muir was entered into and so consummated independently of and aside from any written agreement of the parties had or made looking to and in consummation of final dissolution of the firm, and the disposal and distribution of its assets, and was not a part of nor embraced in such written agreements, nor did it constitute any consideration upon which the same, or any of them, were based; that subsequently, to wit, on or about the 27th day of April, 1906, the firm of Morris Bros. sold and disposed of practically all the shares of stock of the Oregon Water Power & Railway Company, including the 1,000 shares which it held in trust for Muir, to the Portland Railway, Light & Power Company, for the sum of $65 per share, and have not since accounted to the said Muir, or the complainant herein, for the sum of $65,000 so received by it for said 1,000 shares of stock. Wherefore a decree is prayed requiring defendants to account to complainant for said sum of $65,000, and legal interest thereon from April 26, 1906, and for the costs and disbursements of the suit.

It should be explained in this connection that W. H. Hurlburt and George I. Brown, who were also in the employ of these concerns, respectively as manager and engineer, have been carried along in the bill of complaint as if they were also concerned in the litigation, but the suit is by the complainant individually, for a several recovery; the purpose being, no doubt, to set forth by way of inducement the exact relationship of the parties concerned, and to define more clearly and concisely the real interest and status of the complainant, as well as the supposed trust relationship and liability of Morris Bros.

The defendants, by their answer, put in issue the controlling inquiries sought by the bill, and set forth three further and separate defenses, namely: First, that the suit is barred by the statute of limitations and is stale; second; that complainant is estopped by the judgment of the state court rendered in a former action of Muir against Morris Bros. for money had and received to Muir's use and benefit, by which it was sought to recover the same money now sued for; and, third, that previous to the institution of this suit there was an account stated between the parties, Muir and defendants, touching all matters of pecuniary difference between them, and a complete and final settlement had and consummated.

William D. Fenton and James E. Fenton, both of Portland, Or., for plaintiff.

Teal, Minor & Winfree, Dolph, Mallory, Simon & Gearin, and William C. Bristol, all of Portland, Or., for defendants.

WOLVERTON, District Judge (after stating the facts as above). In the view I have taken of this case, it is unnecessary to take note of the several separate defenses, except the second, and of that only by way of inducement to the discussion that will follow in disposing of the main case.

In June, 1911, Muir instituted an action against Morris Bros. in the state court to recover from them the sum of $65,000, which it was alleged Morris Bros. had received on the sale of 1,000 shares of the capital stock of the Oregon Water Power & Railway Company, being the same stock here in controversy, to the use and benefit of Muir. The complaint in that case, although it was an action at law, presented practically the same issues as are presented here, and the testimony adduced by the plaintiff at the trial of that cause was in all material respects the same as that adduced by complainant here. On a motion for nonsuit, the cause was determined in the circuit court in favor of Morris Bros., and against Muir. Muir appealed to the Supreme Court, and the judgment of nonsuit was affirmed. Muir v. Morris, 80 Or. 378, 154 Pac. 117, 157 Pac. 785.

[1] While a judgment of nonsuit in a law action does not bar a subsequent suit or action for the same cause in the state court (Carroll v. Grande Bonde Electric Co., 49 Or. 477, 90 Pac. 903; Hanna v. Alluvial Farm Co., 79 Or. 557, 152 Pac. 103, 156 Pac. 265), and for that reason the judgment of nonsuit against Muir in that court does not bar the present suit for practically the same cause, the reasoning of the Supreme Court is of persuasive force and potency as applicable to the consideration of the cause here upon its merits. That case was disposed of upon the consideration that, where the terms of an agreement have been reduced to writing, the writing is to be deemed as containing all the terms agreed upon, and no evidence other than

the writing itself is competent for establishing the specific conditions. In other words, where parties have reduced their contract or agreement to writing, it is presumed to embrace all previous or concurrent understanding between them respecting the subject-matter of such contract or agreement.

The very crux of this case was presented to the Supreme Court, as it is here, namely, that the members of the firm of Morris Bros. & Christensen, on or prior to June 26, 1905, set aside to Muir 1,000 shares of the capital stock of the Oregon Water Power & Railway Company to be held for his use and benefit, and it was held in effect that the negotiations of the parties in that respect, whatever they were, were merged into and became a part of the written agreements for dissolution of the firm, and that Muir could not be permitted to establish otherwise the alleged agreement upon which he relied for recovery. However, by reason of the very strong contention of counsel that the alleged setting apart of the 1,000 shares of the Power Company stock to Morris Bros. for the use of Muir was an independent arrangement and agreement by and between the members of the firm of Morris Bros. & Christensen, and wholly aside from any of the agreements entered into looking to the dissolution of the firm, I am impelled to consider the case on that theory, but without deciding that the alleged independent agreement is not merged in the written agreements for dissolution.

[2] The questions presented are purely of fact, as it may be conceded that, if the testimony establishes what complainant contends for it, under her theory of the case, she is entitled to recover.

Proceeding on that theory, complainant's case hinges about two propositions, which are insisted upon by her counsel: First, whether in the year 1904, or about November 7th of that year, the Morris Bros., or either of them, agreed with Christensen, or otherwise, that the business of the several companies which Morris & Whitehead, Bankers, and Morris Bros. & Christensen, succeeding that corporation, were engaged in promoting, and especially the Oregon Water Power & Railway Company, had become successful, and that Muir should be paid 1,000 shares of the capital stock of the Power Company as additional compensation for his services rendered such companies; and, second, whether, immediately prior to June 26, 1905, at a conference held by James H. and Fred S. Morris and Christensen in the Philadelphia office of Morris Bros. & Christensen, there was, by mutual agreement between the parties, set apart 1,000 shares of the capital stock of the Power Company to the Morris Bros., or to one or either of them, to be by them held in trust and to be accounted for to Muir.

It is not essential to inquire in detail what the exact terms of the original contract with Muir were with reference to the payment of additional compensation for his services, as it is conceded that whether he was entitled to such additional compensation was dependent upon whether the business of the different enterprises which the companies were engaged in promoting became successful, and then upon the act of his employers in declaring it so, and in determining what the

additional compensation should be and how it should be paid. These were matters, under the alleged agreement, that were left entirely with the employers to determine and adjust.

The organization of the firm of Morris Bros. & Christensen apportioned the interests of the copartners therein, 40 per cent. each to the brothers and 20 per cent. to Christensen. The ownership of the concern comprised, among other property, "all shares of stock" owned by the firm in the Oregon Water Power & Railway Company. On January 31, 1905, the parties to the copartnership entered into what may be styled a preliminary agreement for dissolution, providing that the partnership should terminate on or before the 1st day of July, 1905. Later, on June 26 and 27, 1905, two other agreements were entered into by the members of the firm, designed to settle and distribute among the individual members the property that each should take and the liabilities each should assume and pay. On November 1, 1905, still another agreement was entered into, designed to accomplish the final adjustment of the dissolution and all copartnership affairs between the members of the firm. Reference will be had to the agreements as occasion requires.

Christensen, as a witness for complainant, relates that, in the spring or summer of 1904, Fred S. Morris, while in Philadelphia and at the company's office there, the witness and F. S. Morris being present, said that the firm (Morris Bros. & Christensen) did not own all the Power Company stock except such as had been given away by witness; "that Hurlburt and Muir and Brown were working for a small drawing account, and that he had given them stock in the Oregon Water Power & Railway Company, to the extent of 1,000 shares each, as their extra compensation." The stockbooks were referred to by counsel, which show that 1,000 shares each of such stock were issued, on November 7, 1904, to Hurlburt and Brown, but none on that date to Muir. On cross-examination witness says, touching the same subject, that Fred S. Morris told him "that we (meaning the firm) did not own all the stock; that he had given, or paid, or was about to pay, Hurlburt, Muir, and Brown 1,000 shares apiece, as their compensation; that they had been working for all these years in helping to develop that Oregon Company." That, according to witness, was his first knowledge of the amount of stock that they were to have.

Mr. Muir testified in the case in the state court, and his evidence is introduced here in behalf of complainant. He relates that during the entire time he was in the employ of Morris & Whitehead, Bankers, and Morris Bros. & Christensen, it was frequently stated by Fred S. Morris, who had charge of the business in Portland, that he (witness) was inadequately compensated, and with witness he coupled the names of Brown and Hurlburt, and that his purpose was to see that "we" (Muir, Hurlburt, and Brown) received additional compensation. The witness continues:

"There was never anything definite said to me, just how this compensation would be paid; there was no promise of any definite amount, or any particular thing, but there was a continual statement and promise that there was recognition of the fact that I and the other two men spoken of were very

much underpaid. * * * Putting it in the light that upon the failure, as I looked upon it, we would not be expected to be additionally compensated, but upon the issue of success we would be."

Muir disclaimed any knowledge of any agreement to the effect that he was to be paid 1,000 shares of the capital stock of the Power Company, and seems to have had no information touching any arrangements by and between the Morris Bros. and Christensen relative to his additional compensation until in April, 1908, when he, Hurlburt, and Keady went East with Fred S. Morris, to be present at a trial then pending between Morris Bros. and Christensen.

The only other testimony on the part of complainant that has any relevancy to any alleged agreement of the Morris brothers, or either of them, to pay to Muir 1,000 shares of stock in the Power Company as his additional compensation for services rendered, is that of Hurlburt, who relates that, while the persons above named were on their way East in 1908 to attend the litigation then pending between Morris Bros. and Christensen, and while at the depot at Nampa, Idaho, Fred S. Morris said to him that, when "they were able to dispose of the property, they would make settlement in full with the people who had aided them with the Oregon Water Power & Railway Company. That," witness continued, "included Mr. Muir and myself, Mr. Brown having been settled with."

Fred S. Morris testifies that his brother was present at the conversation alluded to by Christensen, and he denies that he told Christensen, at that or any time, that he had given or intended to give Muir, Hurlburt, or Brown stock in the Power Company to the extent of 1,000 shares each. James H. Morris recalls the conversation alluded to, and corroborates his brother Fred. James H. thinks the conversation took place some time in the summer or fall of 1904. The stockbooks show, as above stated, that 1,000 shares each of the stock were, on November 7, 1904, issued to Hurlburt and Brown, but none to Muir. If this incident proves anything in that relation, it is that there was some understanding on the part of Fred S. Morris, who issued the stock to Hurlburt and Brown, that the same should be so issued; but it negatives any purpose or intention on the part of Fred S. Morris to issue any stock to Muir, simply because of the fact that stock was issued to Hurlburt and Brown, and none was issued to Muir.

All that Christensen testifies to relative to this matter is in the way of admissions made by Fred S. Morris against his interest. He has no personal knowledge of the alleged substantive fact that any agreement was made by Morris to in any way further compensate Muir for his services. The Morrises not only disagree with him as to the admissions, but Fred S. Morris, who alone knew whether such an arrangement had been agreed to by him, testifies positively that there was no such agreement or understanding; and Muir, the party solely concerned and directly interested, had no personal knowledge on the subject whatever. It is impossible wholly to discredit Fred S. Morris, and believe Christensen instead, under the conditions obtaining, and such must be the result if the contention of complainant is to pre-

vail. I therefore conclude that complainant has not only failed to establish her first proposition by a preponderance of the evidence, but that the strong weight of the testimony is against her position.

We come now to the second proposition. Fred S. Morris went to Philadelphia in June, 1905, with a view to settling the partnership affairs of the firm of Morris Bros. & Christensen. Christensen had previously made a tentative draft of an agreement to be adopted for settlement, and had sent the same to Portland for the consideration of Fred S. Morris, but nothing was done in that direction until the latter went to Philadelphia. Mr. Muir went with him to assist in the settlement and in formulating the agreement when one was reached.

Shortly previous to June 26, 1905, conferences were held between the Morris Bros. and Christensen relative to the settlement of their partnership affairs. Christensen testifies that at one of these conferences a definite understanding was arrived at as it relates to the disposition to be made of the Power Company stock. The principal purpose attending the dissolution was so to divide the property in the main that Christensen would take the stocks and bonds of Eastern corporations held by the firm, and the Morris Bros. the stocks and bonds of the Western or Pacific States corporations. In other words, they were to swap stocks and the firm's holdings along these lines in their dissolution adjustment. Of the Eastern companies in which the firm was concerned, the Morris Bros. were to take over the Providence & Danielson Railway Company and the Jersey Central Traction Company, and were to take over all the Western corporations, among which was the Oregon Water Power & Railway Company, or rather the stock holdings thereof. The capital stock of the company consisted of 20,000 shares. Christensen relates that the stock of this concern owned by the firm was ascertained to be 15,478 shares; that, in ascertaining the amount of stock that had been previously disposed of, James H. Morris made a memorandum, on a pad of yellow foolscap paper, of the shares that had been disposed of by the Morris Bros., as Fred S. Morris gave the different items to him from memory, they not having the stockbooks present at the time; that witness enumerated certain items of stock owned outside of the partnership, and which he had disposed of, aggregating 1,503 shares, and that Fred S. Morris made mention of the following items which they had disposed of: J. Frank Watson, 1 share; A. B. Crosman, 1 share; W. H. Hurlburt, 1 share; W. T. Muir, 1 share (these were directors' shares; that is, shares issued to the parties merely for the purpose of qualifying them to act as directors); sold or given to some one in Portland, the name of whom the witness did not get, 15 shares; W. T. Muir, 1,000 shares; W. H. Hurlburt, 1,000 shares; George I. Brown, 1,000 shares—aggregating 3,019 shares, and, together with those disposed of by witness, making a total of 4,522, which, deducted from the 20,000 shares of capital stock, left 15,478 as then owned by the firm.

Witness then further states that his interest therein was found to be 3,095.6 shares, he being entitled to 20 per cent. of the firm property, and that the adjustment was accordingly made that there should be transferred by Christensen to the Morris Bros. 2,096 shares of the

capital stock of the Power Company, and that the Morris Bros. should assume and pay a firm indebtedness of $100,000 due Eugene Ivins, to whom 5,000 shares of such stock had been pledged as security with an option to purchase, and that upon payment of such indebtedness the Morris Bros. should be entitled to the ownership of the 5,000 shares so pledged to Ivins. Christensen's interest in this holding was 1,000 shares, which, added to the above, made up the 3,096 shares which Christensen claimed was his interest in the firm's holdings of the Power Company's stock. This disposition of this particular stock was carried into a written agreement, which was formulated and executed by the parties on June 26, 1905, whereby Christensen bargained, sold, assigned, and set over to James H. and Fred S. Morris the 2,096 shares and the further 1,000 shares held as collateral security by Ivins. By the same instrument James H. and Fred S. Morris were constituted by Christensen his attorneys in fact to assign said shares of stock to themselves. Christensen elsewhere draws the conclusion that there was by that transaction set aside the 3,000 shares to the Morris Bros. with which to further compensate these men—Muir, Hurlburt, and Brown—for their services. Christensen's testimony relative to the mention made by Fred S. Morris of stock so disposed of is somewhat discredited by testimony given in the case of Hurlhurt v. Morris Bros., wherein he deposed that he was not certain whether Hurlburt's name was mentioned or not.

Both Fred S. and James H. Morris testify that the principal purpose of the conference alluded to by Christensen was to discuss and determine upon the division of the property of the firm between them; that it was generally agreed that there should be an exchange of properties, so that in the main Christensen would get the properties, stocks, and bonds of the Eastern concerns, and they those of the Western or Pacific Coast concerns; that there was no reason or occasion for determining to a nicety what the share of each partner was in the Power Company stock, as the whole of it then belonging to the firm was to go to them in any event, and they seem not to remember that any memorandum was made up of the stock previously disposed of, as Christensen contends. These men both say that Muir was present at all these conferences, and participated in the discussions relative to the distribution of the firm property and assets. Christensen denies this, and so does Muir. Muir did, however, draw up the agreements of June 26 and 27, 1905, which were designed to carry into effect the agreement of the parties arrived at during these conferences relative to the distribution of the firm property. Muir disavowed any knowledge of any discussion relative to the disposition of any stock to himself, Hurlburt, or Brown during those conferences, or that the Morris Bros. had agreed at any time to issue to him, or to Hurlburt or Brown, any stock until the time nearly three years later, namely, April, 1908, when he went East to assist in the litigation then pending between Morris Bros. and Christensen.

During the progress of that trial, occasion arose for consulting the stockbooks of the Power Company; it being supposed that they were in the possession of Clark & Co., who were instrumental in the pur-

chase of the stock from Morris Bros. Upon a call at the office, however, it was found that the books were not there. On the same evening a discussion arose, first at the office of Morris Bros. & Christensen, and then at the Art Club, where the parties repaired for dinner. There were present at these discussions, Muir, the two Morris brothers, and Hurlburt. Muir relates that Fred S. Morris wanted him to testify in the case then on trial that Fred S. Morris had theretofore issued to him, Hurlburt, and Brown 1,000 shares each of the Power Company stock, which Muir refused to do, saying it was not the fact, but that Morris insisted it was, and that Muir further insisted that the only stock that had been issued to him was 1,000 shares of the Ivins stock, in which Morris disagreed with him. Muir further testified that there was produced at that time a yellow piece of paper, upon which there appeared a memorandum in James H. Morris' handwriting, showing a disposition of stock very much as Christensen testified was made at the conference just prior to the 26th of June, 1905, except Muir said that it showed an issuance to Brown of 2,000 shares.

On Muir's return to Portland in May following, he made an extended memorandum of his recollection of what then transpired. In his testimony in his former case in the state court, he was unable to testify from his independent recollection of the incident touching the memorandum made on the yellow sheet of paper, or otherwise, except as his own memorandum informed him. The Morris Bros. positively deny that any such conversation took place, either at the office or at the Art Club, or that any yellow paper memorandum was produced such as Muir testified to. Mr. Hurlburt recalls the conversation, but not the incident respecting the yellow paper memorandum.

Shortly after the return from Philadelphia of Muir and Morris, Mr. Flegel interviewed Fred S. Morris, in behalf of Muir, touching the subject of the Morris Bros.' obligation to Muir, and Morris says, after he had discussed the matter fully with Flegel and asserted in the meanwhile that there was no such understanding as Muir claimed, that Mr. Flegel went away apparently satisfied, and that no subsequent mention was made by Muir respecting the matter until action was instituted by him in the state court against Morris Bros.

About December 15, 1905, Fred S. Morris interested himself in behalf of Muir and Hurlburt, and through an arrangement entered into between Morris and Muir and Hurlburt the latter two were enabled to redeem 1,000 shares each of the Ivins stock, with the understanding that they were to pay Morris $50 per share for the stock. Muir and Hurlburt gave their notes at the Merchants' National Bank, each for $25,000, indorsed by Morris, and on December 15, 1905, a certificate of stock for 1,000 shares was issued to each of them. They held this stock until the Power Company sold to Clark, when $65 per share was realized therefrom, and Morris Bros. paid over to Muir and Hurlburt the sum of $15,000 each, being their profit attending the redemption of the stock.

Now, coming to a discussion of this testimony, I am persuaded that a statement was made respecting the firm's holding of the Power Com-

pany's stock at the conference of the parties at the firm's office in Philadelphia, much as Christensen relates, for how otherwise was the amount of the firm's holdings arrived at? And it is quite probable that a memorandum was made showing what was supposed at the time by the parties concerned to have been the disposition of the stock other than the amount then found to belong to the Power Company. Fred S. Morris says that numerous memoranda were made, and perhaps on a yellow pad, during their conference, in order to arrive at a proper division of the properties, but he has no recollection of the specific memorandum alluded to by Christensen respecting the Muir, Hurlburt and Brown stock. There, was, however, really no occasion for ascertaining the exact number of shares of the Power Company stock then held by the firm, nor the amount of such stock that had been disposed of either by Christensen or the Morris Bros., for it was the understanding and agreement of the parties from the first that the Morris Bros. should have all the stock of the Power Company then held by the firm, whether it was much or little. That was a matter predetermined, but it was natural that the parties, for their own satisfaction, should have figured out and made an estimate of such holdings. The fact was that the stockbooks were in Portland, and the Morris brothers were speaking from their recollection when they set down the amount that they supposed they had disposed of. And in this they were mistaken, for they then had disposed of no stock whatever to Muir, except 1 share to qualify him to act as a director on the Power Company's board.

Nor had they really disposed of any of the shares that had been issued to qualify the holders to act as directors on the board. But for the purposes of their adjustment at the time it was wholly immaterial who was the owner of any stock of the Power Company outside of the holdings of the firm. It seems to have been supposed at that time that Christensen held no Power Company stock in his name, and that the whole of it, except what had been disposed of by the partners, stood in the name of Fred S. Morris. This was a mistaken assumption, for at that time there was standing on the stockbooks stock in the name of Christensen in the amount of 3,203 shares, and the contract of June 26th did not really provide for a transfer by Christensen to the Morris Bros. of the whole of his stockholding. But the intention of the parties was clear that he should transfer all his interest in the Power Company stock to the Morris Bros., and the fact that Christensen or the Morris Bros. had previously disposed of some of the Power Company stock was not a material factor in their deliberations at the time.

Although Christensen says that the stock was then set apart to the Morris Bros. for Muir, Hurlburt, and Brown, such was not the purpose of the negotiations. The sole and only purpose of the negotiations was to divide the firm's property among the members of the firm. The fact is that the parties not only did not set apart any stock at this time to the Morris Bros. for Muir, Hurlburt and Brown, but there was no consideration moving to Christensen for sustaining such a transaction. The Power Company stock was all to go to the Morris

Bros. in any event, no matter what the relations were between the Morris brothers, or either of them, and Muir, Hurlburt, and Brown. Christensen did not forego anything of value in view of, or in consideration of, the Morris Bros. taking to their account 1,000 shares each set apart to Muir, Hurlburt, and Brown, to be held for their use and benefit. The fact that the figuring was made as Christensen relates, whether on a yellow pad of paper or otherwise, is some evidence that the Morris brothers, or one of them, had at some time previously obligated themselves to deliver such stock to Muir, Hurlburt, and Brown, but it is not conclusive of such an obligation, and cannot be so treated. It was only an admission against interest at most; so that, if it appears otherwise that no such obligation ever existed, the evidentiary fact arising from the figuring must go for naught.

Furthermore, I have but little doubt in my own mind that Muir discussed the matter with the Morris Bros. in April, 1908, during the litigation between Morris Bros. and Christensen at Philadelphia, either at the firm's office or at the Art Club, very much as Muir relates, and the yellow paper memorandum was probably produced as he indicates; but, assuming all that to be true, it does not establish the fact insisted upon that the stock was set apart to the Morris Bros. at the June, 1905, conference, to be held by them for Muir, Hurlburt, and Brown. It may be some evidence of some previous obligation on the part of Morris Bros., as I have said in the discussion of the effect of the figuring had by the parties at the June, 1905, conference, to deliver to these parties each 1,000 shares of the Power Company stock, but it is very clear that the conversation with Muir in April, 1908, was not conclusive of that fact, nor does it imply a trust relationship between the Morris Bros. and Muir, Hurlburt, and Brown, or any of them.

There is a circumstance attending the negotiations in June, 1905, and which must be borne in mind as it respects the conversation that Muir had with the Morris Bros. in April, 1908, that is very significant, and is a controlling factor as it relates to the alleged obligations of the Morris Bros. to deliver to Muir the amount of stock it is claimed Muir was entitled to. Both the Morris brothers testify that Muir was present at the negotiations that took place in June, 1905. Muir says he was not, and so does Christensen. But whatever the fact is as to that, Muir was in intimate relation with all that went on there. He was the confidential adviser of the members of the firm, and especially of the Morris Bros., and drew the two contracts, those of June 26 and 27, 1905, which were the immediate outgrowth of the conferences had shortly previous thereto, and must have known at the time, and undoubtedly did know, all that took place thereat. If there was any such understanding or agreement as Christensen would seem to indicate, that any stock should be set aside to the Morris Bros. for him or for Hurlburt or Brown, he should have known of it. He says he did not know of it, and did not learn of it until the matters came up in the Philadelphia litigation, which was almost three years later. The simple reason for his not knowing of it is that the supposed fact did not exist. If it had, being an alert and capable lawyer, he would have been quick to take advantage of it and to turn

it to his account, especially after the entire Power Company stock was disposed of to Clark in 1906 at a large figure.

Muir says further that Fred S. Morris at the conversation wanted him to testify in the Philadelphia litigation that he (Morris) had theretofore issued to Muir 1,000 shares of the Power Company stock, or that that amount of stock stood in his name. Morris denies this, and so does his brother, James H. Morris. Hurlburt seems to corroborate Muir; but, whatever the fact may be as to such a conversation taking place, the fact is that never at any time did any Power Company stock stand in the name of Muir, except the 1 share of director stock and the 1,000 shares of the Ivins stock. It is true that there were issued to Hurlburt and Brown 1,000 shares each of stock on November 7, 1904, but none was then issued to Muir, nor at any other time, except the stock above mentioned. If there is any one thing of persuasive force to differentiate this case from the Hurlburt Case (Hurlburt v. Morris, 68 Or. 259, 135 Pac. 531), it is the fact that stock was actually issued to Hurlburt, while none was issued to Muir.

It is strange indeed that Muir, who was employed by Fred S. Morris and acting for the concerns with which he was connected, was his confidential adviser and on close and intimate relations with him, and was at the same time the secretary of the Power Company, and signed as such all the stock that was issued from time to time, never knew of any provision being made for his additional compensation until, as he says, he came into possession of the supposed fact during the pendency of the trial at Philadelphia. The relations between Fred S. Morris and Muir, so far as the evidence shows, were never strained in the least until they disagreed at Philadelphia in 1908, and it is most natural and reasonable to conclude that, if Fred S. Morris or his brother, or the firm of Morris Bros. & Christensen, had made or agreed to make any special provision for Muir as additional compensation, he would have been advised of the fact when the thing was done, and no doubt would have been. The circumstance that he was not is a potent factor tending to show that no such special provision was made for him.

For these reasons, I conclude that complainant has not established her second proposition. So far as the evidence shows, there was never a time when the Morris brothers, or either of them, or the firm of Morris Bros. & Christensen, agreed to compensate Muir futher by paying him 1,000 shares of the stock of the Power Company; nor is it an established fact that any stock was set aside by Morris Bros. & Christensen to the Morris brothers, or either of them, for Muir, or for his use and benefit, and complainant, therefore, is not entitled to recover in this suit.

It is my opinion, gathered from the evidence at this trial, that Fred S. Morris intended to compensate Muir further for his services; but the matter, even under complainant's construction of the employment, was left entirely within the discretion of his employers. I believe that this purpose on the part of Morris continued until the opportunity presented itself for him to assist Muir in the purchase of the 1,000 shares of the Ivins stock, and that, Muir having realized $15,000 out

of that transaction, Morris considered that he was adequately compensated for all services rendered, and dismissed the idea of rendering him further or additional compensation beyond that.

The bill of complaint will be dismissed.

DEMAREST v. WINCHESTER REPEATING ARMS CO.

(District Court, D. Connecticut. April 12, 1919.)

No. 1499.

1. EQUITY ⟸343—ANSWER UNDER OATH—PROBATIVE FORCE—WAIVER OF VERIFICATION.
   Answer under oath has no less probative force because verification thereof was expressly waived by the bill.
2. EQUITY ⟸341—ANSWER UNDER OATH—PROBATIVE FORCE.
   Verified answer, so far as responding to charges of the bill, has probative force, if verification be on personal knowledge, but otherwise if the answer professes not to be on personal knowledge.
3. FRAUD ⟸50—PRESUMPTION.
   Fraud is not presumed, and cannot be imputed from circumstances consistent with honesty, but only from a showing of facts not fairly or reasonably reconcilable with fair dealing and honesty of purpose.
4. FRAUD ⟸58(1)—PRIMA FACIE SHOWING—REBUTTAL.
   A prima facie case of fraudulent intent, made by showing of facts and circumstances, loses its force on a showing of other facts and circumstances sufficient to rebut and overcome it.
5. INJUNCTION ⟸155—PRELIMINARY INJUNCTION—REFUSAL ON GIVING OF BOND.
   To safeguard the interests of plaintiff stockholder seeking, on the ground of fraud, to enjoin reorganization of defendant corporation, and at the same time to allow it to proceed with reorganization, the bill being met by verified answer and affidavits, and plaintiff's motive appearing to be to secure for himself the full value of his stock, one of his prayers being that the court ascertain its value and decree that it be paid to him before performance of the organization agreements be permitted, *held*, that preliminary injunction will be denied, and temporary restraining order dissolved, on condition of defendant filing a bond in the sum alleged by plaintiff to be the value of the stock, conditioned that it be agreed that the court grant such prayer and ascertain the value and order the amount paid to plaintiff.

In Equity. Suit by Elmer W. Demarest against the Winchester Repeating Arms Company. On motion for preliminary injunction. Denied on condition.

Elmer W. Demarest, of Jersey City, N. J., in pro. per.

Allan McCulloh, of New York City, and James E. Wheeler, of New Haven, Conn., for defendant.

THOMAS, District Judge. Whether the plaintiff is entitled to an injunction pendente lite under the allegations of the bill, the answer thereto, and the accompanying affidavits of various witnesses, respecting those allegations, is the question presented and to be here decided. A temporary restraining order was granted on February 18,

1919, upon the filing of the bill, and the plaintiff is now seeking a preliminary injunction under the provisions of equity rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix).

The bill, answer, and affidavits are all verified, although the verification of the answer was waived by the plaintiff. The allegations of the bill are set forth at great length, but the material allegations may be fairly summarized as follows:

(1) The incorporation, powers, and capital stock of the defendant company and the citizenship of the parties are set forth. It is alleged that the plaintiff is the owner of 38 shares of the capital stock of the defendant company, which formerly, from the death of William M. Bishop, about the year 1902, were registered on the books of the defendant company in the name of his widow, Rose E. Bishop, as executrix of his estate, and that 5 of said shares have been owned by the plaintiff since 1916, and the remaining 33 shares were transferred into his name in the month of October or November, 1915, since which time the plaintiff has been trustee of 11 of such shares for Rose E. Bishop, individually, of 11 of such shares for Rose E. Bishop, trustee for William E. Bishop, and of the remaining 11 of such shares for Rose E. Bishop, trustee for Harold B. Bishop. It is further alleged that since its incorporation the defendant has erected a large plant, consisting of buildings, machinery, and equipment, in New Haven, where it has for many years past conducted a large and remunerative business; that prior to the year 1915 the annual statement of its financial condition showed that in addition to its capital it had an equity in its plant and other assets and surplus amounting to more than $15,000,000; that between the years 1900 and 1915 it paid large dividends, varying in amount and averaging about 50 per cent. a year; and that the stock of the company was during said period considered a high-grade investment security and frequently sold as high as $1,400 a share, and during the year 1915 it sold in the open market at $3,200 a share, which sum was offered to the plaintiff for said 38 shares of stock, but said offer could not be accepted, and sale and delivery made to the bidder, because of the refusal of the defendant company to transfer said stock.

(2) It is alleged that late in 1914 or early in 1915 the defendant company entered into contracts with the Russian and English governments for the manufacture of munitions for the European war, and in order to furnish materials contracted to be sold thereafter and until the termination of said war, ran at full capacity, built new buildings, and installed new machinery for the purpose of performing said contracts. It is further alleged that the financial statement presented at the annual stockholders' meeting in February, 1915, showed that, in addition to its capital of $1,000,000, the defendant had a surplus account amounting to $15,842,312.

(3) It is alleged that the financial statement presented at the annual stockholders' meeting in February, 1916, showed gross assets of $40,016,574 and that after charging off $3,154,137 for depreciation of plant, there remained a surplus of $18,332,925 over and above the capital stock of $1,000,000, showing an increase of $2,500,000 for the

said year. It is also alleged that the president, in the report given by him, stated that the special war business, exclusive of regular business for 1916, already contracted for, amounted to $48,176,743, that the earnings for 1915 amounted to $4,600,000, and that it was estimated that the profits for 1916 upon special war orders would amount to $7,000,000.

(4) It also alleged that the printed financial statement mailed to creditors in February, 1917, showed gross assets of $42,458,262.50 and a surplus of $18,343,487 over and above the capital stock of $1,000,000, and that notwithstanding the fact that additions had been made to the plant during 1916 it was carried in said statement at $2,000,000 less than in the statement of the previous year. It is further alleged that the financial statement for 1916 was certified by Arthur Young & Co., certified public accountants, and that attached thereto was a report of the directors, stating that during 1916 the defendant had borrowed $16,000,000 secured by its 5 per cent. notes for that sum, payable in March, 1918, and that with the proceeds of such loan there had been paid indebtednesses of the defendant amounting to $8,250,000, and that among the directors signing said report appeared the name of J. E. Otterson, who is alleged to be the president of the company, and also the name of C. S. Sargent, Jr.

(5) It is further alleged that the printed financial statement mailed to stockholders in February, 1918, showed that the gross assets of the defendant were $37,806,341, including a net balance on valuation of buildings of $14,493,796, after deducting depreciation charges; that the net value of the plant, machinery, and tools had been decreased by $3,200,000 from 1916, and the inventory decreased by $8,500,000 during 1917; that the surplus of $18,343,487 in the profits had been adjusted to $17,990,000, and that after said adjustment a surplus of $18,586,218 over and above the capital stock of $1,000,000 was shown, being an increase over the previous year. It is also alleged that the gross profits for 1917 had been $4,617,847 and the net profits $2,979,-048, after charging off $1,564,789 for depreciation and reserve in excess of said adjustment. It is also alleged that this financial statement contained a special report, signed by nine directors, including J. E. Otterson, who is again described as president, and C. S. Sargent, Jr., director of both the defendant company and Kidder, Peabody & Co., which stated that the defendant was in a financial condition to pay at maturity in March, 1918, one-half of the $16,000,000 in notes issued in 1916, and that new notes for the remaining $8,000,-000 would be issued on March 1, 1918, payable March 1, 1919, and called attention to the fact that the inventory had been reduced by $8,500,000; cash, accounts receivable, and securities increased by $7,562,000, in addition to retiring advances on contracts of $5,782,000; that the defendant's commercial business was in a very satisfactory state; that in addition to the regular commercial business the defendant held contracts for the United States government to the value of over $50,000,000 on a cost and percentage basis, which were proceeding satisfactorily; and that from its present outlook the gross business for the fiscal year should be between $40,000,000 and $50,-000,000.

(6) It is alleged that since 1915 the defendant company has paid no dividends; that the statements above referred to showed that after liberal depreciation and amortization charges the plant was carried at nearly $5,000,000 less on January 1, 1918, than in the statement of two years prior thereto; that the inventory within said two years had been decreased nearly $2,000,000; that after adjustment charges the surplus of the defendant was nearly $3,000,000 more than that appearing in the statement of January 1, 1918; that the plaintiff had been unable, as shown by correspondence referred to in the complaint, to ascertain the total cost of the enlargement of the plant and machinery and the amount charged off to depreciation and amortization since the beginning of the European war; that statements from the officers of the defendant company referred to in the complaint at all times until recently had represented that the defendant was doing a satisfactory business at a fair profit, was liberally charging off for depreciation and amortization, was able to pay when they became due $8,000,000 of its notes out of its profits, and would, except for the uncertainty of the federal tax, be in a position to retire the remaining $8,000,000 in notes in March, 1919; and that the defendant's financial condition appeared better and no worse than at the outbreak of the European war.

(7) It is further alleged that the plaintiff received on or about October 20, 1918, a letter dated October 7, 1918, signed by T. G. Bennett, president of the defendant company, in which letter the plaintiff was requested, "if this [the plan] meets with your approval," to deposit his stock with the Union & New Haven Trust Company as a depository for the purpose of carrying out a certain reorganization. Inclosed in this letter was a printed circular letter, dated September 25, 1918, announcing with all gloom and pessimism the necessity for a reorganization, which circular letter is marked Exhibit B. Therein the plan is outlined, and it is stated: That it was necessary for the company to raise additional funds in order to embark into a new line of business. That a portion of the $8,000,000 of notes maturing March 1, 1919, would be paid out of the earnings and surplus. That a syndicate had been formed to finance the company. That J. E. Otterson, then vice president, but now president, of the company, would continue in the management of the company. That Louis K. Liggett, president of the United Drug Company, would associate himself with the undertaking. That on August 7, 1918, the committee of the directors had been appointed to consider a reorganization, and recommended that a new company be formed to take over the property and business of the defendant company and issue stock as follows:

"The original issue of capital stock of the new company to be $10,000,000 of 7 per cent. cumulative first preferred stock, $2,000,000 of 6 per cent. noncumulative second preferred stock, and $1,000,000 of common stock, all of said stock to be issued as fully paid for the assets of the present company, subject to its liabilities, and the sum of $3,500,000 in cash, which is to be contributed as new capital."

That the common stockholders should have the voting power, unless the dividends upon the first preferred stock were in arrears to the

extent of more than 7 per cent., in which case the first preferred stockholders should have full voting powers, subject to the redemption of their stock. That $7,500,000 of the first preferred be given to the stockholders of the defendant company in exchange for their stock, and that each shareholder of the defendant company should receive 7½ shares of the first preferred stock of the new company in exchange for each share held by him in the defendant company, and that the—

"balance of the original issue of the new company, viz. $2,500,000 of first preferred stock, $2,000,000 of noncumulative 6 per cent. second preferred stock, and $1,000,000 of common stock, will be delivered to Kidder, Peabody & Co. and their associates upon completion of the arrangements for the contribution of $3,500,000 of new capital stock in cash."

Plaintiff also alleges that he was informed by an officer of the defendant company that the new business contemplated by the officers and influences dominating them were somewhat speculative and that Kidder, Peabody & Co., or their associates, were to receive the sum of $2,000,000 for services in financing said scheme. The plaintiff charges that, by the letter—Exhibit C—and said proposed agreement, it is the intention to pay Kidder, Peabody & Co. and their associates the sum of $2,000,000 for their services, and that Kidder, Peabody & Co., or their associates, were, in return for $3,500,000, to receive $2,500,000 of the first preferred, $2,000,000 of the second preferred, and all of the common stock of the proposed company with the exclusive voting power, management, and control thereof, and that this was equivalent to giving to them the entire issue of the common stock and $1,000,000 of the second preferred stock in payment of their services; and that the stockholders of the defendant company would receive $7,500,000 for the entire assets of the defendant company, amounting to upwards of $20,000,000, their stock, and the management of the company.

(8) The plaintiff alleges: That he wrote a letter, dated October 21, 1918, to Mr. Bennett, the president of the defendant company, a copy of which he annexed to the complaint, marked Exhibit D, making certain inquiries, which inquiries he charges have not been answered. That he received in reply thereto from the president a letter, dated November 2, 1918, a copy of which is annexed to the complaint, marked Exhibit E, together with an accompanying "Memorandum in Regard to Reorganization of Winchester Repeating Arms Company," a copy of which is annexed to the complaint and marked Exhibit F, which recited the plan of reorganization and explained that the plant had been enlarged to the extent of $7,167,000, that the sum of $7,733,000 had been expended for tools and machinery, that the company had borrowed and repaid $2,000,000, in addition to the $8,000,000 on notes retired, and that but for the federal tax the company would probably be able to retire in March, 1919, the remaining $8,000,000 in notes. There also accompanied this letter a photographic financial statement as of June 30, 1918, which is marked Exhibit G. This statement shows that the capital stock is $1,000,000, and the surplus

$20,765,958.52, which figures, it is alleged, give a valuation to each share of stock now held by plaintiff of $2,176.59.

It is further alleged that on November 8, 1918, plaintiff wrote a letter to Thomas G. Bennett, a copy of which is annexed to the complaint and marked Exhibit H, and on November 26th received a reply which is marked Exhibit I, in which Mr. Bennett suggested that plaintiff call on Mr. Sargent, who was a member of Kidder, Peabody & Co., and a director in the defendant company.

It is also alleged that the plaintiff, in the early part of December, received a copy of the circular letter dated December 3d, from the committee to the stockholders, which is annexed to the bill and marked Exhibit J, inclosing a copy of the circular letter from Kidder, Peabody & Co. to the stockholders, dated the same day, which is also annexed to the bill and marked Exhibit K, which letter offered an amendment to the previous stockholders' deposit agreement and contained the following alternative propositions:

(a) That for each 7½ shares of first preferred stock of the new company he might obtain one share of common stock of the new company in exchange for 1½ shares of the defendant company, or that

(b) For each share of stock of the old company, the stockholder might subscribe $350 to the syndicate, and be entitled to share proportionately in the securities of the new company in the manner following: Two and one-half shares first preferred stock, two shares of second preferred stock, and one share of common stock for each $350 subscribed. These options were referred to as A and B.

(9) This paragraph of the bill alleges at great length the plaintiff's version of the interview held on December 19, 1918, with J. E. Otterson, president, and C. S. Sargent, Jr., both directors in the defendant company, Mr. Sargent being also a director in Kidder, Peabody & Co., in which the plaintiff offered to sell his stock for $2,300 per share which "would apparently be the book value of the said stock as nearly as the complainant could ascertain the earnings for the last six months of the year 1918. To this offer the said Otterson and Sargent offered to pay no more than $750.

(10) The plaintiff refers to a letter written by him on January 29, 1919, to Mr. Otterson, a copy of which is annexed to the complaint and marked Exhibit L, and to the reply of counsel thereto dated February 5, 1919, a copy of which is annexed to the complaint and marked Exhibit M. The plaintiff also sets forth his version of his subsequent telephone conversation with Mr. Sargent. It is also alleged that—

"It is obvious from the statement of the said Sargent and the statement contained in Exhibit M that it is the intention of the directors of the defendant company, the said Kidder, Peabody & Co., their associates, and the said so-called syndicate, to form a new company to oppress, cheat, and defraud the stockholders of the defendant company by minimizing the value of the stock, to manage the defendant corporation according to the desires of the new company solely for the 'benefit or enhancement of the value of the shares of the common stock of the old company held by the new company, or for such other purpose of the new company as the board of directors

thereof may consider desirable,' and to 'impose upon the shareholders of the defendant company, the debts and obligations of said business, including that of the contemplated company and divert the profits to be obtained therefrom to the stockholders of the new company to the exclusion of the stockholders of the defendant company.'"

(11) It is alleged that the annual meeting of the stockholders was appointed to be held at the office of the defendant company in New Haven on February 19, 1919, and the plaintiff charges that it was the intention of defendant, Kidder, Peabody & Co., and Messrs. Otterson and Sargent to take and procure such action at the meeting as would effectuate the proposed plan of reorganization for stock control, to create additional obligations of the defendant payable in preference to the value of the present capital and surplus to stockholders, to permit Kidder, Peabody & Co. to collect either directly or indirectly from the defendant or its assets said unconscionable sum of money, and to elect a servient board of directors to carry out said inequitable program and diminish or destroy the value of the holdings of the stockholders who have not acquiesced in said reorganization plan.

(12) In this plan, set forth at great length, are the allegations respecting the fraud proposed to be perpetrated by Otterson, Sargent, and others against the plaintiff, the details of which are here omitted, but the direct charge of fraud is set forth in part as follows:

"Complainant charges that the action already taken and that contemplated by the officers of the defendant company, Kidder, Peabody & Co., and their associates are *unjust, inequitable, and an obvious and transparent attempt to defraud* the stockholders of the defendant company, who have not assented to said reorganization plan, that, if successful, would give the said syndicate stock of the old company worth $2,176 per share on June 30, 1918, exclusive of profits made since that date and after liberal depreciation and amortization charges, for a venturesome stock worth no more than $750, without future prospects of profit, and without the right of management."

Respecting the three plans submitted, it is alleged with reference to the third plan that it "is a bold plan of an outsider, who is a creditor of the defendant company, to an extent where his security is not jeopardized *to steal from and defraud* the stockholders of the defendant company * * * upon oppressive and inequitable terms," and then follow many allegations from which the conclusion is drawn that the whole proposition generally is a scheme to defraud the 3 per cent. of the stockholders who have not entered the stock deposit agreement, and asserting that the $2,000,000 to be paid Kidder, Peabody & Co. and their associates, whether in stock or in cash, is an unconscionable sum, usurious, and unjust, and a fraud upon the stockholders of the defendant company, who refuse to enter this agreement.

The prayer for relief briefly is as follows:

(1) That a subpœna issue and that the defendant answer the allegations of the bill, "an answer under oath being hereby expressly waived."

(2) That the defendant account for all money, assets, and property owned by it at the present time, and render an account of the true

value of defendant's plant as of July 1, 1914, with debts then owing and an account of profits and losses since July 1, 1914, to the present time.

(3) That defendant render an account of all money expended by it since July 1, 1914, for the enlargement of the plant by the erection of buildings, purchase of lands, acquisition of new machinery, tools, and equipment, and the sums charged off for depreciation.

(4) That the defendant exhibit to plaintiff the minutes and records of the board of directors to show what acts have been done with respect to the adoption or acceptance of the plans of reorganization.

(5) That the court decree that the proposed plans of reorganization referred to in the bill and the exhibits and as contained in the agreement of September 24, 1918, and amended by the letters of November 26, 1918, and January 25, 1919, are fraudulent, usurious, inequitable, and unconscionable contracts and an illegal disposition of the assets of the defendant corporation and the rights of such stockholders as have not assented to the agreement, and—

"that the court ascertain the value of your orator's stock, and decree that the said value shall be paid to him before the defendant enter into said agreements or permit the same to be performed."

(6) That the court decree the actions of Otterson, President of the defendant company, and C. S. Sargent, Jr., a director thereof, are fraudulent and inimical to the interests of the stockholders, and that all acts by them be declared null and void.

(7) That the court appoint an interlocutory receiver of the assets of the defendant company.

(8) That the defendant, its officers, and agents be, during the pendency of this suit and thereafter, perpetually enjoined and restrained from any and all acts of every kind and nature touching the general proposition here assailed.

The answer of the defendant may be summarized briefly as follows:

All formal allegations respecting incorporation, residence of the parties, and that the 38 shares of stock of the plaintiff were transferred on the books of the company on October 28, 1915, are admitted.

All allegations respecting the sending and receipt of the letters by the defendant to the plaintiff and from the plaintiff to defendant, as set forth in the different paragraphs of the bill and therein referred to as Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, and N, are admitted.

Many allegations made by the plaintiff respecting the figures involved in the transactions discussed in the bill this defendant alleges are erroneous, and points out the corrections, claiming that the sum total of those errors and discrepancies is approximately $11,000,000.

All allegations made by plaintiff respecting the inferences or conclusions drawn from the financial statements, letters, stockholders' agreements, and all allegations respecting the effect of the proposed plans, each and all of them, which are detailed at great length in the bill, the defendant denies.

All allegations charging deceit, fraud, theft, illegality, usury, conspiracy to cheat and defraud, oppression, and inequity are denied.

Without attempting to detail all the positive and negative allegations contained in the answer, I think the matters above referred to fairly present the tenor of the answer, and thus disclose the issue between the parties.

Thus at considerable length I have outlined the main features of this case, in order that the material claims of the parties may be fully presented, without in the least denying to either party full consideration of everything that has been alleged pro and con in this controversy.

From the bill and answer the whole issue may be condensed into a single thought, which is succinctly expressed in a single question, to wit:

Does this defendant corporation, its directors, and officers propose a plan of reorganization which is conceived in fraud and chicanery, with the manifest intent of cheating and defrauding this plaintiff out of his legal rights as a stockholder, and destroying the value of his property rights?

If the proof presented justifies an affirmative answer to the question propounded, then the prayer for an injunction should issue; otherwise, it should be denied.

[1, 2] But at the very threshold of this long discussion certain legal principles are invoked in behalf of this defendant, which, if sound, may preclude a discussion of the merits of the controversy.

The defendant's answer, denying all the material allegations of the bill, is verified, and because of this the defendant relies upon the rule laid down by Judge Morrow, of the Circuit Court of Appeals for the Ninth Circuit, sitting as a District Judge, in Water Co. of Tonopah v. Public Service Commission of Nevada et al. (D. C.) 250 Fed. 304. The court said:

"The well-established rule is that on such an application for a temporary injunction, if an answer under oath has been filed denying the equities of the bill, the temporary injunction will not issue, for the reason that the sworn answer is evidence on behalf of the defendant, and rebuts the allegations of the bill, and such allegations are therefore left at least doubtful."

But the plaintiff contends that this rule cannot apply because its strict application would strip the court of jurisdiction and that filing an answer formally verified to accomplish such a purpose is preposterous and further insists that an examination of the case of Water Co. v. Public Service Commission of Nevada, supra, will show that it does not support the argument.

Before deciding this question, we must for a moment recall that the verification to the answer was waived, but in spite of that the defendant chose to file a verified answer. In addition, it appears that the proof offered in support of the bill is the affidavit of the plaintiff alone, supported by one other witness, and he only as to a certain conversation. Not only is the defendant's answer verified, but the defendant has put in evidence, to overcome the proof contained in the plaintiff's supporting affidavits, the testimony of some

ten witnesses, whose testimony is offered to deny the allegations contained in the bill and the plaintiff's affidavit.

Upon this point the plaintiff contends that, where a bill calls for an answer under oath, the latter is evidential, and can be rebutted by the evidence of two or more witnesses, or that of a single witness and a preponderance of proof, and that this rule is not in harmony with the rule in the Water Co. Case, supra; but where the oath is expressly waived, as here, a verified answer has no probative force.

In Clements v. Moore, 73 U. S. (6 Wall.) 299, 18 L. Ed. 786, the Supreme Court held that a complainant in chancery cannot, by waiving a verification on oath of the defendant's answer, deprive such answer, when made with such verification of its ordinary effect. On page 314 of 73 U. S. Mr. Justice Swayne, speaking for the court, said:

"The complainants waived an answer under oath by this defendant. Her answer is nevertheless verified by an affidavit. This was proper. It was her right so to answer, and the complainants could not deprive her of it. Such is the settled rule of equity practice, where there is no regulation to the contrary."

In Woodruff v. Dubuque & S. C. R. Co. (C. C.) 30 Fed. 91, it was held that the waiver by a complainant in equity of an answer under oath does not take away the right to answer under oath, and such answer, so far as responsive to the bill, must, upon motion for a preliminary injunction made upon bill and answer, be taken as true, and on page 93 Judge Wheeler said:

"The bill charges that it is so done. The answer denies this, and in this respect it is directly responsive to the bill. By the law an answer so responsive is evidence, which must be overcome by other evidence or stand. It is said that the orator waived an answer under oath, as the rules in equity provide may be done. This is not understood to take away the right to answer under oath, and, when a defendant does so answer, the effect of the answer as evidence would appear to rest upon the law of the subject, which the rules of court do not appear to attempt to change. The answer must therefore, in this respect, for the purposes of this motion, be taken to be true."

So the question naturally follows as to whether the answer under oath has probative force. It is well-settled practice in equity that, if the verified answer professes not to be on personal knowledge, it has no probative force, and merely puts the matter in issue. But if the verification be on personal knowledge, and is responsive to the charges contained in the bill, as here, then the rule is that the answer is evidential, has probative force, and is more than a simple pleading putting the facts well pleaded in issue. Nor do I find anything in the new rules indicating anything which changes the pre-existing law as to the probative force of a sworn answer in an equity suit.

In Latta v. Kilbourn, 150 U. S. 524, on page 541, 14 Sup. Ct. 201, on page 208 (37 L. Ed. 1169), Mr. Justice Jackson said:

"Under the well-settled rules of equity pleading and practice, his answer [which was under oath] must be overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances."

Vigel v. Hopp, 104 U. S. 441, 26 L. Ed. 765, was a suit in equity to set aside a deed. There were numerous allegations of fraud in the bill. The answer denied all the allegations of fraud, and the court held that, where the answer is responsive to the allegations of the complainant's bill, they must, to entitle him to relief, be sustained by the testimony of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to the testimony of another witness. See, also, 2 Story, Equity, § 1528. This ruling was followed in Union Railroad Co. v. Dull, 124 U. S. 173, 8 Sup. Ct. 433, 31 L. Ed. 417, and in Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678, and in Kennedy et al. v. Custer et al., 174 Fed. 972, 98 C. C. A. 584.

"And it is a well-settled rule that, when the sworn answer fully and unequivocally denies all the material allegations of the bill upon which complainant's equities rest, the injunction will be dissolved." High on Injunctions, § 1505.

In addition to the sworn denials in the answer to all the allegations of fraud, to say nothing of many of the less important allegations, there are in this record the affidavits of all the members of the stockholders' committee, the affidavits of the officers and directors cumulatively denying many of the allegations based upon the financial transactions of the company, all of the allegations respecting the inferences drawn by the plaintiff respecting the purport and intent conveyed in the stockholders' agreement and decisively denying all of the direct allegations of deceit, fraud, usury, theft, oppression, and conspiracy, as well as denying all allegations from which inferences and conclusions may be drawn respecting the fraud and chicanery charged in the bill.

So that we have in the instant case a situation, so far as proof is concerned, similar to that presented in Water Co. of Tonopah v. Public Service Commission of Nevada, supra, as will appear if we read in full what Judge Morrow said. I quote fully. He said:

"I do not think the *evidence is sufficient* to justify the court in granting the temporary injunction. *It is by no means clear* that the water rates prescribed by the commission in this case will be confiscatory. On the contrary, *the charge made in the bill that such would be the case seems to me to be fully rebutted by the answer and its supporting affidavits.* The well-established rule is that *on such an application for a temporary injunction,* if an answer under oath has been filed denying the equities of the bill, the temporary injunction will not issue, for the reason that the sworn answer is evidence on behalf of the defendant, and rebuts the allegations of the bill, and such allegations are therefore left at least doubtful. That is the situation here. The evidence on behalf of the complainant is not sufficient to overcome the evidence that has been submitted on behalf of the defendants."

The very words of that opinion may be read upon the bill, answer, and affidavits offered by the plaintiff and by the defendant in this case. See, also, Home Insurance Co. v. Nobles (D. C.) 63 Fed. 642; City of Sacramento v. Southern Pacific Co. (C. C.) 155 Fed. 1022; St. Louis, K. C. & C. Ry. Co. v. Dewees et al. (C. C.) 23 Fed. 691; Woodside v. Tonopah & Goldfield R. Co. (C. C.) 184 Fed. 358; Star Co. v. Colven Pub. House (C. C.) 141 Fed. 129; Stevens v. Missouri, K. & T. Ry. Co., 106 Fed. 771, 45 C. C. A. 611; Blakey et al. v. National Mfg. Co. et al., 95 Fed. 136, 37 C. C. A. 27.

Hence I must conclude upon such abundant authority that the defendant's contentions in this aspect of the case are sound.

[3, 4] But as the rights of the plaintiff are very substantial, and lest an injury may result by this ruling, I have concluded, briefly as possible, to discuss and decide the questions here raised on the merits of the controversy, and for this purpose I shall confine the discussion to the sweeping charges of fraud alleged against the defendant, its officers, and directors, and in order to reach a conclusion upon the fraud alleged, and whether the proof justifies the intervention of the extraordinary equitable remedy of injunction, it is sufficient to apply a few of the fundamental principles of law respecting fraud.

In the case at bar fraud is the gist of the whole action. Aside from the other proposition of law, just decided, the plaintiff clearly relies upon his charges of fraud to justify his application for, and the granting by the court of, a temporary injunction.

The universal rule is that fraud is never presumed. The legal presumptions are in favor of honesty and fair dealing. There can be no imputation of fraud when the circumstances and facts upon which it is based are consistent with honesty and purity of intention, and while, as above stated, the general rule obtains that fraud is not presumed as a matter of law, yet it may be inferred from proof of certain facts. No arbitrary or inflexible rule can be given as to the quantum or degree of evidence required to raise a presumption of actual fraud. The rule has been thus stated:

"The proof, however, must be satisfactory. It must be so strong and cogent as to satisfy a man of sound judgment of the truth of the allegation. It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference of a fraudulent intent may be drawn. And an allegation of fraud is against the presumption of honesty; it requires stronger proof than if no such presumption existed. As it is against a presumption of fact, perhaps even a slight one, it requires somewhat more evidence than would suffice to prove the acknowledgment of an obligation or the delivery of a chattel. It is not necessary, however, that the fraud should be proved beyond a reasonable doubt. Issues of fact in civil cases are determined by a preponderance of the evidence, and the rule applies as well to cases in which fraud is imputed as to any other."

A fair rule is that when the plaintiff makes proof of facts and circumstances which not only cast a suspicion on the transaction, but show a state of facts which cannot be fairly or reasonably reconciled with fair dealing and honesty of purpose, he has then overcome the presumption of purity of intention, and has made a prima facie case. As fraud may be inferred from facts and circumstances proved, it is the rule that, when such facts and circumstances are sufficient to make a prima facie case of fraudulent intent, they may be taken as conclusive evidence of such intent, unless met by proof of other facts and circumstances sufficient to rebut and overcome the prima facie case already made.

Even if we concede, arguendo, that the plaintiff's proof casts a suspicion on the transaction, that he has established a prima facie case, and that his construction of the intent and purposes of the officers and directors of the defendant company is fraudulent, nevertheless the de-

fendant has clearly met the obligation imposed upon it by the rule, for it has met the plaintiff's proof by other facts and circumstances sufficient to rebut and overcome the plaintiff's prima facie case.

The plaintiff develops a situation and marshals facts and circumstances in the bill and by his own affidavit, as well as in an able argument, which he insists proves fraud—from which fraud must be inferred. Without detailing them, for they are many and set forth at great length, he says that no other inference could be drawn, but an inference that the contemplated action of the officers and directors was conceived in an attempt to destroy the property rights of the plaintiff, and to be executed in furtherance of the willful and malicious design already formed.

But the affidavits of the defendant emphatically deny such inferences and such intentions. The facts pleaded, the defendant says, do not justify any other conclusion than a fair and honest effort to meet, in a fair and honest way, the present financial situation, in which the defendant finds itself as the result of the signing of the armistice, and that the financial reorganization can in no way injure the property rights of the plaintiff, because the new corporation proposed to be organized is a holding company, which shall take and hold the stock of those who enter the stockholders' agreement and which now amounts to 97 per cent. The defendant further says that such holding corporation, so far as the operations of the defendant company are concerned, will be dependent for its income from its stock holdings upon the prosperity of the defendant corporation, and such prosperity will be enjoyed by the 3 per cent. of stockholders who do not enter the agreement as well as by the stockholders of the proposed new corporation, which will hold the 97 per cent. of the stock of those who enter the agreement. Under such a plan the defendant company does not part with its assets, so that the 3 per cent. of stockholders remain the owners of the assets of the defendant company in proportion to their stock holdings. This conclusion is sound.

The plaintiff contends that, as certain persons are both directors in the defendant company as well as interested in or members of the bankers' firm which is to furnish the cash capital required for the assistance of the defendant, the only inference to be drawn is that they are personally bound to gain in a financial way at the expense of the plaintiff and others, as is conclusively shown by the fact that Kidder, Peabody & Co. are to receive $2,000,000 in stock as its compensation for supplying $3,500,000 in cash to meet pressing obligations, and that Mr. Sargent, at least, is a member of that company, as well as a director of the defendant company.

But the defendant's answer to that is that Mr. Sargent withdrew from the meeting of directors when the vote was taken and took no part in the discussion concerning it. The entry of Kidder, Peabody & Co. into the finances of the defendant occurred over two years ago, when the company was in financial straits as the result of losses in war orders with the British government, and for the vast sums of money loaned the company it was natural that Kidder, Peabody & Co. should have a representative on the board of directors.

While Mr. Sargent's presence there is no fraud, and no evidence of fraud, in the present situation, it unfortunately gives rise to such a claim when it appears that his firm is to receive $2,000,000 in stock for its fee, which amount this court cannot, upon this hearing and at this time, without further evidence, hold to be an unconscionable sum, for the value of the stock at a future time must be first determined, and the services to be rendered are at present, so far as either quantum or value is concerned, indefinite. I think it may fairly be said even now to be a very large fee, but whether it is unconscionable, which it must be to justify an injunction to prevent the reorganization plan from being carried out, I cannot upon the proofs at this time so hold. At final hearing on the merits this question may then be decided.

Without attempting to answer all the claims advanced by both sides to this controversy, upon the whole case the attitude of the court may be stated in a single sentence. I think the record presents too many elements of doubt to warrant the issuing of a preliminary injunction.

[5] But it may be that there are some equities which the plaintiff may be able to establish at final hearing, and my concern is to protect those equities, and at the same time allow this defendant to be relieved of the temporary stay already granted, that it may proceed with its reorganization plan.

A serious question arises concerning the plaintiff's remedy at law. I am not clear but that he could recover at law. But without deciding that question, and for the purpose of ascertaining how he may be protected, let us revert to the last part of the fifth paragraph of the prayer for relief, wherein the plaintiff prays:

"That the court ascertain the value of your orator's stock, and decree that the said value shall be paid to him before the defendant enter into said agreements or permit the same to be performed."

This prayer for relief, doubtless, is predicated upon part of the allegations in the bill found in paragraphs 9 and 12, which, so far as are here pertinent, allege in substance that on December 19, 1918, plaintiff had a conference with J. E. Otterson, president, and C. S. Sargent, Jr., a director, of the defendant company, and at said conference said Otterson and Sargent importuned plaintiff to deposit his stock under the proposed plan of reorganization, or to accept $750 per share for his stock, both of which propositions the plaintiff declined, but did offer to sell his stock for $2,300 per share, which he then claimed to be the apparent book value, which price Otterson and Sargent declined to pay, and offered no more than $750. It is also alleged that the stock held by plaintiff was on June 30, 1918, worth $2,176, exclusive of profits made since that date, and that $2,176 represents the real value of the stock, which amount the plaintiff has indicated a willingness to accept.

Without imputing to the plaintiff any motive except the laudable one of endeavoring to secure for himself the full value of his stock in this company, it is apparent, from some of the allegations in the bill and the prayer for relief, that such a disposition of the matter is the goal toward which he is striving—at least one of the goals. With that purpose in view, I think the interests of the plaintiff are prop-

erly and well safeguarded, though perhaps the equities may not be preserved, if I conclude that the motion for the preliminary injunction be denied, and the temporary restraining order heretofore granted on the filing of the bill be dissolved, upon condition that the defendant file a bond in the sum of $83,000, which amount represents in round figures the value of plaintiff's 38 shares of stock at $2,176, conditioned that the plaintiff agree that the court grant that part of the prayer for relief respecting the value of the plaintiff's stock, and upon proper proceedings ascertain the value of the plaintiff's stock, and order the defendant to pay to the plaintiff such amount as shall ultimately be adjudged its fair value, and, for the purpose of carrying out the intent of this suggestion, the order of the court denying the plaintiff's motion, filed March 13, 1919, for an inspection of the books of the defendant company, is revoked, and the motion granted.

When the defendant company files with the clerk of this court written assent of its willingness to file a bond, or give proper security in the sum of $83,000, the motion for preliminary injunction will be denied, and the temporary restraining order heretofore granted on the filing of the bill will be dissolved; and it is

So ordered.

In re STAR SPRING BED CO.

(District Court, D. New Jersey. April 18, 1919.)

1. BANKRUPTCY ⟸303(3)—PREFERENCE—INSOLVENCY—EVIDENCE.
The amount realized from sale of assets by the receiver or trustee in bankruptcy, while not conclusive as to the value of the assets, is evidence thereof, and where the liabilities greatly exceeded such amount and there was no evidence of change in the bankrupt's condition, it justifies a finding of insolvency, when a transfer was made the day before petition was filed.

2. BANKRUPTCY ⟸165(4)—PREFERENCE—TAKING NEW SECURITIES.
Where a bank, the day before an involuntary petition in bankruptcy was filed, surrendered notes held by it indorsed by the bankrupt in exchange for a note of the bankrupt for the same amount secured by assignment of accounts exceeding the amount of the note by $8,000, the transaction was not a mere exchange of securities, but was a transfer amounting to preference, if made with knowledge of insolvency.

3. BANKRUPTCY ⟸165(1)—"PREFERENCE"—EFFECT OF TRANSFER—"CLASS."
In the provision of the Bankruptcy Act, defining preference as a transfer which enables the creditor to obtain a greater percentage than other creditors of the same class, "class" refers to the four classes of creditors specified in section 64 (Comp. St. § 9648), tax creditors, creditors for wages, creditors entitled by law to priority, and general creditors, and secured general creditors are in the same class as unsecured creditors.

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

4. BANKRUPTCY ⟸166(3)—PREFERENCE—KNOWLEDGE OF CREDITOR—INSOLVENCY OF DEBTOR.
That a bank, to whom a bankrupt transferred accounts the day before the petition was filed, knew that the bankrupt had overdrawn his account, that he had deceived the bank as to securities held by it, and that the transaction was handled for the bankrupt by an attorney, and there-

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after the bank's officers reopened its books and kept its clerks during the evening to enter the transaction and send notice to the debtors of the assignment on that date, justifies the conclusion that the bank's officers believed the transferror to be insolvent.

5. BANKRUPTCY ⇐=298—PREFERENCE—RIGHTS OF TRUSTEE—LACHES.
A delay by the trustee in bankruptcy of several months after a claim is filed, in objecting to a claim as a preference, is not such laches as bars his right to relief, where he objected to the claim as soon as he knew it was filed, though in the meantime the statute of limitations may have run against securities surrendered by the creditor.

In Bankruptcy. Involuntary proceedings against the Star Spring Bed Company. On petition to review an order of the referee holding that a transaction with the Union National Bank did not constitute a preference. Exceptions to the order sustained, and claim expunged, unless the bank surrendered the preference.

See, also, 243 Fed. 957.

Nathan Bilder, of Newark, N. J., and Robert P. Levis, of New York City, for trustee.

McCarter & English, of Newark, N. J., for Union National Bank.

DAVIS, District Judge. On April 18, 1911, the Star Spring Bed Company, the bankrupt, was indebted to the Union National Bank, hereinafter called the bank, on account of discounts made by the said bank for the benefit of the bankrupt in the sum of $58,200. About $20,000 of this amount was represented by notes made by various persons in favor of the bankrupt and indorsed by it. The bank supposed that the said notes were business paper and represented business transactions between the bankrupt and its customers. On the said 18th day of April, after banking hours, at about 4 o'clock in the afternoon, Abraham Silberberg, an attorney representing the bankrupt, went to the bank and advised the president and cashier that the said notes were not business paper received by the company in the pursuance of its business, but were accommodation paper, and that the company desired to withdraw them (although they were not due, and would not be due in some instances for months), and to pay off the said notes with, or put in their place, a note payable on demand for $20,000, secured by certain accounts aggregating $28,000, due the company on its business transactions. The proposition was agreed to by the president and cashier, who delivered to Mr. Silberberg the said accommodation paper, and received from him the demand note for $20,000, and the said accounts which were assigned to the bank. On the following day, an involuntary petition in bankruptcy was filed against the company, and it was shortly thereafter adjudicated a bankrupt, and the assets thereof proved to be sufficient to pay only about 50 per cent. of the indebtedness of the said company.

On the last day that it could do so, the bank filed a claim for the unpaid balance against the estate in bankruptcy. The trustee objected to this claim on the ground that the bank had secured a preference in the before-mentioned transaction on the 18th day of April, and urged that the said claim should not be allowed by the

referee, unless the bank surrendered this alleged preference. The referee held that the transfer did not constitute a preference, that the transaction was a mere substitution or exchange of security, and that the bank, being a secured creditor, did not receive a greater percentage of its debt than other creditors of the same class, for there was no other secured creditor than the bank, and it was therefore in a class by itself. The order of the referee is before this court for review.

[1] In order to prevail, the trustee must establish the following four propositions: (1) That the transaction complained of was made within four months before the filing of the petition; (2) that at the time of the transfer the bankrupt was insolvent within the meaning of section 1 (15) of the Bankruptcy Act of July 1, 1898 (30 Stat. 544, c. 541 [Comp. St. § 9585]); (3) that the effect of the transaction operated as a preference to the bank, enabling it to receive a larger percentage of its debt than other creditors of the same class; (4) that the bank had reasonable cause to believe that the enforcement of the said transfer would effect a preference.

1. It is admitted that the transaction took place within four months of the filing of the petition. In fact, it occurred within 24 hours thereof.

2. The company was adjudicated a bankrupt on petition filed the day following the transaction complained of. The indebtedness of the bankrupt on that day was $126,616.61. The trustee has realized from all the assets of the bankrupt $69,000. The evidence does not show any change in the amount of the assets of the bankrupt between 4 o'clock on the 18th and the time of the filing of the petition on the 19th of April, 1911. The adjudication settles the question of insolvency on the 19th, at the time the petition was filed. That question is res judicata. The amount realized from the sale of assets by the receiver or trustee in bankruptcy may not be of the highest probative character as to the actual value of the assets; but it is of some value, and when no change is shown in the assets between 4 o'clock in the afternoon of one day and the following day, on which a concern is adjudicated a bankrupt, it is evidence that should be considered and which may justify the conclusion, in the absence of proof to the contrary, that the concern was insolvent at 4 o'clock on the previous day. Ridge Avenue Bank v. Studheim, 145 Fed. 798, 76 C. C. A. 362; s. c., 15 Am. Bankr. Rep. 132, 132 Fed. 951; Morris v. Tannenbaum, 26 Am. Bankr. Rep. 368; Grandison v. National Bank of Commerce, 231 Fed. 800, 145 C. C. A. 620, 36 Am. Bankr. Rep. 438; Clarion Bank v. Jones, 88 U. S. (21 Wall.) 325, 338, 22 L. Ed. 542.

The conclusion reached by the referee made it unnecessary that he find, as a fact, that the bankrupt was insolvent at the time of the transfer; but as I understand his language he did find that the company was insolvent at the time of the "transfer." He said:

"Although it has been held that a finding of insolvency on November 1st does not show insolvency on October 17th (Re Rome Planing Mill [D. C.] 96 Fed. 812), and that no legal presumption of insolvency on April 29th can be predicated upon an adjudication of insolvency on May 16th (Kimball v. Dress-

er [98 Me. 519] 57 Atl. 787), yet it seems to me that in this case, where the insolvency is established as of April 19th, and the transfer was made late in the day on April 18th, it is a fair presumption that the financial condition thus determined existed at the time of the transfer."

In my opinion, the conclusion of the referee is correct, and the bankrupt was insolvent at 4 o'clock on April 18, 1911, when the "transfer" was made.

[2] 3. Did the transfer constitute a preference? The test of a preference, under the act, is the payment, out of the bankrupt's property, of a larger percentage of the creditors' claim than other creditors of the same class receive. Swarts v. National Bank, 8 Am. Bankr. Rep. 677, 117 Fed. 1, 54 C. C. A. 387. The referee held that the bank did not receive a preference. "The transaction," said he, "was substantially that of an exchange of securities. The bank surrendered the obligations of third parties, upon which the bankrupt corporation was indorser, and received in lieu thereof the assignment of the accounts to secure a new note practically equal in amount to the notes surrendered. * * * A mere exchange of securities by which the position of the creditor is not proved to be bettered, cannot be considered a preference. Sawyer v. Turpin, 91 U. S. 114 [23 L. Ed. 235]; In re Noel [D. C.] 14 Am. Bankr. Rep. 715, 137 Fed. 694."

The facts of the two cases cited by the referee are quite different from those in the case at bar. In the first case cited, the debtor gave to his creditor a bill of sale of a frame building erected on leased ground, more than four months before the filing of the petition in bankruptcy, to secure the sum of $27,839. The debtor, therefore, had only a chattel interest in the property. The bill of sale "was understood by the parties to be a security for the debt due. It was in substantial legal effect, though not in form, a mortgage." Within four months of the bankruptcy, the creditor surrendered the bill of sale and received a mortgage on the same identical property. The court said:

"The mortgage covered the same property. It embraced nothing more. It withdrew nothing from the control of the bankrupt, or from the reach of the bankrupt's creditors, that had not been withdrawn by the bill of sale. Giving the mortgage in lieu of the bill of sale, as was done, was therefore a mere exchange in the form of the security. In no sense can it be regarded as a new preference. * * * It is too well settled to require discussion that an exchange of securities within the four months is not a fraudulent preference within the meaning of the Bankrupt Law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it. * * * The reason is that the exchange takes nothing away from the other creditors. It is therefore not in conflict with the thirty-fifth section of the act, the purpose of which is to secure a ratable distribution of the property of a bankrupt owned by him at the time of his becoming bankrupt, and undiminished by any fraudulent preferences given within four months prior thereto."

The reasons why the court held in that case that the exchange of securities did not constitute a preference are the very reasons which indicate a preference in the present case. In that case the exchange

"withdrew nothing from the control of the bankrupt, or from the reach of the bankrupt's creditors"; but in this case the so-called exchange withdrew accounts aggregating $28,000 from the bankrupt and from the reach of the bankrupt's creditors. The reason why a mere exchange of securities does not constitute a preference is that it "takes nothing away from the other creditors," and leaves the bankrupt's assets "undiminished" by the transaction. Further:

"The security given must be a valid one when the exchange is made and must be of undoubted equal value with the security substituted for it."

The validity of the security withdrawn in the present case is unknown and its actual value is a question of speculation. That security was destroyed within a few days after the transfer and entirely lost to the estate in bankruptcy, whatever its value might have been. The fact is that for some reason, unsatisfactorily explained, the bankrupt seemed to think it necessary, or at least advisable, to withdraw the security from the possession of the bank, and did so the day before the petition was filed, and either permitted or caused it to be destroyed. In the second case (In re Noel) cited by the referee there was simply the exchange of the form of security, the security in each case being identically the same. The transaction in question was not "a mere exchange of securities by which the position of the creditors is not proved to be bettered." The cases cited by the referee do not support his conclusion.

[3] The referee further states that—

"A point not argued, but appearing to me to be decisive of this case, is that one essential element of a voidable preferential transfer is entirely lacking, that is the effect of the transfer must be to enable the creditor to obtain a greater percentage of his debt than other creditors of the same class. * * * Here, however, is a creditor holding security who surrenders it and receives other security. What creditors 'of the same class' are there over whom he has acquired a preference? There is no proof that there were any."

In other words, the referee held that inasmuch as the evidence showed that the bank was a secured creditor, to the extent of the notes indorsed by the bankrupt, and that the claims of all other creditors were unsecured, the bank was in a class by itself, a secured creditor, and did not and could not receive a larger percentage of its debt than any other creditor of the same class, because there was no other such creditor. Consequently the transfer did not and could not constitute a preference. The test of classification, on his theory, is the security or nonsecurity that a creditor has for his debt, and this finds support in an opinion rendered by Judge Grosscup, of the Seventh circuit, in the case of Doyle v. Bank, 8 Am. Bankr. Rep. 535, 116 Fed. 295, 54 C. C. A. 97. Judge Sanborn, of the Circuit Court of Appeals of the Eighth Circuit, in a very clear and well-reasoned opinion, reached a different conclusion in the case of Swarts v. Fourth National Bank, 8 Am. Bankr. Rep. 673, 117 Fed. 1, 54 C. C. A. 387. He holds that secured and unsecured creditors are in the same class within the meaning of the act, and in this he is followed by the Circuit Court of Appeals of the Sixth Circuit

in the case of Livingston v. Heineman, 10 Am. Bankr. Rep. 39, 120 Fed. 786, 57 C. C. A. 154.

The act itself does not define the word "class," nor state in terms what creditors are in the same class, or different classes. It creates and specifies classes, and from a study of these it may be possible to arrive at a definition of the word "class" within the meaning of the act. Section 64 (Comp. St. § 9618) specifies three classes—parties to whom taxes are owing, employés holding claims for certain wages, and those who, by the laws of the states or of the United States, are entitled to priority. There are also general creditors. The three classes above mentioned have priority over general creditors. There are, broadly speaking, two classes of creditors—those who have priority and are paid in full, and general creditors, including secured and unsecured. These are the classes of creditors of which the Bankruptcy Act treats. Every creditor in the same class always receives the same percentage on his claim that every other creditor in that class receives. Different classes of creditors are paid different percentages in accordance with the provisions of the act, but creditors of the same class always receive the same percentage. Creditors entitled to receive out of the bankrupt estate the same percentage of their claims are therefore in the same class, regardless of whether they may collect any deficiency from others. A creditor may have two notes made by the bankrupt—one secured by the indorsement of a third party, the other unsecured. He is entitled to receive the same percentage out of the bankrupt estate on both notes. He may, however, collect the deficiency on the secured note from the indorser, or he may collect the entire note in the first place from the indorser, who in turn may prove the note against the bankrupt estate and receive the same percentage upon the claim which the original creditor would have received, or which was received on the unsecured note. I agree with the conclusion of Judge Sanborn that, within the meaning of the Bankruptcy Act, the test of classification is the percentage paid upon the claim out of the estate of the bankrupt, and that secured and unsecured creditors are in the same class.

The bankrupt owed the bank on April 18, 1911, in addition to the amount evidenced by the notes surrendered by the bank on that day, about $37,000. In addition to the delivery of the said note, payable on demand for $20,000, the bankrupt, as above stated, assigned and also delivered to the bank accounts payable to it, from customers, aggregating $28,000. The said $20,000 note provided, inter alia:

"And it is hereby agreed and understood that if recourse is had to the collaterals, any excess of collaterals upon this note shall be applicable to any other note or claim held by said bank against the undersigned."

Recourse was had to the collaterals, the accounts, and it was understood by both parties that recourse was to be had to the collaterals. The president of the bank testified that—

"The note was to run with the collateral and as the money was paid in it was to liquidate the note." Testimony of September 17, 1911, p. 19.

And in pursuance of this understanding the clerks of the bank worked overtime on the day of the transaction, until 8 o'clock in

the evening, in order to send out notices to the debtors, on those accounts, of the assignment, to prevent the payment of them to the bankrupt or to others than the bank. Testimony of September 17, 1911, p. 29. The bank, therefore, had the right, under the terms of the note, to apply the $8,000, collateral in excess of the note, to its claim against the bankrupt of about $37,000. Assuming that the notes returned to the bankrupt by the bank on that day were collectible and legitimate, the bank received an excess security of $8,000, to be applied to its claim over and above the security which it surrendered. The bank says in reply that, at the time of the objection made to its claim, it had collected only $15,000 of the accounts; but the trustee rejoins by saying:

"That the point which the referee has decided as exchange of security was not urged by any of the counsel, and was not urged anywhere in the case, and if it had been, it could readily have been established that a large amount of the assigned accounts were collected by the trustee and are being held by him pending the outcome of this proceeding. No such proof was offered, because no such point was taken or urged by either side."

This, however, is not in the testimony and may not be considered. The decision, however, does not depend upon it. If it did, I would refer the case, so that further testimony might be taken on the point. Whatever the possible value of the said security surrendered by the bank might have been, the fact remains that by the transaction the bank received $8,000 more security than it had for the indebtedness due from the bankrupt, and if the referee's order is sustained it will receive a larger percentage on its debt than any other creditor of the same class. I am therefore constrained to hold that the transfer constituted a preference.

[4] 4. The only remaining question is whether or not the bank had reasonable cause to believe that the enforcement of the transfer would effect a preference. If it did, such conclusion must be gathered from the circumstances surrounding the transaction, which was negotiated on the one side by the attorney of the bankrupt, who in this case was its agent, and on the other side by the president and cashier of the bank, each of whom alleges that he did not negotiate the transaction with said attorney, but that it was done mainly by the other.

There was an overdraft in the account of the bankrupt at the bank on that very day of $168.56, and the officers of the bank had knowledge of it. The bank, before the visit of the attorney, had been told, or at least always believed, that the notes surrendered were business paper, and had been received by the bankrupt as the result of business transactions. When the bank was informed by the attorney that they were accommodation paper, it was surprised. The officers themselves, of the bankrupt, for over five years, had transacted its business with the bank. Abraham Silberberg, Esq., had never before transacted any business with the bank in behalf of the bankrupt or otherwise. The attorney was at the bank for some considerable time, and the court is told but very little of what he said during that time.

The officers of the bank, however, did know at least these three facts: There was an overdraft of the bankrupt at the bank that day. The bank had been deceived by the bankrupt in being led to believe that the paper which it surrendered was business paper, for if it had already been known to the bank, the attorney's action in seeing to it that the bank was enlightened is inexplicable. The officers of the bankrupt company, who had transacted its business for over five years, for some reason, did not appear at the bank on the day of the overdraft, to inform it of the character of the securities which it held, and to negotiate this transaction, but instead an attorney, unknown to it, came proposing to give a note, payable on demand, which had been prepared before he came, for notes some of which were not due for several months.

Something must have made a profound impression upon the president and cashier of the bank, whose books had been closed and balanced for that day. Yet the president and cashier regarded the information received from the attorney of sufficient importance to justify the reopening of the bank books, even though erasures had to be made therefor, and to make the entries of the transaction as of that day. The clerks of the bank were detained until 8 o'clock in the evening, in order to send out notices to all the persons whose accounts had been assigned to the bank. All of this was unusual, unreasonable, and is unaccounted for upon any rational theory, except that the bank had some information that something was going to happen the following day, or in the near future; and something did happen. I am forced to the conclusion, as the only reasonable explanation of its action on that day, that the bank had reasonable cause to believe that the bankrupt was insolvent, and that the enforcement of the transfer of the accounts to it would effect a preference, and enable it to receive a larger percentage of its debt than any other creditor of the same class.

[5] I have fully considered the questions of laches urged against the trustee, who waited several months after the claim of the bank was filed before he objected thereto or moved to expunge the same. It is alleged that the notes surrendered by the bank were destroyed by the officers of the bankrupt within two or three days thereafter. The trustee says that as soon as he "found that the claim was filed he presented objections, charging the preference." The trustee, in my opinion, is not guilty of such laches as would justify me in overruling, on that ground, his exceptions. If during the consideration of this case the statute has run against any of the notes surrendered by the bank, and the bank is not now in position to pursue its remedy against the makers thereof, as urged at the argument, that fact is not chargeable to the trustee.

The exceptions to the order of the referee are sustained, and the order allowing the claim will be set aside, and the claim expunged, unless the bank surrenders the preference it received.

UNITED STATES v. METCALF et al.

(District Court, D. Rhode Island. April 2, 1919.)

Nos. 50, 81, 82.

1. PARDON ⇐11—GENERAL AMNESTY—CONSTRUCTION.
In the proclamation of the President of June 14, 1917, reciting the decision of the Supreme Court holding illegal the suspension of enforcement or imposition of sentences by federal judges, and pardoning persons under suspended sentences and those who had been convicted prior to a fixed date, but not sentenced at the date of the proclamation, the pardon to those not yet sentenced was limited to cases where the imposition of sentence had been illegally suspended by the judge, and did not apply where it was suspended to give defendant time to perfect his bill of exceptions, which was delayed by the illness and death of his counsel.

2. CRIMINAL LAW ⇐974(1)—DEMURRER—OPENING THE RECORD.
A demurrer to the government's replication to a plea in arrest of judgment opens the whole record, and the plea, if insufficient, can be overruled.

Edward P. Metcalf and Henry E. De Kay were convicted of misapplication of funds of a national bank. On demurrer to replication to the plea of Henry E. De Kay in arrest of judgment. Demurrer and plea in arrest of judgment overruled.

Harvey A. Baker, U. S. Atty., of Providence, R. I., and George H. Huddy, Jr., Sp. Asst. Atty. Gen. (John W. Baker, of Providence, R. I., on the brief), for the United States.

James W. Osborne, of New York City, and Lee, Boss & McCanna, of Providence, R. I., for defendants.

BROWN, District Judge. The question arising upon this demurrer is whether the defendant, Henry E. De Kay, against whom a verdict of guilty was rendered prior to June 15, 1916, and upon whom no sentence has been imposed, is entitled to arrest of judgment upon his plea of full amnesty and pardon by public proclamation of the President of the United States, dated June 14, 1917, wherein De Kay claims the benefit of said proclamation and accepts the amnesty and pardon thereby declared and granted.

To this plea the United States has filed a replication setting forth the various proceedings in said case after verdict, stating that no motion for sentence has been made by or on behalf of the United States, and that the court has not in any wise suspended sentence or the imposition of sentence upon said defendant, and that said cause has actually been in course of adjudication since the rendition of the verdict of guilty.

From this replication, and from our record, it appears that the delay in imposing sentence was due in part to the defendant's petition for a new trial and to proceedings thereon resulting in its denial, and in part to delays in settling the defendant's voluminous bill of exceptions relating to a long and complicated trial, during the period between November 23, 1914, and January 23, 1915, upon a charge of misapplication of funds of a national bank. In consequence of the serious illness of defendant's counsel, Walter H. Barney, Esq., the

case was by order duly continued from term to term; and as this illness finally resulted in death, the defendant unfortunately was deprived of his services in perfecting the bill of exceptions and assignments of error, and in the prosecution of a writ of error thereon.

It has long been the practice in this district and circuit to defer sentence until after the settling of the bill of exceptions, in order that the record, which is to be re-examined upon writ of error, may be perfected before judgment thereon.

It clearly appears that the deferring of sentence was only to enable the defendant to move for a new trial and to perfect proceedings upon writ of error. This was all at the defendant's request, and in order to obtain legal relief against the sentence, which, in ordinary course, and but for these proceedings for a new trial and for writ of error, would have followed in pursuance of the statute under which he was tried. All of these proceedings would have been idle, but for the defendant's knowledge that sentence was imminent, and would ultimately follow, unless he could set aside the verdict.

The defendant was still held to bail to answer any judgment that should be pronounced against him. Sentence was not deferred upon "considerations extraneous to the legality of the conviction or the duty to enforce the sentence" (Ex parte United States, 242 U. S. 37, 37 Sup. Ct. 74, 61 L. Ed. 129, L. R. A. 1917E, 1178, Ann. Cas. 1917B, 355), but only to enable legal proceedings, pending or contemplated, to be taken for relief against sentence upon the verdict.

After the decision of the Supreme Court in Ex parte United States, 242 U. S. 27, 37 Sup. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178, Ann. Cas. 1917B, 355, relating to the power of a court to suspend sentence, the President, on June 14, 1917, issued a proclamation in the following terms:

"By the President of the United States of America.

"A Proclamation.

"Whereas, a practice has existed for many years among the judges of certain United States courts of suspending either the imposition or the execution of sentences whenever, in their judgment, the circumstances warranted it, which practice is illegal, as has been held by the Supreme Court of the United States in a case entitled 'Ex parte United States, Petitioner,' known as the Killits Case, decided December 4, 1916; and

"Whereas, the practice was widespread, and many thousands of persons are now at liberty under such suspensions, never having served any portion of the sentences duly authorized and required by the statutes; and

"Whereas, many of these persons are leading blameless lives and have re-established themselves in the confidence of their fellow citizens, and it is believed that the enforcement of the law at this late date would, in most instances, be productive of no good results; and

"Whereas, the Supreme Court of the United States, in recognition of the necessity for meeting this situation, has stayed the mandate in the Killits Case until the end of the present term, to wit, until about June 15, 1917:

"Now, therefore, be it known that I, Woodrow Wilson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby declare and grant a full amnesty and pardon to all persons under suspended sentences of United States courts liable to penalties as aforesaid, where the sentences imposed were less than the period between the date of imposition and June 15, 1917, and to all persons, defendants in said courts, in cases where pleas of guilty

were entered or verdicts of guilty returned prior to June 15, 1916, and in which no sentences have been imposed.

"In all other cases of suspension, either of the imposition or the execution of sentence by judges of the United States courts occurring prior to December 4, 1916, the date of the decision in the Killits Case, a respite of six months is hereby granted from June 15, 1917, in order that the facts and merits of the respective cases may be investigated and considered and appropriate action taken, where warranted, by way of executive clemency.

"In testimony whereof I have hereunto signed by name and caused the seal of the United States to be affixed.

"Done in the District of Columbia this fourteenth day of June in the year of our Lord one thousand nine hundred and seventeen, and of the independence of the United States the one hundred and forty-first.

"[Seal.] Woodrow Wilson.

"By the President:

"Robert Lansing, Secretary of State."

[1] The defendant De Kay comes within the literal meaning of the following clause of the proclamation:

"And to all persons, defendants in said courts, in cases where pleas of guilty were entered or verdicts of guilty returned prior to June 15, 1916, and in which no sentences have been imposed."

It is the contention of the United States that this language, though broad enough to include the defendant, must be limited to cases in which the failure to impose sentence has been due to illegal action by a judge, such as was condemned by the decision of the Supreme Court, and has no application to cases where the delay was due to legal proceedings for revision. The United States relies upon the preamble to show the situation which led to the proclamation, and upon the statement in the granting clause "in consideration of the premises."

For the defendant De Kay it is urged that the granting clause contains also the words "divers other good and sufficient reasons me thereunto moving"; that the language is unambiguous, and therefore resort to the preamble is not permissible in aid of its interpretation. It is further urged that the prior clause, relating to persons under suspended sentences for terms less than the period between the date of imposition and January 15, 1917, is applicable equally to cases of illegal and of legal suspension, and that, if in said clause there is no discrimination between sentences legally and illegally suspended, there is no reason for making such discrimination between legal and illegal postponement of sentence; that it is reasonable to suppose and must be assumed that the President and the Attorney General had knowledge of the usual course of legal procedure, and that in so important a matter it cannot be presumed that language so comprehensive in character was used inadvertently or inadvisedly.

It is further urged that it cannot be supposed that, in dealing with cases of suspension or delay either of the imposition or the execution of sentences, it was intended to prefer as objects of amnesty those persons who had benefited by illegal action of the court to those who had not benefited by illegal action, but only by delay to which they were legally entitled. This latter argument, however, ignores one important consideration. Those persons who h.. been deemed by

the judges who tried them entitled to clemency, and who, in a mistaken exercise of discretion, had been relieved from penalties of the law, were presumably persons regarded as worthy of clemency. The suggestion by the Supreme Court of "a grave situation," only to be remedied by the exercise of the pardoning power, or by probation legislation enlarging judicial discretion, was in behalf of a class of persons presumably having special claims to further clemency, since already they had been so regarded by judges familiar with their cases.

If we adopt the construction for which the United States contends, the pardon is applicable only to those persons who have had their sentences delayed either in imposition or execution by illegal action of judges. It follows, therefore, that in each plea of pardon and amnesty it would be insufficient to show that a defendant was within the literal terms of the grant; but it would seem necessary for the defendant to allege and to show that his sentence had been illegally suspended by the judge, or that the judge had illegally refused to impose sentence. In other words, the plea in arrest of judgment, in addition to the facts that verdict of guilty was returned prior to June 15, 1916, and that no sentence had been imposed prior to the date of the pardon, should affirmatively show illegal action by the judge.

The question whether inaction by a judge, or a refusal by a judge to sentence upon motion of a United States attorney, was legal or illegal, might involve a question of great difficulty, since the record on such a motion may afford slight evidence, if any, to assist in determining whether the inaction or action of the judge was within or in excess of a sound judicial discretion.

"The courts inherently possess ample right to exercise reasonable—that is, judicial—discretion to enable them to wisely exert their authority." 242 U. S. 41, 42. 37 Sup. Ct. 72, 74 (61 L. Ed. 129, L. R. A. 1917E, 1178, Ann. Cas. 1917B, 355).

There is judicial discretion to temporarily suspend either the imposition of sentence or its execution, to the end that a pardon may be procured or that a violation of law in other respects may be prevented. The judge may lawfully delay sentence to enable him to better satisfy his own mind what the punishment ought to be, or to give opportunity to a defendant to procure evidence affecting the determination of the length of sentence.

There is no indication in the proclamation of any intention to submit to any one the determination of the question whether or not the suspension, either of imposition or of execution, was legal or illegal, and it must be confessed that there are manifest inconveniences and uncertainties arising from that construction for which the United States contends. These would be obviated by reading the granting clause of pardon according to its terms. There would then be included the entire class of persons who were doubtless intended, and perhaps others in whose cases there had been similar delay, but who were leading blameless lives and had established themselves in the confidence of their fellow citizens. To such persons might well apply the words:

"And it is believed that the enforcement of the law at this late date would, in most instances, be productive of no good results."

What comparative weight was given to the staleness of the cases, and to presumptions therefrom, whether delays due to other causes, possibly inaction by the prosecution, or illness or inability of defendants to appear, or actual knowledge of the number and character of pending cases were included in the "divers other good and sufficient reasons me thereunto moving," are matters of speculation upon which we cannot enter.

A proclamation of general amnesty involves abolition and forgetfulness of the offenses, and for the benefit of a class disregards refined distinctions between offenders. It cannot be said, therefore, that the claim of the defendant to a literal interpretation of the proclamation is altogether unreasonable.

We must inquire, however, whether the literal meaning of the clause is consistent with other clauses, and whether, when read alone, it transcends the manifest intent of the proclamation.

The situation which led to the proclamation is well known, and appears from the preamble of the proclamation and from a reading of the decision of the Supreme Court referred to therein. Through the exercise of clemency by judges in a mistaken, but humanitarian, view of the scope of their discretionary powers, there was presented "a grave situation" calling for remedy by the exercise of legislative or executive power in behalf of a defined class of persons, but a class which, according to the opinion of the Supreme Court, did not include persons in the situation of the defendant. If he has been included, it is because of an intention of the President to enlarge that class. The preamble of the proclamation shows clearly that the grant of pardon was made in consequence of the decision and suggestions of the Supreme Court. The granting clause deals first with a class of persons upon whom sentences had been imposed, and grants amnesty and pardon "to all persons under suspended sentences of United States courts liable to penalties as aforesaid." The reference "as aforesaid" is to the preamble, and indicates that this clause must be read therewith.

The clause whose interpretation is in question follows, and deals with cases in which no sentences have been imposed. This completes the paragraph granting amnesty.

Then follows a clause granting a respite of six months from June 15, 1917, for investigation and appropriate action, when warranted, by way of executive clemency, which uses what seems significant language:

"In all other cases of suspension either of the imposition or the execution of sentence by judges of the United States Courts occurring prior to December 4, 1916, the date of the decision in the Killits Case," etc.

As all other clauses relate to suspension by action of judges, it seems to be inconsistent therewith to read the clause "and in which no sentences have been imposed" to cover cases in which, according to the established practice of the courts, the time has not yet arrived for judgment on the verdict. In such cases the mere extension of time

for petitioning for a new trial, or for perfecting exceptions, is obviously not what is meant by the term "suspension" as used in the proclamation. Such postponement by the assertion of a defendant's rights of review affords no evidence that he was regarded by the judge as entitled, by personal merit or by the peculiar circumstances of his case, to judicial clemency, and seems to afford no reason for that executive clemency for which the Supreme Court afforded an opportunity by stay of the mandate, and which was granted by the President.

Subsequent to the filing of the defendant's plea of pardon a second proclamation was made, dated August 21, 1917, purporting to specifically define the persons to whom amnesty and pardon were extended by the prior proclamation of June 14, 1917. As the plea in arrest of judgment had been filed before the date of the second proclamation, it is doubtful if his rights can thereby be affected. Questions of construction arise upon the second proclamation, which do not arise upon the first, and which, for the disposition of the demurrer, it seems unnecessary to consider.

I am of the opinion that the facts set forth in the replication, and which appear of record, show that the defendant is not within the President's proclamation pleaded in arrest of judgment.

[2] As the demurrer to the replication opens up the whole record, the plea in arrest of judgment must also be adjudged insufficient.

Demurrer to replication overruled.

Defendant's plea in arrest of judgment overruled.

PENNSYLVANIA CO. FOR INSURANCE ON LIVES AND GRANTING ANNUITIES v. AACHEN & MUNICH FIRE INS. CO.

(District Court, E. D. Pensylvania. April 14, 1919.)

No. 5700.

1. INSURANCE ⟸311(3)—MORTGAGEE CLAUSE—FAILURE OF INSURED TO FULLY INSURE.

Provision of mortgagee clause that the insurance as to the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner does not protect the mortgagee against neglect of duty with which the insurer has no concern, or which does not invalidate the policy, and cannot be construed to relieve the mortgagee of the effect of insured's failure, in the first instance, to insure the property to its full value, so that, where fire policy provided insurer should be liable for no greater proportion of loss than amount insured bore to 100 per cent. of actual cash value of property when loss should happen, assignee of mortgage, to whom, by addition to policy, loss was made payable, as its interest might appear, could recover from insurer, for a loss, such proportion only.

2. INSURANCE ⟸539(5)—FIRE INSURANCE—PROOF OF LOSS—NEGLECT OF MORTGAGOR.

Failure of insured to make proof of loss under fire policy within 60 days after fire was neglect not invalidating insurance as to mortgagee or its assignee, an addition to the policy providing that insurance as to interest of mortgagee should not be invalidated by any act or neglect of mortgagor.

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3. INSURANCE ⊂=537—FIRE INSURANCE—PROOF OF LOSS—ASSIGNEE OF MORTGAGE.
Where fire policy provided proof of loss might be furnished by mortgagee of premises within 60 days after failure on part of insured, who also had 60 days to make proof, and insured, not making proof within 60 days allowed, did so at end of 80 days, assignee of mortgage could take advantage of such furnishing of proof of loss, and was not required to do so himself as a condition to holding the insurer.

4. INSURANCE ⊂=578—FIRE INSURANCE—REFUSAL TO HAVE LOSS APPRAISED —NEGLECT OF MORTGAGOR.
Failure or refusal of owner and mortgagor of premises insured against fire to proceed with appraisal of loss as provided by policy, which, by an addition, also provided insurance as to interest of mortgagee should not be invalidated by any act or neglect of mortgagor or owner, was not an act or neglect invalidating policy as to mortgagee or its assignee.

5. INSURANCE ⊂=568, 576(1)—FIRE INSURANCE—WAIVER OF APPRAISAL.
If a fire insurer desired to hold the mortgagee of the premises or its assignee to an appraisement clause in the policy, it was entitled to do so by written demand; but, no such demand having been made, the appraisement must be held to have been waived against the mortgagee or its assignee.

6. INSURANCE ⊂=606(2)—FIRE INSURANCE—RIGHT OF SUBROGATION.
Under the subrogation clause of a fire policy, the insurer is not entitled to an assignment of the mortgage on the property, held by an assignee, where it has neither tendered nor paid any amount to the assignee of the mortgage.

At Law. Action by the Pennsylvania Company for Insurance on Lives and Granting Annuities, trustee for M. Lilly Beale under the will of Clement B. Grubb, deceased, against the Aachen & Munich Fire Insurance Company. On rule for judgment for want of sufficient affidavit of defense. Rule made absolute.

Stern & Wolf, of Philadelphia, Pa., for plaintiff.
Horace M. Schell, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The plaintiff sues upon a policy of fire insurance issued by the defendant to Hortense L. Becker for $3,500. The plaintiff was the holder by assignment of a mortgage for $4,000 upon the premises, and the policy was transferred to it on September 19, 1917, at which date there was added to the policy what is known as the standard mortgagee clause, which provided that the loss be payable to the plaintiff "as assignee of mortgagee, as interest may appear, and this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property."

On October 17, 1917, the insured premises were damaged by fire to an amount admitted by the affidavit of defense to be $3,425. Proof of loss, as provided by the policy, was not filed by the insured within 60 days from the date of the fire, viz., by December 15, 1917, but proof of loss in proper form by the assured, Hortense L. Becker, was filed with the defendant on January 5, 1918.

The affidavit of defense sets up the following defenses:

(1) That the policy contains what is known as the "100 per cent." insurance clause, by which it is "made a condition of this contract that

this company shall be liable for no greater proportion of any loss than the amount hereby insured bears to 100 per cent. of the actual cash value of the property described herein at the time when such loss shall happen."

The defendant avers that the actual cash value of the property at the time of the fire was the sum of $12,000, that the loss did not exceed the sum of $3,425, and that therefore the total amount for which the defendant would be liable, if liable at all, would not exceed 7/24 of the actual loss, or $990.07.

(2) That the defendant is not liable, because Hortense L. Becker, the insured, did not, in accordance with the terms of the policy, furnish a proof of loss within 60 days after the date of the fire; that as to the mortgagee the policy contained the following clause:

"Upon failure of the insured to render proof of loss, such mortgagee shall, as if named as insured hereunder, but within 60 days after such failure, render proof of loss, and shall be subject to the provisions hereof as to appraisal and time of payment and of bringing suit."

The defendant denies that the notice required by the policy of insurance was given to defendant, and hence the defendant is not liable.

(3) In a supplemental affidavit of defense, the defendant avers that it is not liable because the plaintiff failed to comply with the clause of the policy which is as follows:

"*Appraisal.*—In case the insured and this company shall fail to agree as to the amounts of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire, and, failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the county in which the property insured is located. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item, and, failing to agree, shall submit their differences only to the umpire. An award in writing so itemized, of any two, when filed with this company, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him, and the expenses of appraisal and umpire shall be paid by the parties equally."

The defendant avers that it demanded an appraisement, and an appraisement agreement was duly entered into between Hortense L. Becker, the insured, and the defendant; that an appraiser was appointed on behalf of the defendant, and one on behalf of the assured; that the appraiser appointed by the assured declined to accept as umpire any persons suggested by the appraiser appointed by the defendant; that the defendant thereupon presented its petition to the court of common pleas of Philadelphia county for the appointment of an umpire, and that thereupon the court appointed an umpire in the said matter, whereupon the appraiser appointed by the assured withdrew from the appraisal, and no appraisal has ever been made, and, as a consequence thereof, this suit is prematurely brought, and the defendant is not liable.

As to the first defense, it is contended by the plaintiff that the failure to cause the property to be insured to its alleged full value of $12,000 is expressly excepted as a defense against the mortgagee by the

provisions of the mortgagee clause that the insurance as to the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner.

The plaintiff relies upon a line of cases interpreting the standard mortgagee clause in fixing the liability of the insurer, as compared with "the old indorsement which made the mortgagee a simple appointee of the mortgagor, and put his indemnity at the risk of every act or neglect of the mortgagor that would avoid the original policy in his hands." Syndicate Insurance Co. v. Bohn, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614 (C. C. A. 8th Circuit). In that case Judge Sanborn, in delivering the opinion of the court, said:

"Our conclusion is that the effect of the union mortgage clause, when attached to a policy of insurance running to the mortgagor, is to make a new and separate contract between the mortgagee and the insurance company, and to effect a separate insurance of the interest of the mortgagee dependent for its validity solely upon the course of action of the insurance company and the mortgagee, and unaffected by any act or neglect of the mortgagor, of which the mortgagee is ignorant, whether such act or neglect was done or committed prior or subsequent to the issue of the mortgagee clause."

In that case the mortgagee was held entitled to recover, even though the insured was not the sole and unconditional owner of the property when the policy was issued.

In the cases of Eddy v. L. A. Corporation, 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686, Heilbrunn v. German Alliance Insurance Co., 140 App. Div. 557, 125 N. Y. Supp. 374 (affirmed 202 N. Y. 610, 95 N. E. 823), and Reed v. Fireman's Insurance Co., 81 N. J. Law, 523, 80 Atl. 462, 35 L. R. A. (N. S.) 343, acts or neglect of the insured were held not to invalidate the insurance as to the interest of the mortgagee.

In the Eddy Case it was held that the mortgagee was not affected by the fact that the insured, without permission of the company, had taken out additional insurance, the effect of which, as to the insured, was that the company was liable only pro rata with the other insurers.

In the Reed Case, it was held that the mortgagee was not affected by the failure of the insured to furnish proofs of loss or to submit to an appraisement.

In the Heilbrunn Case, it was held that the mortgagee need not allege that proofs of loss were furnished.

Those decisions were all based upon the ground stated by Judge Sanborn, that, under the standard mortgagee clause, a new and separate contract is made between the insurance company and the mortgagee, and that the interest of the owner and of the mortgagee are regarded as distinct subjects of insurance.

The plaintiff also cites Pennsylvania cases. In Southern Building & Loan Association v. Pennsylvania Fire Insurance Co., 23 Pa. Super. Ct. 88, a change of ownership of which the mortgagee was not shown to have had notice, although it invalidated the policy as to the insured, was held not to affect the mortgagee's right to recover.

In Ebensburg Building & Loan Association v. Westchester Fire Insurance Co., 28 Pa. Super. Ct. 341, it was held that a payment of the

amount of loss to the insured did not release the insurance company from liability to the mortgagee.

In Knights of Joseph Building & Loan Association v. Mechanics' Fire Insurance Co., 66 Pa. Super. Ct. 90, it was held that, while a change of ownership of the insured property invalidated the policy as to the insured, the liability to the mortgagee was not thereby affected.

The precise question now raised does not appear to have been heretofore decided. The line of cases of which those cited are examples is based upon some act or neglect which would invalidate the insurance as to the insured. The mortgagee clause provides that the loss or damage, if any, under this policy, shall be paid to the mortgagee, and, while it creates a new contract between the mortgagee and the insurance company, distinct from the contract between the insured and the company, in so far as is in the mortgagee clause provided, it must be construed with reference to the terms as to amount of loss recoverable agreed to in the policy under which the loss or damage made payable to the mortgagee arises. The policy was an existing contract between the insured and the insurer when the interest of the mortgagee arose. If, at the time the mortgagee's interest accrued, other insurance upon the property had been in effect, and the mortgagor or owner had neglected to keep alive that insurance thereafter, the question would be presented whether that was neglect, within the terms of the mortgagee clause, which would prevent the application of the 100 per cent. insurance clause as against the interest of the mortgagee. But it is not claimed that the property was at that time insured to its full value, or that any other insurance had been placed upon it. As I construe the mortgagee clause, it protects the interest of the mortgagee from being invalidated by any act which, as between the insurance company and the mortgagor, or owner, the latter could not do without invalidating the insurance, or from any neglect to do anything he should do to keep the insurance valid. Failure to carry other insurance does not invalidate the insurance, but the amount of insurance carried in proportion to the value of the property fixes the proportion of the loss recoverable. There was no agreement or duty which, as between the insurer and insured, required the insured to place other insurance upon the property. If failure to do so was neglect, it was neglect of a duty to the mortgagee, and must have arisen under the terms of the mortgage. The mortgagee clause was never intended to protect the mortgagee against neglect of a duty with which the insurance company had no concern.

The loss for which the company made itself liable under the mortgagee clause, as a new contract, was the loss arising under the policy to the owner, upon her property therein described, and that loss became payable to the mortgagee under the conditions named in the mortgagee clause, and it is liable to the mortgagee for no greater amount than its liability to the owner or mortgagor under the terms of the 100 per cent. clause. If this were not so, and the insurance were upon the mortgagee's interest, irrespective of the owner's property, then the mortgagee could recover only to the extent of its loss, and it would be incumbent upon it to prove its loss. It does not fol-

low, because the loss of the owner of property of the value of $12,000 is $3,450, that the mortgagee has suffered any loss at all, for it still has its lien against the damaged property covered by its mortgage, and non constat that the remaining value of the property is not sufficient to pay the mortgage debt. The effect of the plaintiff's contention would indirectly be to relieve the owner of payment of the mortgage debt to the extent of the entire damage to her property, and thus give her an advantage to which she is not entitled under the policy.

[1] It is concluded that the defendant is liable only in that proportion of the loss which the amount insured bears to the total value of the property as fixed by the company's liability to the insured at the time the mortgagee clause went into effect.

[2, 3] The question whether there is any liability on the part of the defendant depends upon the other two defenses. The failure of the insured to make proof of loss within 60 days after the fire is without contradiction a neglect which does not invalidate the insurance as to the mortgagee. As to the mortgagee, the policy provides that proof may be furnished by it within 60 days after such failure on the part of the insured. The mortgagee, therefore, under the strict terms of the policy, had 120 days in which to make proof of loss. At the end of 80 days the insured made proof of loss in proper form. It is difficult to understand what more the defendant can reasonably demand. The object of the proof of loss is to give such notice to the insurer as will enable it promptly to make a survey of the insured property, determine the amount of the loss, determine whether it will restore the property, and otherwise protect itself in the premises. While the policy requires that the "mortgagee shall, as if named as insured hereunder," render a proof of loss, it would be a hard and technical rule indeed which forbade it to take advantage of the proof of loss made by the insured within the time allowed to the mortgagee, when that proof was of equal value to the insurer as though made by the mortgagee. That such proof may be taken advantage of by the mortgagee is held in Germania Fire Insurance Co. v. Bally (Ariz.) 173 Pac. 1052, and is in accord with sound policy and in harmony with the provisions of Act June 27, 1883 (P. L. 165). See Stainer v. Insurance Co., 13 Pa. Super. Ct. 25. It is held, therefore, that as to the mortgagee the proof of loss was made in time, and that it is entitled to avail itself of the proof made by the owner.

[4, 5] Upon the question of appraisement, the failure or refusal of the owner to proceed with the appraisal is clearly an act of neglect which does not invalidate the policy as to the mortgagee. If the company desired to hold the mortgagee to the appraisement clause, it was entitled to do so, if it made written demand upon the mortgagee. No such demand having been made, it must be held to have been waived as against the mortgagee, and the failure of the insured to proceed with the appraisal does not, in my opinion, affect the company's liability to the mortgagee.

[6] The defendant is not entitled to an assignment of the mortgage under the subrogation clause, because it has neither tendered nor paid any amount to the plaintiff. See Ebensburg Building & Loan Asso-

ciation v. Westchester Fire Insurance Co., 28 Pa. Super. Ct. 341; O'Neil v. Franklin Fire Insurance Co., 159 App. Div. 313, 145 N. Y. Supp. 432.

Rule absolute for $990.07, with interest from March 7, 1918.

UNITED STATES v. ROBERTSON.

(District Court, S. D. California, S. D. February 25, 1919.)

No. 1632.

PERJURY ⊂⊃9(2)—AUTHORITY FOR OATH—APPLICATION FOR PASSPORTS.

The presidential rule for the issuance of passports, requiring an affidavit from a credible witness who has known the applicant two years, does not require the affiant to swear to acquaintance with the applicant, though that is in the form prescribed by the Secretary of State, and making false affidavit as to acquaintance is not false swearing in a case in which a law authorizes an oath to be administered, within Criminal Code, § 125 (Comp. St. § 10295).

D. F. Robertson was indicted for perjury in making false affidavits relative to applications for passports. On demurrer to the indictment. Demurrer sustained.

Robert O'Connor, U. S. Atty., and Lyndol L. Young, Ass't U. S Atty., both of Los Angeles, Cal., for the United States.

S. E. Vermilyea and N. Blackstock, both of Los Angeles, Cal., for defendant.

TRIPPET, District Judge. The defendant is indicted for perjury, in making affidavits relative to applications for passports. In the first count of the indictment he is charged with having sworn falsely that he had known the applicant for passport for a period of four years, when as a matter of fact he had only known the applicant for a period of not more than one month previous to the date he made the affidavit that he had known him for four years.

The rules, governing the granting and issuing of passports, promulgated by the President, contain the following matter:

"The application must be supported by an affidavit of at least one credible witness, who has known the applicant at least two years, stating that the applicant is the person he represents himself to be and that the facts stated in the application are true to the best of the witness' knowledge and belief."

It is perfectly plain that this sentence does not require the witness to swear in his affidavit that he has known the applicant at least two years. The phrase "he has known the applicant at least two years," modifying the word "witness," is plainly no part of the affidavit. The sentence shows clearly what the affidavit shall state. There is no more reason for putting in the affidavit the length of time the witness has known the applicant than for putting in the affidavit that the witness is credible. The law requires strict construction of statutes which define a crime, and necessarily a proclamation, such as the one under con-

sideration, must be strictly construed, when a person is being prosecuted for a serious crime like perjury.

It is material to the investigation that the witness should be credible and should have known the applicant for at least two years. But there is no requirement in these rules that the witness should so swear or that any one should so swear. If the writer of these rules had meant that the witness should swear that he had known the applicant for two years, it would have been perfectly easy for him to have so prescribed by putting the verb in the sentence after the word "witness," and make the sentence read as follows:

"The application must be supported by an affidavit of at least one credible witness, stating that he has known the applicant at least two years and that the applicant is the person he represents himself to be," etc.

The United States attorney argues that this is, undoubtedly, what the party meant who wrote these rules. There is no ambiguity in the sentence. There is really no opportunity for the construction placed upon the sentence by the United States attorney. The English is too plain to admit of discussion.

The form of oath taken by this witness is prescribed by the Department of State for the purpose of enforcing the rules promulgated by the President. These rules do not demand such an oath, and therefore the Department of State had no right to exact it. The position that the court takes may be illustrated thus: Suppose the rules prescribed that a passport should be issued to an applicant upon making application and presenting it, indorsed by a citizen in good standing, who had known him for two years. Now, it will be observed in this supposititious case that there is no rule requiring an oath of any kind. No one would contend that such a requirement would be authorized by the law. The defendant is indicted under section 125 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1111 [Comp. St. § 10295]). That section provides that a person shall be guilty of perjury when he swears falsely "in any case in which a law of the United States authorizes an oath to be administered." Since the law did not authorize an oath to be administered, as was administered in this case, it follows that the defendant has not violated any law by testifying falsely.

The second count of the indictment is subject to the same objections as the first count, and the demurrer to the whole indictment will be sustained.

NAPA VALLEY ELECTRIC CO. v. RAILROAD COMMISSION OF CALIFORNIA et al.

(District Court, N. D. California, Second Division. March 31, 1919.)

No. 396.

1. PUBLIC SERVICE COMMISSIONS ⟸32—REVIEW OF ACTS—NATURE.
Public Utilities Act Cal. § 67, authorizing the state Supreme Court to determine whether the Railroad Commission had regularly exercised its authority or violated constitutional rights, contemplates a strictly judicial review.

2. PUBLIC SERVICE COMMISSIONS ⟸27—REVIEW—CHOICE OF COURTS.
Where a railroad petitioned the commission for rehearing, but the motion was denied, it may either apply to the state Supreme Court for a judicial review of the decision under Public Utilities Act Cal. § 67, or invoke the jurisdiction of the proper federal District Court.

3. JUDGMENT ⟸S28(1)—RES JUDICATA—JUDGMENT OF STATE COURT.
Where railroad's petition to the state Supreme Court for a writ of review, upon the ground that the Railroad Commission's order deprived it of constitutional rights, was denied without opinion, the matter was rendered res judicata, so as to preclude a subsequent injunction suit against the commission in a federal District Court.

In Equity. Suit for injunction by the Napa Valley Electric Company against the Railroad Commission of California. Bill dismissed.

U'Ren & Beard, of San Francisco, Cal., for plaintiff.
Douglas Brookman, of San Francisco, Cal., for defendants.

VAN FLEET, District Judge. The plaintiff, a public service corporation furnishing electric energy for power and other purposes, seeks to enjoin the enforcement of certain orders of the defendant commission regulating rates to be charged for its service as being in violation of its rights under the contract clause of the Constitution of the United States (article 1, § 10, cl. 1), and the Fourteenth Amendment thereto.

Defendants have moved to dismiss the bill on the ground, among others, that it appears from its averments that the controversy stated is res judicata, and I am of opinion that the motion must prevail. It appears from the bill that after the rendition of the orders in question plaintiff filed with the defendant board a petition for a rehearing of the controversy, which petition was upon consideration denied; and it is alleged:

"That thereafter, and on the 20th day of June, 1917, your orator duly filed in the Supreme Court of the state of California its petition for a writ of review, asking and praying that a writ of review issue out of said court, commanding said Railroad Commission to certify to said court, on a day named in said writ, a full and complete record of all the proceedings leading up to the making of said order and decision dated May 21, 1914, together with said order and decision and your orator's application for a rehearing thereof, and also a full and complete record of all the proceedings leading up to the making of said order and decision dated November 15, 1916, together with said order and decision and orator's application for a rehearing thereof, and that upon the return of said writ, said orders and decisions of the said Railroad Com-

mission be reversed and vacated and annulled, upon the ground that said orders and decisions violate the rights of your orator under the Constitution of the United States, and more particularly its rights under section 10 of article 1 thereof, and under section 1 of article 14 of the Amendments thereto; that the said Supreme Court of the state of California denied your orator's said petition for a writ of review, and refused to issue a writ of review, as prayed for in said petition."

[1-3] This application was made within the time prescribed by and in pursuance of section 67 of the Public Utilities Act (Stat. Cal. Extra Session 1911, pp. 18, 55), which gives the right to a party deeming himself aggrieved to apply to the Supreme Court of the state, within 30 days after the decision by the commission on a petition for rehearing, to have—

"the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined"; that such review "shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of California"; and that upon the hearing "the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission."

As the terms of the statute clearly import, the review there contemplated is strictly a judicial one, before the court sitting in its capacity as a judicial tribunal, limited to a consideration of the purely legal aspects and propriety of the act of the commission under review, and not, as in Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, as a part of the rate-fixing power of the State. Detroit & Mackinac R. Co. v. Michigan Railroad Commission, 235 U. S. 402, 35 Sup. Ct. 126, 59 L. Ed. 288; Palermo Land & Water Co. v. Railroad Commission of California et al. (D. C.) 227 Fed. 708.

Under this statute, when plaintiff's petition for rehearing was denied, the legislative history of the orders complained of was complete; the final step to make them effective having been taken. The question of their validity then became a justiciable one, and plaintiff could at once proceed to test that question in the courts. Palermo Land & Water Co. v. Railroad Commission, supra. For that purpose plaintiff was at liberty to proceed either in the state court, as it did, or in this court, since the state statute, even if so intended, could not restrict or abridge its right to invoke the jurisdiction of the latter court in any case falling within its jurisdiction. It chose to present its case to the state court, and, as we have seen, upon the same questions of right as those presented here. That court was in all respects as competent and as much under obligation to protect those rights, constitutional or otherwise, as this court, and it will, of course, be presumed that it kept that obligation in view in passing upon plaintiff's application.

In this state of the case I am unable to perceive how the objection that the action of the state court is conclusive of the controversy, and that plaintiff is now precluded from bringing the same grievance here, may be avoided. It has had its day in court. Detroit & Mackinac R. Co. v. Michigan Railroad Commission, supra. While it might

have sought a review of the decision of the state court at the hands of the Supreme Court of the United States by appropriate proceedings under section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. § 1214])—Williams v. Bruffy, 102 U. S. 248, 255, 26 L. Ed. 135—it did not see fit to do so, and it cannot now be heard to litigate the controversy anew in this court. The ruling in the Michigan case would seem to be conclusive on this point. And on the question of the functions of the state court the present case would appear to fall more clearly within the rule there announced than the case there presented, by reason of the less explicit language of the Michigan statute, leaving the question seriously open to construction. Here the explicit limitations found in the California act as to the purpose and extent of the review by the state court leave no possible room for construction.

The contention by plaintiff that the ruling of the state court is not a proper predicate for invoking the doctrine of res judicata, in that it is not a judgment "on the merits," but purely a negative determination or refusal to assume jurisdiction, is unsound. We are bound to assume, if we accept the averments of the bill, that the petition put that court in full and complete possession of all the facts upon which it relies here (Detroit & Mackinac R. Co. v. Michigan Railroad Commission); and, that being true, the denial of the petition was necessarily a final judicial determination (Williams v. Bruffy, supra), based on the identical rights asserted in this court, and it was between the same parties. Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact. Calaf v. Calaf, 232 U. S. 371, 34 Sup. Ct. 411, 58 L. Ed. 642; Hart Steel Co. et al. v. Railroad Supply Co., 244 U. S. 294, 299, 37 Sup. Ct. 506, 61 L. Ed. 1148. Nor is it material that the reasons for the conclusion reached by the court are not given. We are not concerned with the reasoning, but only with the judgment, and it must be assumed in support of the latter that upon the facts presented to it the state court upon due consideration reached the conclusion that plaintiff's rights had not been violated. Hart Steel Co. et al. v. Railroad Supply Co. and Williams v. Bruffy, supra.

Lastly, it is an unwarranted assumption that the doctrine invoked is one of a highly technical character, to be reluctantly enforced. As stated in the Hart Steel Case:

"This doctrine of res judicata is not a mere matter of practice or procedure, inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts, to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect. Kessler v. Eldred, supra [206 U. S. 285, 27 Sup. Ct. 611, 51 L. Ed. 1065]."

It results that the bill must be dismissed; and it is so ordered.

Ex parte JOCHEN.

(District Court, S. D. Texas. April 8, 1919.)

D. L. 267

1. ARMY AND NAVY ⟸2—MILITARY LAW—MILITARY JURISDICTION.
As distinguished from "military government" and "martial law" proper, military jurisdiction under military law, which is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces, obtains and is to be exercised in time of peace as well as of war.

2. ARMY AND NAVY ⟸44(2)—MILITARY LAW—PERSONS SUBJECT.
Whether one is subject to military jurisdiction under military law depends on whether he is a member of the land or naval forces and Congress has subjected him to such law.

3. JURY ⟸11(4)—PERSONS SUBJECT TO MILITARY LAW.
If one is a member of the land or naval forces, Congress can subject him to military law, and the guaranties of the Constitution for trial by jury are inapplicable.

4. ARMY AND NAVY ⟸44(2)—LAND FORCES—ABSENCE OF UNIFORM.
That one may be a part of the land forces, and so may be subjected to military law, it is not necessary that he be in uniform.

5. ARMY AND NAVY ⟸44(2)—ARTICLES OF WAR—"ATTENDANT OR PERSON ACCOMPANYING OR SERVING WITH THE ARMIES."
One serving with troops as superintendent quartermaster corps is an "attendant or a person accompanying or serving with the armies," within Articles of War, art. 2, as adopted August 29, 1916, subjecting such persons under certain conditions to such articles.

6. ARMY AND NAVY ⟸44(2)—ARTICLES OF WAR—"IN THE FIELD."
The term "in the field," in Articles of War, art. 2, as adopted August 29, 1916, subjecting to such articles all retainers and persons accompanying or serving with the armies in the field, will be construed as used with the meaning which long usage of the War Department had given them, and as contained in its General Orders, Compilation 1881 to 1915, § 319, also Manual Quartermaster's Corps, United States Army, § 2193, defining "field service" to be service in mobilization, concentration, instruction, or maneuver camps, as well as service in campaign, simulated campaign, or on the march.

[Ed. Note.—For other definitions, see Words and Phrases, In the Field.]

7. ARMY AND NAVY ⟸44(2)—ARTICLES OF WAR—"IN THE FIELD."
Were the words "in the field," in Articles of War, art. 2, as adopted August 29, 1916, subjecting to such articles all retainers and persons accompanying or serving with the armies in the field, used in their limited sense, and applicable only where the armies are in or expecting actual conflict, the conditions along the Mexican border from February, 1917, to December, 1918, were such as to make them applicable.

Habeas Corpus. Application by Edward E. Jochen for writ of habeas corpus to secure release from military custody. Application dismissed.

Upon application for writ of habeas corpus by Edward E. Jochen, it appearing therefrom that applicant is in custody at Brownsville, Tex., more than 300 miles from Houston, where the court is sitting, a rule was issued requiring the respondent, Col. Frank Keller, to show cause February 28, 1919, at Houston, Tex., why writ of habeas corpus should not issue. To this rule respondent made return, justifying the detention of applicant upon the following state of facts:

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

That the defendant, as commanding officer of United States troops at Brownsville, Tex., has the applicant in confinement. That applicant from February 12, 1917, to December 24, 1918, served with the United States troops in the territory embraced in the Brownsville district, namely, from the mouth of the Rio Grande river to Arroyo Del Tigre, as superintendent quartermaster corps, during all of which time applicant was under the direct orders of the commander of the Brownsville district. That on, to wit, December 23, 1918, he was charged with having, during the time of his service from September 1, 1917, to December 15, 1918, committed crimes and offenses in violation of the Articles of War (Comp. St. § 2308a), and was taken into custody by the authority of respondent. That these charges were duly referred for trial to the General Court-Martial, duly appointed to sit at Brownsville. That the applicant was duly arraigned and tried by said court, and is now held in confinement awaiting the review of the said proceedings, and that in all matters relating to the arrest, confinement, and trial of the applicant the rules regulating military procedure have been complied with. That the military jurisdiction over applicant as to arrest, detention, and trial is asserted upon the ground that applicant is a person subject to military law, being as claimed by respondent, though a civilian, a person coming within the scope and meaning of subdivision D of the Second Article of War, which provides as follows:

"All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war, all retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."

That during the period in which the applicant is charged to have committed the crimes and offenses, the United States was at war, and that during all of said time the armies of the United States with which the applicant was serving, to wit, troops in the Brownsville district, were in the field. That the general orders of the War Department, section 319, Compilation 1881 to 1915, also section 2193, Manual Quartermaster's Corps, United States Army, provides as follows:

"Field service is defined to be service in mobilization, concentration, instruction or manuever camps, as well as service in campaign, simulated campaign, or on the march."

That the duty of the troops in the Brownsville district is to patrol the Texas-Mexican border, for the preservation of life and property in the district, and to enforce the laws of the United States. That, in the performance of said duty, outposts at frequent intervals are maintained at or near the Rio Grande river. That, as supports and reserves for said outposts, squadron stations are maintained at Brownsville, San Benito, Mercedes, McAllen, Sam Fordyce, and Ft. Ringgold. That they are all equipped for field service, wear the field uniform, are supplied under conditions for troops in the field, are housed in the outposts in tents or huts, and at the squadron stations—with few exceptions—in barracks of the cantonment type, and the troops are designated as troops in the field. That the commander of said district had at all times had authority in certain contingencies to cross the river into Mexico, and troops had been prepared to make such crossings at an instant's notice. That all administrative orders relating to said troops are given to them as troops in the field. That since 1915 there has been considerable unrest on the border. What were known as bandit raids frequently occurred, and numerous fights took place between bandits, soldiers, and civilian officers, extending to the wrecking of a passenger train and the killing and wounding of several persons. That during 1916, and up to the present, there had been about five distinct invasions of Mexico by our troops following bandits therein. That the soldiers have been greatly needed on the border to protect life and property, and that they are at all times maintained and equipped for combat with bandits and law violators in the border section.

Attached to the return among other affidavits are affidavits of Col. Hamilton Bowie, commanding United States troops at Ft. Ringgold, Tex., and of

Col. Herbert J. Slocum, commander of the Brownsville district troops from January, 1918, to October, 1918. They establish that, during the time the latter was in command of the district, one officer was killed in Mexico, and about ten enlisted men were killed by fire from Mexico; that at many times it was unsafe to water the horses in the river; that in the military sense the troops were ready and looking for a fight at any minute; their duties were the same as if opposing a foe, and the troops were frequently on the firing line; that the war with Germany made it necessary for these troops to be in the field along the Southern Texas border for protection against German influences in Mexico, which at times assumed a serious and dangerous aspect, requiring our troops to be on constant patrol duty in the field, at all times fully armed and equipped. By his affidavit, Col. Bowie establishes that the troops under his command at Ft. Ringgold were on "field duty" as defined in the army regulations, as distinguished from garrison duty; that, of the four troops of cavalry under his command, one was constantly on outpost duty on the international border at distances of from 13 to 25 miles from Ringgold, and that frequent patrols were made along the border, and guards were at all times maintained; that these troops were equipped for field service with pack trains at all times ready, together with a wireless station for communications; and that an intelligence department was maintained and civil scouts employed to procure and report information of military value. At the time the troops stationed at Ft. Ringgold, and detached from that station, they were occupied with guard duty, patrols, target practice, and care of animals, incident to field service, to the exclusion of ceremonies and drills of precision, which are features of garrison service. All matters of fact thus stated in support of the return, I find to be true.

It further appears from the application and the return that, on some of the offenses with which Jochen is held to the military court, he is also charged in this court in the Brownsville division, and has been bound over by the commissioner to the grand jury. It appears with reference to this feature of the case, as shown in the supporting affidavits, that the arrest by the civil court was made on information from the military authorities, and after the military authorities had taken the applicant into actual or constructive custody, and it is apparent that, in so far as the question of comity arises between the military and the civil tribunal, as to many of the matters with which he is charged by the court-martial, no jurisdiction has ever attached in the civil court, and that as to those of which the civil court has jurisdiction the same was acquired under such circumstances as that, if comity alone operated to dispose of this matter, it would require that applicant not be taken from the military control in which he now is.

James A. Graham, of Brownsville, Tex., for applicant.

Major William C. Bedal, Judge Advocate, for respondent Col. Frank Keller.

HUTCHESON, District Judge (after stating the facts as above). [1] In every inquiry by the courts into the assertion and exercise of military jurisdiction, the question which arises at the threshold, and must be first determined, is: What kind of jurisdiction does the military seek to assert? As to this question, there has not, since the great case of Ex parte Milligan, 4 Wall. 141, 18 L. Ed. 281, been any difficulty in arriving at the fundamental principles which determine it, but only in applying those principles to the particular states of fact. In that case the court said:

"There are under the Constitution three kinds of military jurisdiction: One to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within the states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrec-

tion within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the national government, when the public danger requires its exercise. The first of these may be called jurisdiction under 'military law,' and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as 'military government,' superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated 'martial law proper,' and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights."

[2, 3] In the case at bar, the jurisdiction asserted by the military is under the first subdivision, "military law," and is bottomed on the acts of Congress "prescribing rules and articles of war or otherwise providing for the government of the national forces." It is therefore wholly beside the mark to discuss, consider, or give weight to the question of whether civil courts were properly functioning, or whether those extreme conditions which alone justify the exercise of military jurisdiction under those branches known as "military government" and "martial law" proper have operation. I would be the last to view with equanimity, or permit without relief, any usurpation or deprivation of civil rights by the military; but where the military, as in this case, seeks only to assert the jurisdiction under military law as represented in the acts of Congress over persons who are claimed to be a part of the national military establishment, the duty of this court is the simple one of determining whether the applicant is a member of the land or naval forces of the United States, and, if so, whether Congress has subjected him to military law, because, while it is clear that under the guaranties of the Constitution no person can be deprived of his right of trial by jury except he be a member of the land or naval forces of the United States or of the militia when in actual service, it is as equally true that if he is a member of the land and naval forces Congress has the plenary power to subject him to military law, and the guaranties of the Constitution for trial by jury are wholly inapplicable.

Of such weight, however, with Congress, has the right of trial by jury always been, that it has never left to implication or construction the question of whether a person is subject to military law, and, in each case where military jurisdiction of that kind is asserted, it is incumbent upon the military to put their finger on the act which confers the jurisdiction.

As far back as 1819, Hon. William Wirt, then Attorney General of the United States, in an able and exhaustive opinion to the Secretary of War, on the question of whether cadets at West Point are subject to military law, in discussing this phase of the question said (1 Op. Attys. Gen. 276):

"Congress has no power to pass a law which shall deprive the person accused of a criminal or otherwise infamous offense, of his trial by jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger.

"Even in relation to the land and naval forces (including the militia when

in actual service), Congress have never considered the mere act of stamping on those bodies a military character, by ordering them to be raised, organized, and called into service, as being sufficient, of itself, to subject them to trial by court martial under the rules and articles of war; because this would be to abrogate a high constitutional privilege by implication. In every instance, therefore, in which Congress has impressed a military character on any body of men, whom they intended to divest of the civil right of a trial by jury, besides the impressment of that military character, they have uniformly and expressly declared that they should be subject to the rules and articles of war."

And in the learned and exhaustive way characteristic of that great and able lawyer, he collates and presents the many acts of Congress touching upon such matters from the first resolve of the Continental Congress, passed April 12, 1785, to the act of April 24, 1816, then lately passed.

An investigation of the subsequent enactments of Congress having to do with similar matters will show, in the language of Mr. Wirt, "a course of legislation so long continued and so uniform marking the sacred respect in which Congress have ever regarded the right of trial by jury, that it will justify us in assuming it as their sense, that this right is never to be taken away by implication, never by the mere impressment of the military character on a body, never without a positive provision to that effect." So that, in approaching an investigation of whether the act relied upon as subjecting a civilian attached to the army to military law was within the power of Congress, impressed as I am with the evidences of the caution and respect in which Congress, the co-ordinate branch of this government, has ever regarded jury trials, I would not be justified, except in the clearest case, in declaring an act unconstitutional which is passed by Congress in the exercise of their acknowledged authority to confer military jurisdiction over persons in the land and naval forces of the United States.

[4] That it is not necessary that a person be in uniform in order to be a part of the land forces, I think clear, not only upon considerations of common sense and common judgment, but upon well-considered and adjudicated authority. Some of the leading cases sustaining the jurisdiction of military courts over civilians attached to the army and navy are In re Thomas, Fed. Cas. No. 13,888, 23 Fed. Cas. 931; United States v. Bogart, Fed. Cas. No. 14,616; In re Reed, Fed. Cas. No. 11,636, 20 Fed. Cas. 409; Bogart's Case, Fed. Cas. No. 1,596, 3 Fed. Cas. 796; Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838; Ex parte Milligan, 4 Wall. 123, 18 L. Ed. 281. Against these authorities I find no contrary expression. The apparently contrary view expressed by Attorney General Charles Devens, in 16 Op. Attys. Gen. 13, that a quartermaster's clerk, a civilian employed in that capacity, is amenable to the rules and articles of war, shows that his opinion turned, not upon the want of power of Congress, but upon its failure to subject him to military law; because in that opinion the Attorney General declares that had the clerk been serving with the armies in the field he would, under the sixty-third Article of War, become for the time amenable to court-martial jurisdiction, citing Benet Military Law, p. 29, nor is there any violence done to the dictates of humanity and reason when a person who has become voluntarily a member of the military estab-

lishment has martial law invoked against him; the maxim volenti non fit injuria at once arises, or as it was otherwise stated by Attorney General George H. Williams, in 14 Op. Attys. Gen. 22:

"Persons who attach themselves to an army going up on an expedition against hostile Indians may be understood as agreeing that they will submit themselves for the time being to military control."

[5, 6] It being established then that Congress has the power to subject a civilian to military law under such terms and conditions as it might see fit to impose, it remains only to determine whether the conditions surrounding Jochen's service with the army were those defined in subdivision D, article 2, as a condition of subjection to military law. There is no question but that Jochen was either a retainer to the camp or a person accompanying or serving with the armies of the United States; there is equally no question but that his service was in time of war. On the other hand, he was not serving without the territorial jurisdiction of the United States, and it is vigorously denied that the armies with which he was serving within the United States were "in the field" within the meaning and intent of the act.

Whether, then, the armies with which Jochen was serving were "in the field" is the storm center of this case. Counsel for applicant contends that the words "in the field" are there used in the sense and meaning of the area of actual conflict with an enemy with whom the United States is at war, or, at least, if not within the area of the actual conflict, that the troops must sustain such a relation to the combatant troops in the actual field of battle, as that constructively they are part and parcel of the field operations, and in support of this contention cites the definitions of lexicographers, and the opinion of Judge Hand in Ex parte Gerlach (D. C.) 247 Fed. 616; of Judge Davis in Ex parte Falls (D. C.) 251 Fed. 415; and of Judge Smith in Ex parte Mikell (D. C.) 253 Fed. 817. Counsel for the army, on the other hand, contends that the words "in the field," as used by Congress, have the meaning not only of the territory or zone of actual battle operations against an enemy with whom a declared state of war exists, but that it embraces troops engaged in maneuvers, expeditions, or disposition of any nature designed to perform actual service, either by way of scouting or procuring information, or by way of patrol duties in guarding and protecting the border and the citizens from bandit and other forays, and especially that Congress, in enacting this article in 1916, used the terms "in the field" in the sense in which those terms were defined in the general orders of the War Department, set out in this opinion supra.

It is admitted that the War Department in its practical construction, and in the opinions of the department of the Judge Advocate General, gives the construction to the terms of the act now contended for by the army; but applicant asserts that this construction is purely an administrative one, and that this court must determine the meaning of the words themselves uninfluenced by the construction placed upon them by the Executive Department.

Of course, from a general point of view, this contention is sound, as the judicial branch of the government has no right to delegate its duties

to or receive its instructions from the Executive Department; but there is a difference between the construction given by the Executive Department though mere executive orders which would have no weight whatever with the court, and the construction contained in the quasi judicial opinions of the Judge Advocate General, which, though not binding, would certainly be persuasive in their reasoning with the courts; and it is further a familiar principle of general application that, in considering a statute, technical words relating to an art, a science, or a trade, are ordinarily to be taken in their technical sense, and will be so construed unless the context or other consideration plainly shows a contrary intent (2d Lewis, Sutherland, Statutory Construction, pars. 393–395; 36 Cyc. 1118), and it addresses itself to the reason that, when Congress used a military term in articles of war intended for the government of the military, it used that term in the recognized sense then and for many years given it by that Executive Department, for whose use and employment the article was passed.

In addition to the opinions of the Judge Advocate General, which as aforesaid clearly and with unanimity declare troops in the situation of those to which petitioner was attached to be "in the field," the books contain an opinion written by George H. Williams, Attorney General of the United States, on April 1, 1872 (14 Op. Attys. Gen. 22), in which, as the head of the law enforcement branch of the Executive, he advised the Secretary of War that—

"Civil employés of the War Department, serving with the military forces of the United States in the Indian country" under circumstances showing that "defensive earthworks are deemed necessary and have been built" by troops, where within twelve months soldiers had been attacked and killed by hostile Indians, "and where Indians are believed at all times to be in a semi-hostile attitude," amenable to military jurisdiction and controlled by court martial as persons serving with the armies of the United States "in the field."

This opinion was based on the sixtieth Article of War, providing as follows:

"All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

The Attorney General said.

"To determine when an army is 'in the field' is to decide the question raised. These words imply military operations with a view to an enemy. Hostilities with Indians seem to be as much within their meaning as any other kind of warfare."

The only court opinions construing the words "in the field" are, I believe, the three opinions of the district judges above referred to. In the first, Ex parte Gerlach, an application for habeas corpus brought by Gerlach, mate of the steamship El Oxidente, was dismissed; it appearing that the ship was engaged in army transport, and Judge Augustus Hand saying:

"The words 'in the field' do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted."

In Ex parte Falls, it appeared that Falls was assigned as chief cook on the Edward Luckenbach, engaged in transporting supplies for the United States Army. He attempted to desert and was held to court-martial. Judge Davis held that a person serving in the United States Army Transport Service, transporting arms, equipment, and supplies, in time of war, was a person serving with the armies of the United States in the field. In Ex parte Mikell, the applicant was first a stenographer, later field auditor attached to the construction quartermaster of the camp at Camp Jackson, Columbia, S. C., a cantonment, mobilization, and training camp. Judge Smith held that the words "in the field," as used in the second Article of War, mean "in the actual field of operations against the enemy; not necessarily the immediate battle front, nor necessarily the immediate field of battle, but the field of operations, so to say; the field of war; the territory so closely connected with the absolute struggle with the enemy that it is a part of the field of contest"—and, while conceding that under the construction of the War Department the troops at that point would be "in the field," refused to follow the construction placed upon the words by that department.

From the opinion in the case it appears that the construction given by the War Department was not presented as a construction in use prior to and therefore incorporated by Congress into the words of the act, but a subsequent construction grafted on the words of the act by executive decision, and in that view, of course, the remarks of the judge were eminently correct. It appears further from the opinion that Judge Smith was greatly impressed with the idea that military jurisdiction should not be asserted because of the fact that the courts of the country were open for the administration of public justice, and no occasion for the exercise of military existed. He said:

"In the present case, military law has not been proclaimed, all the courts of the country are open, the field of actual war is thousands of miles removed from this district, and peace prevails wholly within the territorial jurisdiction of the United States. There is military preparation there, but no military conflict."

In my view these expressions were not pertinent to the decision of the point, because the only branch of military jurisdiction sought to be exercised by the army in the Mikell Case, as in this, was the first branch, "military law," to be exercised both in peace and war, and resting entirely within the discretion of Congress to be exercised in the manner and over the subjects selected by Congress. Whether or not, therefore, civil courts are functioning, has no bearing, because Congress has the undoubted right to pass laws making persons, members of the land forces, subject to military law even in permanent camps and under strictly peace conditions of absolute normality.

That Congress, in approving and passing the act of 1916, had in view the well-defined and settled use of that term in military parlance and practice, and that it used it in that meaning, I have no doubt. It must be borne in mind that when Congress drafted this act in August, 1916, while the United States was not at war, it was on the very threshold of it, its peaceful ships had been sunk at sea, its nationals had

been sent to violent deaths, on the international border the ordinary racial antipathy of the lawless and ignorant Mexican to the Gringo, which had been through their own civil wars and state of banditry fanned into a smouldering and almost leaping flame, was being fomented by German spies and German propoganda, and border conditions were so acute that mobilization of the militia of the country became necessary. With these conditions of actual war staring Congress in the face, with the country ringing from end to end with demands for preparedness, with the spectacle before its eyes of the most tremendous struggle and the most extraordinary acts of preparation on the part of the combatant nations, the Congress having in mind that, should this country enter the great war, it would need, as experience in Europe showed, an immense army to which must be attached thousands of quasi civilians, and that to produce such an army the United States would necessarily be turned into a vast maneuver field with concentration, mobilization, and training camps and quarters scattered broadcast, having in mind the great maxim, "Salus populi suprema lex," passed the act so as to give to this great army the jurisdiction in time of war to adequately and properly function, not only with reference to the enlisted men, but to all those attached to it for other purposes. The history of the times, as embodied in legislation even affecting civilians, shows that extreme conditions demanded extreme measures. I need only refer to the Espionage Act, the acts against exportation, the act protecting the life of the President, the act authorizing the taking over of the railroads and the wire systems; all of these acts of Congress passed in times of emergency, and designed to compel the individual to subordinate himself, temporarily at least, to things and activities of war conditions, shows the temper, the spirit, and the point of view of Congress so clearly and furnishes such an index to its composite mind, that it can with confidence be asserted that, when it used the words "in the field," it clearly intended them to have the meaning which long usage of the War Department had given to them. If more were needed to sustain this view, comparison of the act in question with the act which it superseded would furnish it.

Prior to the adoption of the present articles, on August 29, 1916, the Article of War more nearly corresponding to paragraph D, second Article of War, was the sixty-third article, reading as follows:

"All retainers to the camp and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and discipline of war."

The present article subjects to military law all persons attached to the armies of the United States without its territorial jurisdiction, irrespective of the character of the service performed by the armies or of the fact of the existence of war, and subjects all persons within the United States in time of war provided they were serving with the armies in the field.

[7] It is my view, therefore, that the writ should be denied:

First, because I hold that the terms "in the field" were used by Congress in the meaning and sense given to them in the general orders of the War Department, as follows:

"Field service is defined to be service in mobilization, concentration, instruction or maneuver camps as well as service in campaign, simulated campaign or on the march."

And, second, that if in this I am mistaken, and the words are not broad enough to embrace armies in concentration, maneuver, and mobilization camps, but must have application only where the armies are in or expecting actual conflict, that the conditions on the border during the period of Jochen's service were such as that, in the more limited sense as well, the armies with which he was serving were "in the field."

So believing, I hold that Jochen should remain in the custody of and be tried by the military authorities, that the return to the rule should be held sufficient, and the application for the writ of habeas corpus should be dismissed; and it is so ordered.

In re MOHAN SINGH.

(District Court, S. D. California, S. D. March 24, 1919.)

No. 3276.

ALIENS ⇐61—NATURALIZATION—"WHITE PERSON"—HINDU.

The possession of a common racial stamp being the basis of classification, the Hindus of India, as members of Aryan branch of the Caucasian race, are "white persons," who, under Rev. St. § 2169 (Comp. St. § 4358), may be naturalized; the meaning to be given the term being that which, from the growth of knowledge, it had when, having accidentally been omitted in revision from the original naturalization law, it was by enactment reincluded.

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

Application by Mohan Singh to become a citizen of the United States. Application granted.

S. G. Pandit, of Los Angeles, Cal., for applicant.

Frederick K. Jones, of Los Angeles, Cal., United States Naturalization Examiner.

BLEDSOE, District Judge. Mohan Singh, a high caste Hindu, competent in all moral and intellectual respects, has applied for citizenship. His application is resisted by the government upon the ground that, being a Hindu, he does not come within the terms of section 2169 of the Revised Statutes (Comp. St. § 4358). The matter has been presented in a very able and enlightening manner by the learned counsel for the petitioner (himself a naturalized Hindu), and has been submitted by the government upon the brief filed by it before the United States Circuit Court of Appeals in the Second Circuit in the matter of the application of one Balsara, a Parsee, born in Bombay, India, together with a memorandum submitted to the District Court of Pennsylvania, Eastern District, in the matter of Sadar Bhagwab Singh, also a Hindu, and the decision in favor of the government in the case last mentioned, reported in 246 Fed. 496.

The comprehensive and well-nigh exhaustive brief submitted by the government in the Balsara Case failed, however, to convince the Circuit Court of Appeals of the correctness of the contentions made therein, because the judgment of the Circuit Court (171 Fed. 294) admitting the petitioner to citizenship was affirmed (180 Fed. 694, 103 C. C. A. 660). The whole controversy seems to revolve around the construction to be given to section 2169, supra, which reads as follows:

"The provisions of this title [Naturalization] shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

The first federal naturalization law was passed March 26, 1790. Section 1 of that act (1 Stat. pp. 103, 104, c. 3) provided "that any alien, being a free white person, who shall have resided," etc., might be admitted to become a citizen, etc. Though the section was amended several times, yet this general language, containing always, however, the phrase "free white persons," remained in the naturalization statute until 1874, at which time, at a revision of the laws, but obviously because of an inadvertence, the phrase was omitted. This inadvertence was due in part, perhaps, to the fact that in 1870 the naturalization laws had been amended, so that the privileges of naturalization were "hereby extended to aliens of African nativity and to persons of African descent." Comp. St. § 4358. Immediately upon the hiatus being discovered, and the suggestion being made that the revision, pronouncedly, was not intended to effectuate a change in the law, but merely a revision of it, section 2169 was amended to read as is first set forth hereinabove.

Much discussion seems to have been indulged in by different courts with respect to the meaning to be accorded now to the phrase "free white persons." The Circuit Court of Appeals of the Fourth Circuit, Dow v. U. S., 226 Fed. 145, 140 C. C. A. 549, inclines to the opinion that since there was a positive repeal, through the revision, of the phrase as originally enacted, and subsequently a re-enactment thereof, its meaning now must be determined by a consideration of the meaning at the time of the last enactment in 1875, rather than at the time of its first enactment in 1790. The truth seems to be, however, that Congress never deliberately repealed the phrase, and that when it was called to its attention that its repeal had been effectuated through a mere inadvertence, its re-enactment or reinstatement was immediately had. In any event the debates in Congress at the time seem to indicate that the action taken in 1875 was taken merely to correct an obvious inadvertence, and therefore, in truth and in fact, it would seem as if the section now should be construed as if the unintentional repeal in 1874 had never occurred.

In the brief in the Balsara Case a great deal of learning is employed in the effort to establish the contention that Congress did not in 1790 intend to include the "white" or "Caucasian" race, as the same has since been called, in its reference to "free white persons." This is probably so, since the classification of races embodying the generic term "Caucasian" had not then been promulgated, at least in America.

Be that as it may, it seems clear to me, however, that the phrase as used in the 1790 statute was intended rather in an exclusive than in an inclusive sense.

Naturalization statutes had been adopted theretofore by several of the American colonies. The committee of three, which reported the original bill containing the phrase "free white persons," was composed of members from the states of Pennsylvania, South Carolina, and Virginia, each of which had naturalization statutes.[1] The latest South Carolina statute, enacted in 1786, provided for the naturalization of "all free white persons,"[2] and from this I think it reasonably safe to assume that the member from South Carolina, Mr. Tucker, probably had something to do with the drafting of the statute reported, and, being familiar with the existing provision of his own state, drew upon that for the language wherewith to indicate the class of persons to whom federal naturalization was to be available.

In South Carolina, at that time, there were black slaves in large numbers, and perhaps, also, even at that late date, red slaves[3] and white slaves.[4] It seems, therefore, obvious that the South Carolina Legislature was declining to accept into the citizenry of the colony slaves and indented servants of every character and color along with those who, in comparison with "reds" and "blacks," then present in large numbers, were to be considered as "whites." There is nothing that I can discover to indicate anywhere that either the colonies originally or the United States government later, when the federal statute was first passed, had in mind the exclusion from citizenship of any other persons than those referred to, to wit, negroes, Indians, and unfree whites. In fact, in the debates on the adoption of the statute in 1790, Representative Page of Virginia, speaking upon the motion, said:

"I think we shall be inconsistent with ourselves if, after boasting of having opened an asylum for the oppressed of all nations," etc. Annals of Congress, cols. 1109–1125.

In spite of the discussions and not infrequent controversies in the courts, which have arisen with respect to the meaning of the phrase, Congress has seen fit at no time since its incorporation into the law to change it, and it remains to-day as it was originally enacted more than a century and a quarter ago. With the march of time and growth of knowledge, ethnologically and otherwise, however, it may be inferred, I think, that Congress, in its successive re-enactments of the language, has re-enacted it with its enlarged meaning in mind; and the conclusion of the Circuit Court of Appeals of the Second Circuit in the Balsara Case, "supported by the great weight of authority," to the

1 Annals of Cong. vol. 1.

2 4 St. at Large, S. C. p. 746.

3 As late as 1708 one-quarter of the whole body of slaves were Indians. Doyle, English Colonies in America, vol. 1, p. 359.

4 White slaves were found in all the southern colonies in early days, recruited from English prisons, unsuccessful revolutionists, and kidnapped men, women, and children. Doyle, supra, pp. 382–385. Their presence in the states as late as 1789 was a subject of debate in the Congress of that year. Harper's Encyclopædia of U. S. History, vol. 8, p. 209.

effect that "Congress intended by the words 'free white persons,' to confer the privilege of naturalization upon members of the white or Caucasian race only," seems reasonable and just. The court then continues:

"The words refer to race, and include all persons of the white race, as distinguished from the black, red, yellow, or brown races, which differ in so many respects from it. Whether there is any pure white race, and what peoples belong to it, may involve nice discriminations; but for practical purposes there is no difficulty in saying that the Chinese, Japanese, Malays, and American Indians do not belong to the white race."

Modern ethnologists use the terms "white" and "Caucasian" synonymously and interchangeably. Seemingly the preponderance of respectable opinion includes the Hindus of India as members of the Aryan branch or stock of the so-called Caucasian or white race. See Report of the Immigration Commission, Senate Document No. 662, 61st Congress, Third Session. I have been cited to no anthropological authorities which include the Hindus in any of the other races of mankind. They belong to the Aryan stock, and therefore to the Caucasian or white race, because of certain physical and other peculiarities possessed by them and which indubitably mark their descent. "Caucasians" are "white," whether they live under the tropic sun, and therefore have a very dark skin, or abide in northern climes, and possess a light one. The possession of a "common racial stamp" is the basis of classification.[5]

My conclusion is that, in the absence of any more definite expression by Congress, which is the body possessing the power to determine who may lawfully apply for naturalization, any members of the white or Caucasian race, possessing the proper qualifications in every other respect, are entitled to admission under the general wording of the statute respecting "all free white persons." In the absence of an authoritative declaration or requirement to that effect, it would seem a travesty on justice that a refined and enlightened high caste Hindu should be denied admission on the ground that his skin is dark, and therefore he is not a "white person," and at the same time a Hottentot should be admitted merely because he is "of African nativity." The same observation might apply with respect to equally enlightened members of other races who are now denied admission on the ground that they fall without the designation white or Caucasian. See Balsara Case, supra. But that is a matter for adjustment by Congress, and not by the courts.[6]

[5] Man, Past and Present, Dr. A. H. Kean, Cambridge University Press, 1900, p. 448.

[6] 28 Am. Law Review, p. 818, contains a very interesting article written by Prof. J. H. Wigmore, in 1894, in criticism of Judge Colt's decision (In re Saito [C. C.] reported in 62 Fed. 126), denying citizenship to Japanese on the ground that they are not Caucasians. To maintain his thesis that they are, Prof. Wigmore indulged in the postulate that "Caucasian" and "Aryan" are interchangeable terms, and that otherwise the Semitic peoples, who are freely admitted, would fall under the ban because, being non-Aryan, they would be non-Caucasian. The error in this seems obvious. See Immigration Commission Report, supra, p. 5.

The case cited in 246 Fed. 496, supra, does not seem to be supported, in my judgment, by the controlling authorities, and its reasoning is to me inconclusive. On the contrary, the Circuit Court of Appeals of the Second Circuit, in the Balsara Case, supra, the Circuit Court of Appeals of the Fourth Circuit, in the Dow Case, supra, and other courts cited and relied upon in those decisions, seem to support the views announced herein. In addition, I am advised by counsel for petitioner herein, and his statement is not challenged by the government, that Hindus have been admitted to citizenship in the Southern district of Georgia, the Southern district of New York, the Northern district of California, and the Eastern district of Washington by the courts of the United States, and by the superior court of California in both San Francisco and Los Angeles. All of these precedents are persuasive.

Taken in connection with the reason of the thing, as it appeals to me, the granting of petitioner's application seems proper; and it will be so ordered.

FREEPORT TEXAS CO. et al. v. HOUSTON & B. V. RY. CO. et al. (MIDLAND BRIDGE CO., Intervener).

(District Court, S. D. Texas. March 20, 1919.)

Consolidated Cause No. 88.

1. BRIDGES ⊂=20(4)—CONSTRUCTION—RECOVERY FOR WORK DONE.
A company contracting to complete a bridge cannot recover for work done on a structure which collapsed before its completion, except by showing strict compliance with the plans, that the structure fell solely because of this compliance, and that the company was not chargeable with notice of the defects, or that such a result was likely to occur.

2. BRIDGES ⊂=20(2)—CONSTRUCTION—MODIFICATION OF CONTRACT—FEDERAL STATUTE.
Act March 3, 1899, § 9 (Comp. St. § 9971), requiring modification of certain bridge plans to be approved by federal authorities, is inapplicable to a change which does not affect the location or obstructive nature of the bridge.

3. BRIDGES ⊂=20(6)—CHANGE OF PLAN—EVIDENCE.
In action to recover for work done on a bridge before it collapsed, evidence *held* to show that defendant railway company had consented to certain changes in the plans, although its chief engineer had not personally authorized the modification.

4. BRIDGES ⊂=20(4)—CHANGE OF PLAN—RECOVERY ON CONTRACT.
Plaintiff company cannot recover for work done on a bridge which collapsed before it was completed, upon the ground that the collapse was due to a defective change in the plans, where plaintiff proposed the change and the owner, relying on the bridge company's recommendation, consented to it.

5. BRIDGES ⊂=20(4)—CONSTRUCTION—RECOVERY.
Plaintiff cannot recover for work done on a partially completed bridge upon the ground that the bridge's collapse was due to following the owner's plans where collapse was partly due to plaintiff's use of faulty material and improper methods of work.

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6. BRIDGES ⇐20(4)—CONSTRUCTION—RECOVERY.

A bridge company, claiming that the collapse of a partially completed bridge was due to following changed plans and specifications, cannot recover for work done where it knew or was chargeable with knowledge that the changed plans were dangerous and could easily have provided against the danger.

In Equity. Suit by the Freeport Texas Company against the Houston & Brazos Valley Railway Company and others, in which the Midland Bridge Company intervened. Judgment denying intervention.

Scarritt, Scarritt, Jones & Miller, of Kansas City, Mo., for intervener.

A. R. Masterson and Andrews, Streetman, Logue & Mobley, all of Houston, Tex. (John A. Mobley, of Houston, Tex., of counsel), for defendant.

HUTCHESON, District Judge. This matter is before the court on exceptions of the Midland Bridge Company to the report of the special master denying the intervention of that company.

The matter at issue springs from the making and partial performance of a bridge construction contract entered into on July 1, 1914, between the Bridge Company, intervener, and the Houston & Brazos Valley Railway Company and Brazoria county. The Bridge Company, as contractor, agreed with the Houston & Brazos Valley Railway Company and the county of Brazoria, Tex., as owners, to build a bridge across the Brazos river between Freeport and Velasco, Tex., about four miles from the Gulf, in accordance with certain plans and specifications therefor which were prepared by the owners through their engineers, and which were attached to and made a part of the contract. This contract expressly gave the right to the owners to modify and change the plans and specifications, and to designate and direct, within certain limitations, the quality of work and material to be done and supplied, and the contract price was to be determined by the quantity done or supplied, as the price was to be determined on a piece price basis.

The contractor proceeded with the work, and constructed three concrete piers on and from the Velasco side. Pier 3, being a pivot pier located about one-third of the way across the river, was intended to support a revolving steel span 290 feet long, and that pier was entirely completed, and so much of the steel revolving span as connected Pier 2, which was at the shore line, with Pier 3, and extending two members beyond Pier 3, were completed, when, on May 7, 1915, this Pier 3 toppled over and fell into the river, carrying with it the steel span attached to it, creating a condition of obstruction to navigation and total loss of the steel unless removed. Intervener contending that the fall of the bridge was due to no fault on the part of it, but totally to defective plans furnished by the owner, and that, therefore, it was not responsible for the fall, and the defendants denying this and asserting that the responsibility for the fall and consequent loss was chargeable to the Bridge Company, it became immediately apparent that a serious, and

perhaps long drawn out, controversy would develop. The parties to the construction contract thereupon, for the purpose of making some progress in taking care of the physical situation thus developed by the presence of the steel in the stream, did, by their written contract, dated June 21, 1915, in four paragraphs agree as follows:

Paragraph 1 provided that—

"The contractors will begin at once and diligently prosecute the work of taking the steel composing the span recently erected as a part of the combination railroad and wagon bridge over the Brazos river between Freeport and Velasco in Texas, and now in the bed of the river near the site of the bridge, from its present location and of removing the same to the river bank at or near the Velasco end of said bridge site, * * * and the contractors will continue the prosecution of such work until it shall become plainly evident that the cost of taking further steel per unit will exceed the value thereof, or until the representative of the owners at the site of the work shall determine it to be impracticable to further prosecute the work, and shall in writing request the contractors to discontinue it."

Paragraph 2 provided for keeping cost account and the contract value of the work.

Paragraph 3 provided basis of calculation and time of payment.

Paragraph 4 provided as follows:

"Neither the fact that this contract has been entered into, nor that the work herein contemplated has been done, nor that it has been paid for shall prejudice or estop either of the contractual parties from asserting all the claims against each other, or any other person, which they respectively might otherwise assert, growing out of their relation to the previous history of the aforesaid bridge. The contractors claim and assert, among other things, that they are in no way liable or responsible in law to the owners for the loss or damage that has occurred by reason of the fact that a part of the said bridge heretofore constructed did not stand up. The owners contend the opposite. If it shall hereafter be established or agreed by the parties interested, or if it shall be judicially determined that the contractors are right in their said claim and assertion, then the portion and amount of said contract value that they have by the terms of this contract agreed to bear shall be allowed and paid to them by the owners; and on the other hand, if it shall hereafter be established or agreed by the parties interested, or if it shall be judicially determined that the contractors are liable and responsible in law to the owners for the loss or damage that has occurred by reason of the fact that a part of the said bridge heretofore constructed did not stand up, then the portion and amount of said contract value that the owners shall have paid to the contractors under the terms of this contract shall be allowed and paid to them by the contractors."

The work was forthwith begun by the Bridge Company under this contract, and was proceeded with until all contemplated work was completed. Accounts of the cost of the work were kept and rendered biweekly as contemplated by the contract, amounting in all to $———, but at no time did the owners make any of the biweekly payments, or, in fact, any of the payments, as they had agreed to do. Hence, this intervention to recover that contract value, and to establish a lien therefor upon the receivership property. The Houston & Brazos Valley Railway Company interposed various pleas and demurrers, all of which have been waived and abandoned. They joined issue on the merits of the intervention, and also by cross-complaint sued for certain sums due them. The intervener asserted that both the original plan, which pro-

vided for a 35-foot foundation supported by piles if required by the engineer, and the changed plan, which provided for a 32-foot foundation and 21 piles (which change they allege was by the authority, if not the direction, of the Railway Company and its engineers), were fundamentally defective. That they built the bridge in strict accordance with the plans as originally made, except where changed as above, without fault of any kind on their part, and that the building of the bridge in accordance with such plans was the sole cause of its fall. The defendant contended, first, that the burden was on the intervener to establish its contentions, and that it had not only failed to do so, but that the proof had shown affirmatively, first, that the original plan was not defective, second, that the change in the plan was unauthorized, and, third, that neither the original plan nor the changed plan would alone have caused the fall but for the use by intervener of defective concrete in the pier, and of defective methods in making the excavation in the bed of the stream near the pier; the master agreeing with the contentions of the defendant that the change in the plan was unauthorized, that the excavation in the stream was dangerous and improper, and that there was defective concrete in the pier, both contributing causes of the fall, found that the intervener was not entitled to recover on its claim, and that it was due the defendant and its receiver the sum of $1,692.08, and so finding recommended that judgment go accordingly.

From this statement of the issues joined it appears that the case presents the now familiar aspect of a controversy between builder and owner, where, notwithstanding the fact that the structure which the contractor agreed to erect is not and never will be completed, the contractor claims recovery for the work and labor done on the contract, asserting that the failure to complete it is chargeable, not to his fault, but to that of the owner, in that the contractor faithfully followed the plans prepared by the owner; those plans being defective and impossible of execution. In some jurisdictions which, in this character of contracts, apply the contractual maxim that, "as a man binds himself so shall he be bound," to the completion of the structure rather than to the means by which it is to be completed, such a claim could not form the basis of a serious controversy, because these courts hold that, while it is true that the contractor has agreed to build by and in accordance with certain plans, it is equally true and of more controlling influence that he contracted, not for an incomplete, but for a completed thing, and that, until he completes and presents to the owner the thing contracted for, he has no standing in court. Illustrative of, and perhaps the leading authority on this line, is the decision of the Supreme Court of Texas, in Lonergan v. San Antonio Trust Co., 101 Tex. 63, 104 S. W. 1061, 106 S. W. 876, 22 L. R. A. (N. S.) 364, 130 Am. St. Rep. 803; Creamery Package Co. v. Russell, 84 Vt. 80, 78 Atl. 718, 32 L. R. A. (N. S.) 135; Chandler v. Wheeler (Tenn. Ch.) 49 S. W. 278. This line of cases seems to be bottomed, not only on the general principles of English common law, but on the vigorous authority of the United States Supreme Court, in the case of Dermott v. Jones, 2 Wall. 7, 17 L. Ed. 762. In other jurisdictions, of which Bently v. State, 73

Wis. 416, 41 N. W. 338, is perhaps the leading case, see, also, Schliess v. City of Grand Rapids, 131 Mich. 52, 90 N. W. 700; Huetter v. Warehouse & Realty Co., 81 Wash. 331, 142 Pac. 675, L. R. A. 1915C, 671; Pine Bluff Hotel Co. v. Monk & Ritchie, 122 Ark. 308, 183 S. W. 761. Such claim makes an issue, and, if the facts support the contention that the failure to complete was solely due to the defective plans, will sustain recovery.

By the federal Circuit Courts the middle ground seems to be taken, that while the contractor may claim relief if he shows that the defect in, or loss of, the structure was due solely to defective plans, this claim can only be asserted by him where he shows that he did not know, or ought not to have known in the exercise of reasonable care, of the defects therein and their consequences. Of this class of cases are Northern Pacific Railroad v. Goss, 203 Fed. 904, 122 C. C. A. 198, Ninth circuit, and Penn Bridge Co. v. City of New Orleans, 222 Fed. 737, 138 C. C. A. 191, Fifth circuit. Without undertaking to determine as a matter of first impression which of these various views is the sound one, this case will, because of the ruling of the Circuit Court of Appeals, this circuit, be determined in accordance with the last-named view.

[1] Tested by these principles, then, in order for the intervener to make a case, it must have shown, first, that the loss was due solely to defective plans furnished by the owner, and, second, that it did not know, and had no reason to know, that the plans were defective for the purpose designed. The obligation of the intervener being contractual to build and complete the bridge, it cannot hope to recover for a structure falling before completion, unless it brings itself clearly within the principle contended for it by presenting evidence of such clear and satisfactory nature that it establishes affirmatively, and not merely by suspicion or conjecture, first, that it complied strictly and exactly with the plan, second, that the structure fell because, and only because, of this compliance, and, third, that in the course and progress of the work it did not know, and was not charged with knowledge, of the defects, and that such a result was likely to occur because of them.

As to the first matter the intervener concedes that the bridge was not built in accordance with the original plan, but claims that the change in plan under which they were proceeding when the bridge fell was authorized by the owner, and therefore must be regarded from its legal aspects as though it was the original plan.

The defendant denies that the change in the plan was authorized or assented to, and that therefore the sole responsibility for the change and its consequences must be borne by the intervener.

On this question of the change in the plan, which in the hearing before the master was largely the storm center of the case, the master found specifically that one Thanheiser was the engineer of the Railway Company, within the meaning of the term "engineer" as used in the contract, that no change could be made in the plan without his personal approval, and that he did not approve. The master, therefore, though Banks, one of the representatives of the Railway Company, knew and approved of the change, and Tolman, the engineer for the county, also

knew and approved of it, found that the responsibility for the change must rest upon the intervener, since Thanheiser had not given his approval.

Upon this finding the master predicated his conclusion, in part, that the intervener should not recover, resting same upon two grounds: First, that the change in the plan, not having been approved by the Chief of Engineers and the Secretary of War, the same was in violation of section 9, Act of Congress of March 3, 1899 (30 Stat. 1151, c. 425. [Comp. St. § 9971]), as follows:

"That is shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War:

"Provided, that such structures may be built under authority of the Legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced:

"And provided further, that when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

And that being such violation and therefore unlawful, prevented recovery, since the doing of an unlawful act which is the proximate cause of the loss will always deprive the doer of any rights which he otherwise would have had. Second, that, the intervener having changed the plan without authority, and the change being the cause of the fall, it could not recover even apart from the statute, since it could not exonerate itself from responsibility by claiming strict performance.

[2, 3] I have carefully and laboriously read the entire record in this cause, and, agreeing with the fact findings of the master, I have affirmed his recommendation and entered judgment accordingly. I cannot, however, agree with the master on his legal conclusions, that the failure of Thanheiser and the War Department to assent to the change in the plan is of controlling, or even material importance, in this case. While the theory of the master, that the failure to secure the approval of the War Department made the change unlawful, is ingenious and plausible, I do not think it more. It is a hard doctrine that civil contract rights shall be lost through the failure to submit to the War Department changes in plans when these changes do not affect the location of the structure or its obstructive nature in the stream by enlarging its size or changing its shape, and I cannot believe that the purpose or scope of the act referred to contemplates that the engineers shall pass upon the character and tensile strength of all of the material used in the structure. If the master is right in his view, it seems to me it would be necessary that every change, though involving only the substitution of one kind of cement for another, must be submitted to the War Department, and I cannot think it reasonable to hold that the Board of Engineers of the War Department act as consulting or

supervising architects in matters of bridge construction. Their only purpose and obligation is to pass upon the plans for structures in navigable streams to determine their effect upon streams from the standpoint of navigation, and not in any sense for the purpose of determining their structural or architectural efficiency. Nor do I agree with the master's legal conclusion, that the change in the plan was not assented to and approved by the Railway Company, although I do sustain his fact finding that Thanheiser did not consent to the change. So far as assent on the part of the company could have a bearing on the question, I think that it is sufficiently shown by the facts and circumstances, and that whatever consequences flow from such assent and acquiescence must be imputed to the Railway Company, because, in my judgment, it was not at all necessary that Thanheiser personally should have specifically authorized the change. The master, however, attaches more importance than I do to the question whether the change in the plan was authorized or assented to, because, under the circumstances, the assent by the Railway Company could in no manner avail the contractor.

[4, 5] The evidence overwhelmingly establishes that the change in the plan was not at the suggestion of the owner, but of the contractor himself; that the engineer, Tolman, who for the county agreed to the change, rested his agreement, not on his personal observation of the conditions, but upon the recommendation of the bridgemen, having the reputation of being skillful and accurate bridge builders of long experience; and the Railway Company, through Banks, gave the same assent under the same influence. Therefore, the change must be treated as a change made by the contractor and not the owner. It must be held that the contractor did not comply strictly and exactly with the plan of the owner, and that therefore, having failed on the first essential of the case, he cannot recover. Should, however, I be mistaken in this view of the law, and should the changed plan be treated, because of the owner's assent, as the owner's plan, still the intervener cannot recover, because the second obligation imposed upon him, to prove that the structure fell because, and only because, of the strict compliance with the plan, has not been established. The master finds, and his findings are sustained by the evidence, that a large part of the cement in the pier which gave way was of a bad and worthless character, not in accordance with the plans and wholly without sufficient tensile or supporting strength. That the construction of the pier and cofferdam was done in a dangerous and improper manner, calculated to produce the very result that followed, through excessive dredging and lowering of the subsoil at, and adjacent to, the pier, and that these defective and improper conditions proximately contributed to, and caused, the fall of the pier.

[6] While the master has made no finding on the third element of defendant's burden, it is as clear as the rest that it has failed to show that it did not know, and was not charged with knowledge, that such a result was likely to occur through the plans and methods adopted and employed. On the contrary, I find that, under all the conditions, the danger from the use of the changed plan was, or should have been, known to the contractor, and that it could have easily provided against

it by placing the proper number of piles in the stream, and that knowing, or being charged with knowledge of, this fact, it wholly failed to take the elemental and necessary precautions; all the testimony agreeing that a sufficient number of piles would have kept the pier up forever. The testimony is affirmative that the contractor knew the conditions surrounding the work as it progressed, especially the conditions caused by the excavation in the stream to obtain material to stop the leak in the cofferdam, and it was his duty to protect against the conditions caused by his own conduct, by providing an adequate number of piles. Finding, then, as I do, not only that the contractor has wholly failed to show with the clearness and certainty which the law requires when he seeks to evade responsibility for the failure to fully complete the contract, that the fall was caused by defective plans of the owner, but that the evidence, on the contrary, affirmatively establishes that the plan, if it was a cause of the fall, was only one of the contributing causes, and that, had the cement in the pier been in the proper condition, and the excavation in the stream not been made in the way and manner it was, the pier would have stood indefinitely, I sustain the master's finding and recommendation, and order judgment accordingly.

OLD COLONY R. CO. et al. v. GILL, Internal Revenue Collector.
SAME v. MALLEY, Internal Revenue Collector.

(District Court, D. Massachusetts. June 28, 1916.)

Nos. 259, 367, 582.

1. INTERNAL REVENUE ⟸9—CORPORATION TAX—LEASE OF PROPERTIES BY RAILROAD—"ENGAGED IN BUSINESS."

The Old Colony Railroad Company, whose demised roads were operated by the New York, New Haven & Hartford Railroad Company as lessee, and not as agent, *held* not a corporation "engaged in business" during the years 1909–1912, inclusive, within the meaning of Corporation Tax Law Aug. 5, 1909, § 38, and therefore not subject to the imposition of the tax authorized.

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

2. INTERNAL REVENUE ⟸38—ILLEGAL TAXES—PAYMENT UNDER PROTEST—RECOVERY WITH INTEREST.

Corporation taxes assessed against a railroad, which had leased its properties and was not engaged in business during the years in question, were illegal, and, having been paid under protest, may be recovered, with interest, from the collector of internal revenue.

At Law. Actions by the Old Colony Railroad Company and others against James D. Gill and against John F. Malley, each as Collector of Internal Revenue for the Third District of Massachusetts. Judgments directed for plaintiffs.

F. A. Farnham and Arthur W. Blackman, both of Boston, Mass., for plaintiffs.

Asa P. French, U. S. Atty., of Boston, Mass., for defendant Gill.

Geo. W. Anderson, U. S. Atty., of Boston, Mass., for defendant Malley.

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

BINGHAM, Circuit Judge. [1] The Old Colony Railroad Company was not a corporation engaged in business during the years 1909, 1910, 1911, and 1912, within the meaning of the Corporation Tax Law of August 5, 1909, § 38, 36 Stat. 112, and was not subject to the imposition of the tax therein authorized. N. Y. Central & Hudson R. R. R. Co. v. Gill, 219 Fed. 184, 134 C. C. A. 558; Traction Cos. v. Collectors, 223 Fed. 984, 139 C. C. A. 360; Miller v. Snake River Valley R. R. Co., 223 Fed. 946, 139 C. C. A. 426; Public Service Ry. Co. v. Herold, 229 Fed. 902, 144 C. C. A. 184; Anderson v. Morris & Essex R. R. Co., 216 Fed. 83, 132 C. C. A. 327. The New York, New Haven & Hartford Railroad Company operated the demised roads as lessee and not as agent. After the lease was given the Old Colony Railroad Company did not exercise the powers of a principal, but simply those of a lessor.

[2] The taxes assessed against the lessor during the years in question were illegal, and, having been paid under protest, the plaintiffs are entitled to recover the same with interest. National Home for Disabled Volunteer Soldiers v. Parrish, 229 U. S. 494, 496, 33 Sup. Ct. 944, 57 L. Ed. 1296.

In No. 259 judgment will be entered for the plaintiffs for $13,515.30, with interest thereon from June 30, 1910, and costs.

In No. 367 judgment will be entered for the plaintiffs for $14,204.80, with interest thereon from June 28, 1911, and costs.

In No. 582 judgment will be entered for the plaintiffs for $14,624.80, with interest thereon from June 30, 1912, and for $15,114.80, with interest thereon from April 16, 1914, and costs.

BOSTON & P. R. CORPORATION et al. v. GILL, Internal Revenue Collector.

(District Court, D. Massachusetts. September 13, 1916.)

Nos. 263, 364, 519, 521-523, 583.

INTERNAL REVENUE ⊂=38—ILLEGAL ASSESSMENTS—RECOVERY—INTEREST—LACK OF DILIGENCE.

Where railroads, seeking to recover from collectors of internal revenue taxes illegally assessed, delayed in pressing their claims on account of an understanding with the collectors that the claims should await the decision of other pending cases, but it became apparent that the question of interest could not be adjusted, and would have to be submitted to the court, the railroads' conduct did not disentitle them to interest for any lack of diligence in prosecution.

At Law. Two actions by the Boston & Providence Railroad Corporation and others against James D. Gill, as Collector of Internal Revenue, heard with actions by the Boston & Providence Railroad Corporation, by the Boston & Lowell Railroad Company, by the Connecticut River Railroad Company, by the Fitchburg Railroad Company, and by the Worcester, Nashua & Rochester Railroad Company against John F. Malley, as Collector of Internal Revenue. Judgment directed to be entered in due course for plaintiffs for the amounts agreed upon, with interest.

Case No. 263:
F. A. Farnham and A. W. Blackman, both of Boston, Mass., for plaintiff.
Asa P. French, U. S. Atty., of Boston, Mass., for defendant.

Case No. 364:
A. W. Blackman, of Boston, Mass., for plaintiff.
Geo. W. Anderson, U. S. Atty., of Boston, Mass., for defendant.

Case No. 583:
F. A. Farnham and A. W. Blackman, both of Boston, Mass., for plaintiff.
Geo. W. Anderson, U. S. Atty., of Boston, Mass., for defendant.

Cases Nos. 519, 521, 522, and 523:
Charles H. Blatchford, of Portland, Me., for plaintiffs.
Asa P. French, U. S. Atty., of Boston, Mass., for defendant.

MORTON, District Judge. The question whether the defendants are liable for interest on the taxes illegally assessed has been decided since these cases were argued in the plaintiffs' favor. See opinion of Bingham, J., Old Colony R. R. Co. v. Gill, Collector (D. C. Mass., No. 259, June 28, 1916) 257 Fed. 220.

The only other question is whether the plaintiff in any of the cases is not entitled to interest because of lack of diligence in prosecuting its claim. All the plaintiffs were closely associated. The delay in pressing their claims was, for a considerable period, due to an understanding with the defendants that these claims should await the decision of other pending cases. As late as April 30, 1915, it was suggested, on behalf of the defendants, that two of these cases should "await the decision of cases involving similar questions now pending in other districts." That suggestion was equally applicable to the other cases. Just when it became apparent to the parties that the question of interest could not be adjusted between them, and would have to be submitted to the court, is not clear. It must have been after the date referred to. Under such circumstances I do not think that the plaintiffs' conduct has been such as to put them outside the usual rule.

Judgment may be entered in due course for the amounts agreed upon, with interest.

HAYWOOD v. ATLANTIC COAST LINE R. CO.

(District Court, S. D. Georgia, E. D. April 17, 1919.)

RAILROADS ⊂=369(4)—MOVING TRAINS IN YARDS—DUTY TO TRESPASSER OR LICENSEE—ANTICIPATING PRESENCE.

Railroad employés in charge of switching operations must exercise ordinary care to anticipate the presence of, and avoid injury to a boy of tender years, where they have sanctioned his practice of passing through the yard at a particular hour to serve the company's employés.

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

At Law. Action by Clifford Haywood, by his father and next friend, James Haywood, against the Atlantic Coast Line Railroad Company. On demurrer to petition. Overruled.

Oliver & Oliver and S. R. Dighton, all of Savannah, Ga., for plaintiff.

Osborne, Lawrence & Abrahams, of Savannah, Ga., for defendant.

BEVERLY D. EVANS, District Judge. According to the allegations of the petition, the plaintiff was a small boy, 12 years of age, who for 3 years prior to his injury had been engaged in carrying dinners to employés of the railroad company, at work in its switching yard. These employés were allowed one hour for dinner, and it was the custom of the railroad company, pursued and acquiesced in for many years, to permit small boys to carry dinners to its employés while working in the yard of the company, and every day numbers of small boys came into the yard of the defendant company and carried dinners to its employés. The plaintiff's custom was to carry the dinners to an office inside the yard, which office was occupied by the trainmaster and other employés, and leave them there for such employés as would call for them. Other dinners which he carried for employés working at Southover he was accustomed to put on a shuttle train which carried the dinners to Southover and brought back the receptacles. For employés working in the yard and on the wharves he would carry the dinners into the yard and through the yard to the wharves. At the end of the dinner hour he would return through the yard, get the buckets from the employés in the yard, also the buckets left in the office, and also the buckets returned by the shuttle train. This practice and custom was well known, not only to the employés of the company for whom plaintiff carried dinners, but was also known to the officers of the railroad company in the office in the yard used by the trainmaster and other employés, was known to the yard foreman having in charge the switching and operation of the trains in the yard, and was known to the engineers in charge of the engines doing the actual switching in the yard, and to the switchmen working in the yard. The company's employés had permitted him to pursue this custom and practice without objection, and had permitted him to return through the yard to get the buckets.

About 1 o'clock in the daytime, as plaintiff was returning through the yard to get the buckets, and when he was crossing one of the tracks, three box cars which negligently and in violation of law had been kicked down upon this track moved suddenly upon him, striking him before he knew of their proximity, knocking him to the ground, and inflicting injury upon his person. The company was negligent in failing to exercise ordinary and reasonable care under the circumstances, and especially negligent in kicking the cars upon the track which plaintiff was crossing, in failing to have a lookout, and in failing to give warning of the approach of the cars prior to the kicking.

As a general rule a railroad company has the right to shift and move freight cars at its pleasure upon the tracks in its yard, and under ordinary circumstances it would be under no obligation to keep a watch upon the movement of these cars for the purpose of preventing an injury to a person not an employé, or not in the yard by permission, who might casually happen to be upon one of the tracks when a car is set in motion. S., F. & W. Ry. Co. v. Waller, 97 Ga. 164, 25 S. E. 823, 34 L. R. A. 459; Rome Railroad Co. v. Tolbert, 85 Ga. 447, 11 S. E. 849; Central Railroad Co. v. Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634. But this rule does not exclude a recovery for an injury sustained under the circumstances alleged in the petition. The differentiating fact is that the railroad company's employés in charge of the yard and its switching operations, from a long-established custom, had sanctioned the practice of allowing this boy of tender years, at a particular hour of the day, to pass through the yard on a mission of service to its employés, and they were under a duty to exercise that degree of vigilance which would amount to ordinary care to anticipate his presence in the yard. It is for the jury to say whether, under the allegations of the petition, the railroad company's employés, in the exercise of ordinary care, had cause to anticipate the plaintiff's presence in the yard at the time of the injury, and whether, if ordinary care had been exercised, the injury to him would not have occurred.

The general rule that as to a trespasser or licensee upon a railroad track the duty of observing ordinary care for his protection does not devolve upon the company's agents in charge of a train until his presence becomes known to them does not relieve the company under all circumstances from anticipating the presence of a trespasser or licensee upon its track, and from taking proper precautions to prevent injury to him. Southern Ry. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. (N. S.) 283, 4 Ann. Cas. 675. The foundation of the rule that a railroad company is not liable to a trespasser injured in the ordinary movement of its trains, unless the injury is caused by the willful or wanton acts of its servants in charge of the train, is that the railroad's agents are not under duty to anticipate the presence of the trespasser. But where the circumstances are such as to raise a duty to anticipate the presence of a trespasser or licensee, then the railroad's agents must exercise ordinary care in the discharge of that duty.

This principle, as applied to the allegations of the petition, constrains me to overrule the demurrer.

INTERSTATE BUSINESS MEN'S ACC. ASS'N OF DES MOINES, IOWA, v. LESTER.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5204.

1. INSURANCE ⟸453—ACCIDENT INSURANCE—CHANGE OF OCCUPATION—"OCCUPATION OF PHYSICIAN AND SURGEON."
A physician, who at the time of insurance and of his death was in the general practice, and was also a medical officer in the state National Guard, with the rank of major, and who on the day he was killed, after visiting his patients, had gone out, as surgeon only, with a detachment of the guard which was on emergency service at the town of his residence during a strike, *held* to have been "engaged in the occupation of physician and surgeon," within the terms of the policy.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Occupation.]

2. INSURANCE ⟸453—ACCIDENT INSURANCE—CHANGE OF OCCUPATION.
To constitute a change of occupation from that specified in a life or accident policy, it must be abandoned and some other calling adopted.

3. INSURANCE ⟸146(3)—ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—EXCEPTIONS FROM RISK.
If the language of a life or accident policy does not express an exception, when fairly interpreted, the courts will not write an exception into it by interpretation, for the purpose of exempting the insurer from liability after death or accident.

4. INSURANCE ⟸455—ACCIDENT INSURANCE—RISKS—EXPOSURE TO INJURY OR DEATH.
If a person holding a policy insuring him against accidental injury does something which culpably provokes or induces the act causing his injury or death, then the result is not accidental; but, if he is wholly free from culpability himself, the result is accidental as to him, though it may have been within the deliberate intent of the aggressor.

5. INSURANCE ⟸455—ACCIDENT INSURANCE—DEATH FROM ACCIDENT—"ACCIDENTAL DEATH."
The death of a physician, who was a medical officer in a National Guard regiment, and who was shot and killed while performing his duty as such officer with a detachment of the guard detailed to preserve order during a strike, *held* accidental, within the meaning of an insurance policy.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident; Accidental.]

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

Action by Edith A. Lester against the Interstate Business Men's Accident Association of Des Moines, Iowa. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert M. Haines, of Des Moines, Iowa (S. D. Bishop, of Lawrence, Kan., and Dunshee, Haines & Brody, of Des Moines, Iowa, on the brief), for plaintiff in error.

Henry H. Asher and M. A. Gorrill, both of Lawrence, Kan., for defendant in error.

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

AMIDON, District Judge. This action was brought by the plaintiff, Mrs. Lester, against the Insurance Association, as defendant, to recover on an accident policy covering the life of her husband, Dr. Pliny P. Lester. The policy insured him "while he is engaged in the occupation of a physician and surgeon * * * in case of death effected directly and independently of any other contributing, concurring or intervening cause, by external violent and accidental means." When the insurance was taken out, in January, 1913, and at the time of his death, Dr. Lester was engaged in the practice of his profession at Walsenburg, in the state of Colorado, which is one of the important towns in the district covered by the mining operations of the Colorado Fuel & Iron Company. He was also a member of the National Guard of Colorado, holding the rank of major, and assigned to the medical corps. During the fall of 1913, and the winter and spring of 1914, the employés of the Colorado Fuel & Iron Company were engaged in a strike, which for months assumed the form of belligerent opposition to the authorities of the state. The Governor called the National Guard into service to protect life and property in the district. Dr. Lester joined his company as a part of its medical corps. He was not otherwise connected with the military operations. He was equipped with no gun or sword. The only weapon upon his person was a pistol, which he carried in his pocket. He wore the insignia of the Red Cross, and his work was confined to caring for the sick and wounded. At times his service seems to have taken him away from his home town. Part of the time he was at Ludlow, but at the time of his death he was stationed at Walsenburg, and was engaged there in the practice of his profession, and at the same time performing such duties as were necessary in connection with the military force that was located in the city, numbering about 600 men. On the morning of April 29, 1914, he visited a number of his patients in Walsenburg, professionally. He then went with a small detachment, consisting of 30 men, to a point a few hundred yards from the city; the force having been sent out to reconnoitre and resist, if necessary, the activities of strikers who were in the foothills or mountains near the town. The lieutenant of this force was wounded. Dr. Lester had just finished dressing his wound, and was down on his hands and knees in a railroad cut observing some men through his field glass, to decide whether they were strikers or soldiers. He was shot, and died almost instantly.

The case was tried in the lower court before a jury, but at the conclusion of the evidence motions were made by both parties for a directed verdict. The jury was excused, pursuant to written stipulation, and the case submitted to the judge for decision. He found in favor of the plaintiff, and entered judgment for the full amount of the policy. The Insurance Association brings error to review that judgment.

In the trial court and here the case turns wholly upon two questions: (1) Was Dr. Lester at the time of his death "engaged in the occupation of a physician and surgeon"? (2) Was his death effected wholly by "accidental means"?

[1] In our judgment the first question is answered by the stipulation of facts, which was signed by the parties. It reads as follows:

"It is agreed and hereby stipulated by and between the parties to this action that the insured, Dr. P. P. Lester, was on the 17th day of January, 1913 [the date of the policy], a resident of Walsenburg, Colo.; that at that time his only occupation was that of a physician and surgeon, and that his duties were fully described as those of 'general practice'; that he continued in the general practice of medicine and surgery in and about Walsenburg, Colo.; and that on the morning of April 29, 1914, he called professionally and rendered professional services to several of his patients in the vicinity of Walsenburg.

"It is further agreed and hereby stipulated that the said Dr. P. P. Lester was on the 17th day of January, 1913, a surgeon in the medical corps of the Colorado National Guard, and continued to be such until the time of his death, at which time he held the rank of major, and was performing the duties of a surgeon in the said medical corps of the Colorado National Guard; that at all the times above mentioned he was a member of the American Red Cross Society."

This, in our judgment, shows beyond reasonable controversy that Dr. Lester, at the time of his death, was engaged in the occupation of a physician and surgeon. This is the showing, not only of the stipulation, but of the evidence.

[2] The defendant insists that the language of the policy, when fairly interpreted, confined Dr. Lester to the practice of his profession in the ordinary walks of civil life; that, when he joined his company in the military service to which it was called, he changed his vocation and became, instead of a physician and surgeon, a soldier. We do not think this position can be sustained without disregarding the facts. His service with his company was temporary. He was called out to meet an emergency. While the service lasted for some months, it was a side issue. It was known that it would be temporary, and was to be considered as answering a call to suppress a riot, or any other temporary engagement. This measures the term of the service; but we are to look at the character of the service also. Dr. Lester was in no way engaged in the military activities of his company. His services there were those of a physician and surgeon. He continued to practice his profession at Walsenburg, as well as attend to the needs of his company. The authorities are uniform that such temporary changes do not constitute a change of occupation within the meaning of insurance policies. To constitute such a change there must be an abandonment of the vocation specified in the policy and the adoption of some other calling. The record here affirmatively shows that there was no such change; on the contrary, it shows that Dr. Lester was engaged on the very morning of his death in the practice of his profession in the community where he resided, and, so far as his service in the company is concerned, it shows that he was there also engaged in the occupation of a physician and surgeon, and had been practicing that profession only an instant before his death. If such temporary activities are to destroy the protection of insurance, it must be by an express provision in the policy. Such exceptions have long been a feature of accident contracts. Their omission must be held to spring from deliberate purpose.

The language of Judge Hook, speaking for this court in Railway Mail Association v. Dent, 213 Fed. 981, 983, 130 C. C. A. 387, 389 (L. R. A. 1915A, 314), is equally appropriate here.

"So many and varied are the causes of accidental injury that the particular language employed in instruments of insurance is of the greatest importance. A word added or omitted may alter materially the scope of the indemnity. Many cases like the one at bar lie close to the border line, perhaps, because not definitely in mind for inclusion or exclusion; but it is a delicate thing for a court to adopt the latter course, merely upon a supposition that they would have been excluded in terms, had they been thought of. The insurer most familiar with the subject chooses the words of his undertaking, and it is not unjust to take them in the sense conveyed to the ordinary reader, nor to hold against him in case of real substantial doubt."

[3] What the company is really asking us to do is to amend its policy, and write into it an exception to the effect that, if the insured should engage in any military service the insurance should cease. It urges this upon the ground that the hazard of the service which Dr. Lester was performing was so much greater than the hazard which attends the ordinary life of a physician and surgeon that the court must find that it was not within the contemplation of either party to the contract. It may be that, if the subject had been brought clearly before the minds of the parties, some provision would have been made in the policy with respect to such hazards. But for the court to amend the policy, and write into it by interpretation an exception which is in no way expressed in its language, would violate every rule with which we are familiar for the interpretation of insurance contracts. If their language does not express an exception, when fairly interpreted, the courts have uniformly refused to write an exception into them by interpretation, for the purpose of exempting the company from liability after death or accident. It is a rule as old as insurance, and has been stated and enforced in countless decisions, that such instruments are prepared by the company; they have been the result of long development and very careful choice of language. If the language is open to doubt, the doubt will be resolved in favor of the insured. Here the language does not even furnish a ground for doubt.

In so far as vocation is a factor in determining the hazard, it is based upon the average of the whole class. It contemplates that each individual will in the course of his life necessarily be exposed to varying degrees of hazard. It is likewise true that the actuaries recognize that different individuals in the class will vary greatly in the extent of hazard to which they are exposed. A physician practicing his profession in the congested districts of a large city, for example, will be exposed to many hazards to which a physician in a small country town will not be subject. All of these matters, however, are embraced in the general average of hazards of the class of physicians and surgeons. If one individual at one time is exposed to a largely increased hazard, as Dr. Lester was on the occasion of his death, others will be exposed to hazards falling greatly below the average. These are the factors upon which the insurance is based.

Men holding accident policies do not have to enter into nice calculations to determine whether they are stepping into a field of greatly increased hazard or not in following their vocations. They may go about their course of life, knowing that they are protected by their insurance, unless they enter a hazard which is expressly excepted from their policy.

The parties to the contract here had under consideration the subject of exceptions. It provides that there shall be no liability for an injury sustained when the member is:

"(1) Insane. (2) Not in the present full possession and normal exercise of all his faculties. (3) Engaging in any act in violation of any law or ordinance."

The fewness of exceptions in such policies is constantly urged as a ground for accepting the insurance by agents and solicitors. To add to the list of activities which should forfeit the insurance, after accident or death, would be a fraud upon the insured. The uniform holding of the courts has been along the lines which we have stated. The law is elementary, and we cite a few cases which illustrate and apply the rules: Gotfredson v. German Com. Acc. Co., 218 Fed. 582, 134 C. C. A. 310, L. R. A. 1915D, 312; Wildey Casualty Co. v. Sheppard, 61 Kan. 351, 59 Pac. 651, 47 L. R. A. 650; Union Mut. Acc. Ass'n v. Frohard, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664; Taylor v. Ill. Com. Men's Ass'n, 84 Neb. 199, 122 N. W. 41, 24 L. R. A. (N. S.) 1174; Fox v. Masons' Fraternal Acc. Ass'n, 96 Wis. 390, 71 N. W. 363; Hess v. Pref. Masonic Mut. Acc. Ass'n, 112 Mich. 196, 70 N. W. 460, 40 L. R. A. 444; Eggenberger v. Guar. Mut. Acc. Ass'n (C. C.) 41 Fed. 172.

Was Dr. Lester's death "accidental"? Whether it was intended by the person who fired the fatal shot is matter of conjecture. That, however, is not material. The word, as used in the policy, is a term of art. To answer the question we must consider the event from the point of view of Dr. Lester. Was it accidental as to him? Defendant says it was not, because he knowingly and consciously exposed himself to the very hazard which caused his death, and must have contemplated such a result as a natural and probable consequence of the service in which he engaged. It is insisted that, to be accidental within the meaning of the policy, the result must have been "unforeseen and unexpected." We do not regard this view as sound, either in law or upon principle. Persons protected by accident insurance may incur consciously hazards which may result in their injury or death without forfeiting the insurance, unless the policy expressly excepts the hazard. In the course of life men are constantly required to pass into environments of greatly increased hazard. They may do that knowingly, and, if injury or death results, it does not forfeit their insurance, unless they do something which directly and immediately contributes to produce the act from which their death or injury results. For example, for several years past there have been districts in most of our large cities at certain seasons of the year in which there have been habitual assaults upon peaceful citizens by highwaymen. Men have been well aware of the risks of going upon the streets in such districts alone. They may have been so far conscious of the risks as to arm themselves for protection. And yet any peaceful citizen, who has in the pursuit of business or pleasure incurred these hazards, is entitled to claim, if he is injured or killed by highwaymen, that as to himself the result is accidental.

[4] So it is not true that simply going into an environment of great-

ly increased hazard, with conscious knowledge of such hazard, will cause injury or death which results therefrom not to be accidental within the meaning of such policies as we have before us here. Even in case of personal encounter, if the party wounded or killed is wholly free from fault, his injury or death is accidental within the meaning of the term as used in accident insurance. This has been the uniform holding of the courts. The line of distinction is this: If the party does something which culpably provokes or induces the act causing his injury or death, then the result is not accidental; but, if he is wholly free from culpability himself, the result is accidental as to him, though it may have been within the deliberate intent of the aggressor.

[5] Within this rule the death of Dr. Lester was clearly accidental. He did nothing to provoke or induce the act which resulted in his death. In the pursuit of duty he simply exposed himself to the hazard of the service. He may have contemplated death or injury as possible, or even probable; but, if he did, this would not take him out of the protection of his accident insurance. So far as we are able to discover from the authorities and text-writers, this is elementary law at the present time. It is possible to build up an argument to the contrary only by catching at phrases and single sentences, and separating them from the real scope of judicial decision. We content ourselves with referring to a few of the many cases which illustrate and enforce the rule. Ripley v. Railway Pas. Ass'n Co., Fed. Cas. No. 11854; Robinson v. Mut. Acc. Ass'n (C. C.) 68 Fed. 825; Talliaferro v. Travelers' Prot. Ass'n of America, 80 Fed. 368, 25 C. C. A. 494; Lovelace v. Travelers' Prot. Ass'n of America, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638; State Life Ins. Co. v. Ford, 101 Ark. 513, 142 S. W. 863; Campbell v. Fid. & Cas. Co., 109 Ky. 661, 60 S. W. 492; Supreme Council v. Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Union Cas. & Surety Co. v. Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873; Travelers' Prot. Ass'n v. Fawcett, 56 Ind. App. 111, 104 N. E. 991; Hutchcraft's Ex'r v. Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; Hutton v. States Accident Ins. Co., 267 Ill. 267, 108 N. E. 296, L. R. A. 1915E, 127, Ann. Cas. 1916C, 577; American Ins. Co. v. Carson (Ky.) 30 S. W. 879.

The judgment of the trial court is clearly right, and it is affirmed.

STEBBINS v. SELIG.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919. Rehearing Denied May 31, 1919.)

No. 5168.

1. COURTS ⇐405(5)—CIRCUIT COURTS OF APPEALS—APPELLATE JURISDICTION—CASE INVOLVING JURISDICTION OF LOWER COURT.

Where the jurisdiction of a District Court depended upon whether a paragraph of the complaint stated a cause of action for special damages claimed therein, without which the amount involved was below the jurisdictional limit, a writ of error to review a judgment sustaining a de-

murrer to such paragraph and dismissing the action was properly taken to the Circuit Court of Appeals.

2. DAMAGES ⇐23—FAILURE TO PERFORM CONTRACT—SPECIAL DAMAGES WITHIN CONTEMPLATION OF PARTIES.

In an action for breach of a written contract by defendant to drill an artesian well and install a pump therein for irrigation purposes, damage to a rice crop on land which the well was intended to irrigate, based upon the difference between the rice crop actually raised and a rice crop raised on any adjoining land, resulting from failure to perform the contract, *held* not recoverable as special damages, in the absence of any provision in the contract indicating that such damages were contemplated by the parties.

Stone, Circuit Judge, dissenting.

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

Action by Lewis A. Stebbins against A. F. Selig. Judgment for defendant, and plaintiff brings error. Affirmed.

L. A. Stebbins, of Chicago, Ill., X. O. Pindall, of Little Rock, Ark., and Paul E. Price, of Chicago, Ill., for plaintiff in error.

Thomas S. Buzbee, George B. Pugh, and Harvey T. Harrison, all of Little Rock, Ark., and O. M. Young and John M. Wilson, both of Stuttgart, Ark., for defendant in error.

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

CARLAND, Circuit Judge. The plaintiff in error, hereafter plaintiff, sued the defendant in error, hereafter defendant, to recover damages for the breach of a contract in writing, entered into between the plaintiff and defendant on June 22, 1916, whereby the defendant in consideration of $2,000 agreed to drill an irrigation well on the Stebbins farm, near Olena, Ark., and install a pump therein within 20 days from date of contract. The complaint set out the contract, alleged that defendant wholly failed to perform the same, and that in consequence thereof plaintiff was compelled to make a new contract for the same purpose with the Layne & Bowler Company, at a difference in cost of $675 over and above what the well and pump would have cost if the defendant had performed his contract. The complaint then alleged by way of special damage as follows:

"(4) Plaintiff further alleges that the said field upon which the defendant had obligated himself to sink a well and install a pump as aforesaid was a field well suited for the growth of rice, and was intended and was in fact used for the cultivation of rice. The plaintiff further alleges that it is a well-known fact that rice cannot be cultivated successfully unless the field upon which the rice has been sown is kept flooded by a constant supply of water, and defendant well knew that the plaintiff contemplated using the said field upon which the defendant had agreed to sink a well and install a pump as aforesaid for the purpose of raising and cultivating rice, and that the sole purpose of the plaintiff in contracting for the sinking of the well and the installation of a pump as aforesaid was to secure a constant supply of water for his rice crop. Plaintiff further alleges and avers that the said defendant was engaged in the business of sinking wells for rice fields and for no other purpose, and had been engaged in said business for a great many years, and was thoroughly familiar with the rice-growing industry, and by reason of his ex-

perience well knew that rice could not be successfully cultivated unless the field upon which the rice has been sown is kept flooded by a constant supply of water, and that the direct and immediate result of his failure and refusal to complete a well and install a pump must necessarily be grave and serious damage to the rice crop of the plaintiff; and the plaintiff further alleges and avers that, as a direct and proximate result of the failure of the said defendant herein to comply with the said contract as aforesaid, the rice crop upon said land became and was greatly damaged and injured, because of the inability of the plaintiff to inundate said lands with water for the period following the date on which said defendant agreed to complete the said well and install the said pump hereinbefore referred to, and the time within which the said Layne & Bowler Company were able to complete their said well and install their said pump, and that the said well so constructed and the said pump installed by the said Layne & Bowler Company was and is of the same general kind and character as that which the defendant herein had agreed and obligated himself to construct, erect, and install, and upon its completion yielded a constant supply of water per minute equal to the amount guaranteed to be furnished by the said well and pump which the defendant had obligated himself to erect and construct.

"The plaintiff further alleges and avers that the sole and only means of flooding or inundating the said field, upon which the defendant had agreed to sink a well and install a pump as aforesaid, was by means of said well and pump as aforesaid, and the said defendant well knew that the sole and only means of flooding and inundating said field was by means of said well and pump, which he had agreed to sink and install as aforesaid, and that the plaintiff had no other means or facilities for flooding or inundating said field.

"The plaintiff alleges and avers that the lands upon which the defendant had agreed to sink a well and install a pump as aforesaid, and over which the waters from the said well were intended to flood, and which were in fact flooded, by the said well and pump subsequently sunk and installed by the said Layne & Bowler Company, as hereinbefore set forth, yielded 4,440 bushels, and that other land of the same kind and character and of the same acreage, which was properly flooded at all times as this land would have been had not the defendant wholly neglected and refused to complete his contract, as aforesaid, yielded rice greatly in excess of this land, to wit, from 3,200 to 5,600 bushels more of rice.

"The plaintiff further alleges and avers that the sole and only reason for the difference in yield between the said field upon which the defendant had agreed to sink a well and install a pump as aforesaid, and the field of the same acreage hereinbefore referred to, was the fact that the said field upon which the said defendant had agreed to sink a well and install a pump as aforesaid was, by reason of the failure of the defendant to comply with his said contract, without water for a long space of time, to wit, 10 days from the 12th day of July, A. D. 1916, the date upon which the said defendant had agreed to complete the said well and pump as aforesaid, until the plaintiff was able to secure the completion of a well and the installation of a pump by the said Layne & Bowler Company as hereinbefore set forth, and that if the said field upon which the said defendant had agreed to sink the said well and install the said pump as aforesaid had been properly supplied with water from the 12th day of July, A. D. 1916, as aforesaid, and had not been without water for a long space of time, to wit, from the 12th day of July, A. D. 1916, to the 22d day of July, A. D. 1916, the date upon which the said Layne & Bowler Company's well and pump as aforesaid were completed and placed in operation, to wit, 10 days, the yield of the said field upon which the said defendant had contracted and agreed to sink a well and install a pump as aforesaid, would have been the same, or nearly so, as the said lands hereinbefore described, which were properly supplied with water at all times, and so by reason of the premises the plaintiff lost and was wholly deprived of a vast quantity of rice, which he otherwise, in the ordinary course of events, would have received, except for the failure of the defendant to comply with his said contract as aforesaid, to wit, the difference between the average yield of adjoining

rice fields of the same acreage and character, which were properly supplied with water at all times, and the said field upon which the said defendant had wholly neglected to sink a well and install a pump as aforesaid, in accordance with his agreement, to wit, 3,200 bushels of rice. The plaintiff states that the fair current market price for rice of the kind and character grown on this land, in the month of October, 1916, when said rice was threshed, was $1.10 per bushel. Wherefore the plaintiff says that he was damaged in the sum of $3,500, the fair market value of said rice, and prays judgment for this amount."

[1] The defendant demurred to said paragraph 4 on the ground that the complaint did not state a cause of action for the damages claimed in said paragraph, and demurred to the complaint without said paragraph on the ground that it did not state a cause of action within the jurisdiction of the court. The court below sustained the demurrer, and, the plaintiff electing to stand upon his complaint, the same was dismissed for want of jurisdiction. On this state of the record, counsel for defendant suggests that plaintiff ought to have gone directly to the Supreme Court by virtue of section 238, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. § 1215]). We are of the opinion that the case was properly brought here, because, conceding there was a question of jurisdiction after the elimination of paragraph 4, resulting from the fact that the damages claimed would be less than $3,000, still that was not the only question in the case, and the judgment of the court below must be construed in our opinion as equivalent to a holding that the complaint did not state a cause of action. R. J. Darnell v. I. C. Ry. Co., 225 U. S. 243, 32 Sup. Ct. 760, 56 L. Ed. 1072. The procedure in this case is not the same as in Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171, hereafter referred to.

[2] In the case last mentioned there was no question but that of jurisdiction. The litigated question, below and here, was and is whether the special damages alleged in paragraph 4 may be recovered by reason of the nonperformance of the contract by the defendant. We have no doubt of our jurisdiction. In considering the question of special damage we must remember that the contract between the parties was in writing and contained no expression as to what the damages should be in case either party wholly failed to perform it. The general rule is that a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. Under this rule the plaintiff in the present case could clearly recover in the proper forum the sum of $675, which he alleges was the excess paid to the Layne & Bowler Company for doing the same work that the defendant agreed to do. Parties, when they make contracts, contemplate performance, not breach; therefore they do not usually say anything about consequences in case of breach by either party. In this situation the law establishes a rule by which it may be determined with reasonable certainty what the parties would have said, had they spoken in their contract. Thus arises the rule, above stated, that parties who break their contracts are to be held responsible for such consequences as may be reasonably supposed to be in the contemplation of

the parties at the time of making the contract. The rule being thus established, the next question that arises is: How shall it be determined what the consequences were which the parties to a contract contemplated when they entered into the same? It has been decided that these consequences may be shown by oral evidence when the contract is in writing. It has also been decided that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account, if he fails to deliver the goods. As was said by Mr. Justice Willes in British Columbia Saw Mill Co. v. Nettleship, L. R. 3 C. P. 499, 508:

"The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."

In this case the special condition would be that defendant entered into the contract in question, knowing that the plaintiff reasonably believed that, if the defendant wholly failed to perform the contract, he would be liable to the plaintiff for the difference between the value of the rice crop raised upon plaintiff's land and the value of the rice crop raised upon any adjoining land; this difference amounting in the present case to $3,500. One way of testing whether the defendant contemplated this consequence is to suppose that, had defendant been asked to agree to a clause in the contract that would make him liable in the way specified, would he have assented to the same? In our judgment there can be but one answer to this question: He would not. The foregoing principles of law are fully illustrated and sustained by the Supreme Court of the United States in Globe Refining Co. v. Landa Cotton Oil Co., supra, where the cases, English and American, are cited.

This case in our opinion fully sustains the ruling of the trial court. While the complaint shows that the defendant was in the business of sinking wells for the irrigation of rice lands, and knew that the plaintiff wanted the water to be pumped from the well in question to be used for the growing of rice, there is no showing, in our opinion, that the plaintiff believed or contemplated, or that it was in the contemplation of either party, that if the defendant failed to perform the contract within 20 days he would be liable for the difference in value between the rice crop of the plaintiff and any rice crop raised upon any adjoining land. The authorities upon the question of damages for the breach of contracts are innumerable, but in the view we take of the case we are controlled by the case last cited.

We have considered the case of Harrington v. Blohm, 206 S. W. 316, in the Supreme Court of Arkansas. It is not a parallel case to the one at bar, and in so far as it is in conflict with Globe Refining Co. v. Landa Cotton Oil Co., supra, could not be followed by us.

The judgment below is affirmed.

STONE, Circuit Judge, dissents.

BROOKS-SCANLON CO. v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Fifth Circuit. April 7, 1919.)

No. 3285.

1. SALES ⟸79—AMBIGUITY IN CONTRACT—UNDERSTANDING OF PARTIES.
Where the application of the facts to the expression "f. o. b.," used in a contract of sale, was a matter of doubt and controversy, it was a proper subject for an understanding between the parties, and, such an understanding having been reached, it was not in conflict with the effect of the letters, but merely defined the application of the expression.

2. SALES ⟸88—MEANING OF CONTRACT—QUESTION FOR JURY.
In a railroad's action to recover from the seller an excess, paid under a contract whereby lumber was purchased "f. o. b." its rails, issue as to the understanding of the parties regarding the meaning of the expression "f. o. b." *held* for the jury under the evidence.

3. SALES ⟸87(3)—CONSTRUCTION OF CONTRACT BY PARTIES—SUFFICIENCY OF EVIDENCE.
Evidence *held* to warrant jury in finding that letters "f. o. b." were accepted by both parties as referring alone to charges connected with handling and loading the sold lumber at shipping point, and as not having reference to charges conditional in character and the existence of which resulted from the subsequent action of the buyer railroad.

4. SALES ⟸54—PRACTICAL CONSTRUCTION OF CONTRACT—SELLER'S RIGHT TO ACCEPT.
A company which sold lumber to a railroad, contracting to supply it "f. o. b." its rails, had the right to accept and act on a practical construction of the contracts as to the meaning of the letters by the railroad.

5. ESTOPPEL ⟸72—MISLEADING MISTAKE—PROTECTION OF PARTY WHO HAS SUFFERED.
Where one of the parties to a sale has been misled to his disadvantage by the conduct of the other, based on mistake, when he had a right to assume the other was acting with full knowledge of the facts, and it being impossible for the parties to be restored to their original condition, the party who has suffered by the mistake will be protected.

6. SALES ⟸79—CONSTRUCTION OF CONTRACT—RIGHT OF RELIANCE.
Where a company, which sold lumber to a railroad "f. o. b." its rails, made its prices with reference to the railroad's practical construction of the contract, in relation to such letters, by payment of the lumber company's bill without deduction of payments made by a division of the railroad, and such construction was followed thereafter, the railroad cannot recover back part of the payments made on the ground that the construction was erroneous.

7. SALES ⟸88—ACTION FOR OVERPAYMENT—ISSUE OF ESTOPPEL.
In an action by a railroad to recover from a lumber company alleged overpayments on purchases of lumber, issue of estoppel of the railroad to claim any overpayment, on the ground that it had practically construed the contracts between the parties, *held* to be submitted to the jury for determination.

Walker, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit by the Illinois Central Railroad Company against the Brooks-Scanlon Company. To review a judgment for plaintiff, defendant brings error. Reversed.

Robert R. Reid, of Amite, La., and W. E. Lamb, of Chicago, Ill., for plaintiff in error.

R. V. Fletcher, of Chicago, Ill., and Gustave Lemle and Hunter C. Leake, both of New Orleans, La. (Lemle & Lemle, of New Orleans, La., and Blewett Lee and W. S. Horton, both of Chicago, Ill., on the brief), for defendant in error.

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

BATTS, Circuit Judge. On a former appeal (Ill. Cent. R. R. Co. v. Brooks-Scanlon Co., 241 Fed. 445, 154 C. C. A. 277) judgment for Brooks-Scanlon Company was reversed. Upon a retrial, judgment was for the Illinois Central Railroad Company.

Suit was instituted by the railroad company on December 8, 1914. Plaintiff alleged that during the years 1907 to 1912, inclusive, the railroad, on various dates, purchased lumber from the Brooks-Scanlon Company; that each contract provided for delivery to petitioner "f. o. b." its rails; that the lumber was manufactured by the lumber company, at mills at Kentwood, La., from logs carried into Kentwood by the Kentwood & Eastern Railroad Company; that at the time of each of the purchases there was in effect an agreement between the Illinois Central Railroad Company and the Kentwood & Eastern Railroad Company for a division of freight rates, by which, on all lumber manufactured from logs brought over the Kentwood & Eastern into Kentwood, and manufactured there, and shipped over the Illinois Central to territory known as "Central territory," the Kentwood & Eastern would be allowed 2½ cents per 100 pounds; that this agreement was known to the lumber company; that the lumber purchased was shipped by the Illinois Central to destinations within this territory, as it was understood it would be at the time the purchases were made; that, by reason of the joint tariffs, it was obligatory on the Illinois Central to pay, and it did pay, to the Kentwood & Eastern, on lumber so purchased from the lumber company (indicated by attached exhibits) the agreed division rates, amounting in the aggregate to $25,643.29; that the lumber company, having agreed to make deliveries "f. o. b.," was under obligations to pay the expenses of the transportation from the point of origin on the Kentwood & Eastern to the Illinois Central rails. There were also allegations as to the manner of payment, indicating the causes of the errors in making payments to the lumber company without deducting amounts paid to the Kentwood & Eastern.

The answer alleged that it was the understanding of the Illinois Central and the lumber company, at the time of the delivery, that the expressions "f. o. b.," or "f. o. b. cars," or "f. o. b. cars I. C. tracks, Kentwood," required the defendant to deliver lumber on board cars on the tracks at defendant's mill in Kentwood, and that the cost of the service in making such delivery at such point, in loading the lumber into said cars, and any other costs or charges that had accrued at the time and place of delivery, would be borne by defendant and included in the prices named; that with this understanding, upon receipt of each written order, the defendant inserted therein the prices it was will-

ing to receive, which prices were accepted by petitioner, with the understanding that they included delivery at the point and under the conditions stated; that the lumber so specified was thereafter delivered on tracks at defendant's mill in Kentwood, and that for this lumber petitioner paid defendant's invoices at the prices so specified without objection or claim of incorrectness; that any future charges that accrued or would accrue on said cars after delivery, by reason of their transportation from Kentwood to Central points, were to be borne by petitioner; that any charges accruing as the result of any action by the railroad after the lumber was received would be borne and paid by petitioner; that there were no unpaid transportation charges upon the lumber, or the logs from which it was manufactured, and that the lumber was delivered to the railroad at Kentwood free and clear of charges of every kind and nature; that it was never contemplated by petitioner and defendant that the expenses for the transportation of the lumber, or the material from which it was manufactured, should not be paid by the railroad; that the prices were fixed by defendant for the lumber with reference to the understanding that the division charges should be borne by the purchaser; that the payments to defendant, without deduction for the division charge, were made with full knowledge of all the facts, and that plaintiff is estopped from claiming from defendant the amounts paid to the Kentwood & Eastern.

In the opinion rendered on the former appeal it is said:

"It is not questioned, and, under the evidence adduced, it is not open to question, that the terms 'f. o. b.,' 'f. o. b. cars,' 'f. o. b. cars Illinois Central tracks, Kentwood,' as used in the contracts of sale and purchase, obligated the seller to pay freight charges incurred for the shipment of the lumber or the logs out of which it was manufactured, to the point at which the lumber bought was to be delivered to the plaintiff by the seller, the Brooks-Scanlon Company; that plaintiff was entitled to a delivery of the lumber on its line free of charges."

Upon the former trial the Brooks-Scanlon Company introduced no evidence, and the case was determined upon the pleadings of the parties and the evidence introduced by the plaintiff. Upon the second trial the pleadings were unchanged, but evidence was introduced by the lumber company upon the defensive issues made.

[1] The expressions "f. o. b." "f. o. b. cars," "f. o. b. tracks," etc., are as free from ambiguity as most other words and symbols. But, however well defined words used in a contract may be, it is frequently the case that there can be no proper determination of the meaning of a contract without an understanding of the circumstances and conditions with reference to which it is made. The meaning of a word is sometimes indicated by the context, and sometimes dependent upon the conditions under which it is used. While the letters "f. o. b." carry the idea that the delivery is to be made without a charge for prior transportation service, the use of the expression would not preclude inquiry as to what would be regarded as within such charges, if the conditions were different from those under which it had acquired the ordinary business significance. If the circumstances raised such a question, the doubt would furnish a proper occasion for an understand-

ing between the parties. The facts developed are that the lumber company, when it shipped logs to Kentwood, paid all the charges payable to the Kentwod & Eastern for the service, with the understanding that, if the company received an additional sum for the service, the amount would be returned to the lumber company; the railroad retaining its full original pay. Under these circumstances, and in the absence of an understanding, when the Illinois Central received lumber cut from these logs, and, because of its shipment into certain territory, had to pay a sum in addition to the stipulated price, it might be held that the lumber was not received "f. o. b." But an inquiry could naturally arise, under the conditions detailed, as to the meaning of the expression and the scope of its application. At the time of the sale, no charges were due or payable. The lumber, however, was, under certain conditions, subject to an additional charge, based upon a service already rendered. There was no patent ambiguity in the expression used. There was no doubt about the facts. But the application of the facts to the expression could well be a matter of doubt and controversy; and, being the subject of either, it was a proper subject for an understanding between the parties affected. Such an understanding having been reached, it would not be in conflict with the effect of the letters "f. o. b.," but would define the application of the expression. While these initial letters ordinarily have a sufficiently clear and definite meaning, not requiring limitations or explanations, the circumstances developed by the second trial show that they do not necessarily import a degree of certainty precluding inquiry as to their meaning, nor a degree of inflexibility preventing adjustment and understanding.

[2] Assuming that an issue may be made as to the meaning of the contract, or as to the understanding of the parties as to its meaning, it would appear that sufficient evidence was introduced to authorize submission of the issue to the jury. The Brooks-Scanlon representatives testify distinctly as to their understanding, and the understanding of the agents of the railroad company could be inferred from their conduct. The circumstance that, for a period of five years, claims were made by the lumber company and paid by the railroad company, which would accord with such meaning or understanding, would give support to the lumber company's contention. Upon the former appeal this fact was given little weight, because of the uncontroverted claim of the railroad company that the payments were by mistake, under circumstances excusing mistake. It was stated that the purchasing department of the railroad had no knowledge of the fact that the division to the Kentwood & Eastern was paid on this lumber, and that the traffic department did not know that the invoices were paid without deductions. The purchasing agent testified that, while he knew the lumber was purchased at Kentwood, he had no means of knowing whether it originated on the Kentwood & Eastern, or at points further south on the Illinois Central, and he also testified that he was not familiar with "traffic transactions."

Knowledge of a corporation may be only through individual representatives of the corporation; and, ordinarily, knowledge resulting from transactions by an agent within his authority, or acquired by

him in the conduct of such business with reference thereto, will be knowledge imputed to the corporation. But this case, in the aspect under consideration, deals with the construction placed upon a contract by the parties who made it, and an inference with reference thereto from the conduct of the parties, based upon an assumption of knowledge of pertinent facts, cannot be indulged, where the knowledge is merely imputed to the corporation, and does not actually exist in some individual representing the corporation.

Upon the former appeal, not only was there an absence of evidence of the understanding of defendants, but an absence of evidence of knowledge in any representative of the railroad company, from which an inference could be legitimately drawn that he had given a construction to the contract other than that suggested by the ordinary meaning of its terms. In passing upon such an issue, even the knowledge which the law imputes to a man (as the published tariffs) could not logically be considered.

In the case made out on the second trial there was proof that the requisite knowledge existed, or, at all events, there was sufficient evidence of such knowledge to authorize submission of the issue as to its existence to a jury. Mr. Bradley, purchasing agent of the railroad, admitted on the second trial that he had actual knowledge of the tariffs providing for the divisions—that he had knowledge of the fact that the lumber was made from logs that came from the Kentwood & Eastern and that the divisions were actually paid to the Kentwood & Eastern. He is also made to testify that he understood that defendants were to receive the specific prices named in the contracts, that there was nothing to be taken off the prices, that nothing was to be deducted, and that he understood that defendants so understood. From the remainder of his testimony it is to be inferred that the purport of the questions to which the witness gave his acquiescence was not realized, and little effect is given to that which would otherwise be conclusive. But, while these statements are not to be taken as an admission of complete knowledge, a jury would be warranted in assuming that he had, in addition to the knowledge admitted, knowledge of the facts it was his duty to know in the conduct of his work, and which he could easily have ascertained. If a jury should so believe, it would have a sufficient basis for a finding that the corporation had full knowledge of all of the facts, and that it gave a practical construction to the contract, by which it is now bound.

[3] Every shipment from Kentwood that went into Central territory involved a division and a payment by the Illinois Central to the Kentwood & Eastern Railroad. All of the officials and employés of the Illinois Central have notice of the published tariffs applicable to the shipments from Kentwood. Some of them had actual knowledge of the tariffs, of the origin of the timber, and of the destination of the lumber. It was the duty of the auditing and paying departments to know what was contracted to be paid for lumber, and what was paid. It was the duty of the purchasing department to know what was actually being paid. Under the facts disclosed, it would involve too great an assumption of carelessness, indifference, and incompetency upon

the part of the responsible agents and employés of the Illinois Central to assume, as a matter of law, that they did not know that, on shipments from Kentwood, the railroad was paying, not only the price fixed by the lumber company, but also the division to the Kentwood & Eastern. During all the period of more than five years the railroad company was paying the entire amount fixed by the contracts as the price of the lumber, and when it shipped the lumber into Central territory, it paid the additional amount required by its division with the local railroad. The transactions were very large in number and in the amounts involved. These circumstances would warrant a jury in concluding that the letters "f. o. b." were accepted by both parties as referring alone to charges connected with loading and handling the lumber at the shipping point, and as not having reference to charges conditional in their character and the existence of which resulted from subsequent action of the purchaser.

[4-7] The lumber company had the right to accept and act upon this practical construction of the contracts. It had a right to, and did, consider the payments made to it by the Kentwood & Eastern (of the divisions from the Illinois Central) in fixing the prices of the lumber. While only one price was made, whether the lumber was shipped into Central territory, or into the territory to which the division did not apply, there is evidence that the money to be received from the division was considered in fixing the price. The experience of the lumber company indicated about the percentage which was to go into the one territory and the other, and this percentage furnished a reasonable basis for the determination of the prices. Where one of the parties to a transaction has been misled to his disadvantage by the conduct of the other, based upon mistake, the circumstances being such that he had a right to assume that the other was acting with full knowledge of the facts, and it being impossible for the parties to be restored to their original condition, the party to the contract who has suffered by the mistake of the other will be protected. The lumber company, after the first contract had been practically construed, by payment of its bill without deduction of the division, was warranted in assuming that like contracts would be given a like meaning, and was warranted in giving a lower price than it would have given, if deductions had been made. The Lumber Company made its prices with reference to this practical construction of the contract. If the practical construction is not the correct construction, it was still the construction, or apparently the construction, of the railroad company, acquiesced in and acted upon by the lumber company. The prices having been fixed with reference to this practical construction, and the lumber company receiving as the price less than it would otherwise have charged, the railroad company ought not now to be permitted, by insisting upon a different construction, to retain the benefit of the reduced prices and secure the return of the sums payment of which induced the prices; or, at all events, the issue of estoppel developed by the pleadings and evidence ought to be submitted to the jury for its determination. It may be that the plea of estoppel could be applied to part only of the amount in controversy.

The correctness of the propositions made in the opinion on the first

appeal we have no occasion to question; but the defenses developed by the evidence adduced by the defendant upon the last trial of the case should have been submitted to the jury.

The judgment is reversed.

WALKER, Circuit Judge, dissents.

INTERSTATE BUSINESS MEN'S ACCIDENT ASS'N v. LEWIS.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5278.

1. STIPULATIONS ⟹14(4)—CONSTRUCTION—STIPULATION OF FACTS.
   Stipulation of facts, in action on accident policy, that the scarf pin used by insured in pricking pimple communicated the infection into the tissues of the lip, *held* properly construed as meaning that the pin itself was infected.

2. INSURANCE ⟹455—ACCIDENT INSURANCE—"ACCIDENTAL MEANS."
   Means of death were accidental, within an accident policy, where deceased selected a scarf pin, in ignorance of its infected condition, to puncture a pimple.

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

3. INSURANCE ⟹146(3)—CONSTRUCTION OF POLICY—RESOLVING DOUBT.
   Rule of construction that doubt should be resolved against insurer cannot be applied to a clause which is reasonably clear.

4. INSURANCE ⟹530—ACCIDENT INSURANCE—DEATH RESULTING FROM INFECTION.
   Where insured punctured a pimple with an infected pin, in ignorance that pin was infected, and infection was immediately communicated and spread, whether death ensuing therefrom be ascribed to the original injury, under the doctrine of proximate cause, or whether the infection be deemed a part of the injury, the case is governed by the clause of the policy providing that whenever, as the direct result of an injury occurring solely by external, violent, and accidental means, the skin is punctured, and there is introduced into the system through the puncture, and by the same means causing the puncture, any bacteria which shall produce blood poisoning or infection, indemnity for disability or death resulting therefrom shall not exceed $500.

5. INSURANCE ⟹530—ACCIDENT POLICY—SKIN.
   The definite article before the word "outer," in clause of accident policy limiting liability, relative to puncturing "the skin or the outer covering of the eye," shows the word "skin" refers to the skin of the body, and not the outer covering of the eye.

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Action by Maude Lewis, executrix of John Folger Bailey, deceased, against the Interstate Business Men's Accident Association. Judgment for plaintiff, and defendant brings error. Reversed, with instructions.

R. M. Haines, of Des Moines, Iowa (Dunshee, Haines & Brody, of Des Moines, Iowa, on the brief), for plaintiff in error.

Eugene D. Perry, of Des Moines, Iowa (H. H. Stipp, R. J. Bannister, Vincent Starzinger, and H. B. Bradbury, all of Des Moines, Iowa, on the brief), for defendant in error.

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

CARLAND, Circuit Judge. This is an action to recover a death indemnity alleged to be due and payable by the plaintiff in error, hereafter defendant, to the estate of John F. Bailey, deceased. The case was heard by the trial court, sitting without a jury, upon the pleadings and a stipulation of facts. Judgment was rendered in favor of the defendant in error, hereafter plaintiff. Section 10, article 6, of the articles of incorporation of defendant, and paragraphs 7 and 8 of the stipulation of facts, read as follows:

"Section 10. The association shall pay to the beneficiary designated in writing by any member of the accident department, who must be either the surviving wife or heir of such member, the proceeds of one assessment of $2 on each member of the accident department in good standing at the time of the accident, to an amount not exceeding $5,000, on account of the death of any member of the accident department occurring within 90 days from the happening of the accident and resulting directly and without intervening cause from a bodily injury sustained by the member while in good standing and effected solely by external, violent, and accidental means, subject only to the conditions, provisions and limitations of the by-laws."

"(7) That prior to his injury the insured, John F. Bailey, was a strong and vigorous man, actively engaged in his business, and apparently in excellent health. That on or about the 5th day of July, 1915, he discovered a small pimple on the right side of his upper lip. That upon discovering said pimple, while alone and in the absence of any eyewitness, he removed his gold scarf pin from his necktie and intentionally pricked said pimple with said scarf pin. That his lip at said place became immediately infected with staphylococci infection from the pricking of said pimple with said scarf pin. That said infection spread rapidly over the right side of his face and extended to his nose and eye. That medical treatment was received by said insured, but that his physicians were unable to arrest the spread of said infection, which resulted in basilar meningitis, due to staphylococci infection, from which the insured died on July 18, 1915.

"(8) That the physicians in attendance upon said insured would testify that, in their opinion, the death of said insured was caused by basilar meningitis resulting from the infection to his lip, caused by the pricking of the pimple on said lip, by the insured, with said scarf pin, and that, for the purpose of avoiding the expense and delay of taking depositions, it shall be taken as true that the scarf pin used by insured in pricking his lip communicated or caused the infection by being introduced into the tissues of the lip, and that the infection, so caused, proximately resulted in basilar meningitis, which was the eventual cause of death."

It is claimed that the trial court erred: (1) In concluding as matter of law that the death of the deceased was due to a bodily injury effected by external, violent, and accidental means. (2) In concluding as matter of law that the liability of the defendant was not limited to the sum of $500.

[1] The trial court interpreted the stipulation of facts above quoted as meaning that the scarf pin itself carried the infection, and as there was no evidence that the deceased knew this fact, nor could not be presumed to know it, the use of the pin thus infected was an accidental means causing death, within the meaning of section 10, article 6, above quoted.

Counsel for defendant admits that the stipulation of facts declares that the pin did carry the bacteria into the tissues of the lip of deceased,

but insists that as to whether these bacteria originated on the skin of the lip or in the pus, or were present on the pin when selected, is a fact as to which the record is silent. We are satisfied that the interpretation placed upon the stipulation of facts by the trial court is a reasonable one, and that which the parties intended. If the pin communicated the infection, as the stipulation says, the reasonable conclusion is that the pin itself must have been infected.

[2] Counsel for defendant further contends that, if the deceased selected the scarf pin in ignorance of its infected condition to use in making a voluntary puncture of the skin, this fact would not make the means of death accidental. To sustain this proposition, a distinction is sought to be drawn between the intentional selection of an instrument in ignorance of some peculiar property which it possessed, and the inadvertent selection of an instrument known to be inappropriate. The last-named situation it is admitted might be an accidental means; but in inadvertently selecting an instrument known to be inappropriate there is no intention of selecting that instrument; neither was there in the case at bar, any intention to select an infected instrument. Such refinement may be indulged in as a matter of intellectual pleasure, but in the practical adjustment of the rights of parties to an insurance contract it ought not to be given much weight. There is no evidence or finding that deceased knew as a fact that the scarf pin was infected, and we are not prepared to decide that the knowledge as to bacterial infection has been so widely diffused that the deceased was bound to know that fact. The stipulation of facts is silent upon the question; but as the trial court found in favor of the plaintiff it must have found that the deceased did not know, nor could he be presumed to know, of the presence of bacteria upon the pin.

We are therefore of the opinion that the death of deceased was due to a bodily injury effected by external, violent, and accidental means. Without citing all the authorities bearing upon the question, we cite those which clearly in our opinion sustain the position here taken. Western Commercial Travelers' Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653 (Eighth Circuit); Lewis' Executrix v. Ocean Accident & Guarantee Corp., Ltd., 224 N. Y. 18, 120 N. E. 56; Miller v. Fidelity & Casualty Co. (C. C.) 97 Fed. 836; Healey v. Northwestern Mutual Accident Ass'n, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637; United States Mutual Accident Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; Sinclair v. Maritime Passenger Assurance Co., 3 El. & El. 478; Brintons, Ltd., v. Turvey, A. C. 230, 2 Ann. Cas. 137; H. P. Hood & Sons v. Maryland Casualty Co., 206 Mass. 226, 92 N. E. 329, 30 L. R. A. (N. S.) 1192, 138 Am. St. Rep. 379; Railway Mail Ass'n v. Dent, 213 Fed. 981, 130 C. C. A. 387, L. R. A. 1915A, 314 (Eighth Circuit); Ætna Life Insurance Co. v. Portland Gas & Coke Co., 229 Fed. 552, 144 C. C. A. 12, L. R. A. 1916D, 1027.

The case of Lewis' Executrix v. Ocean Accidental & Guarantee Corp., Ltd., supra, is the identical case now at bar, so far as the facts are concerned. Cardozo, J., delivering the opinion of the Court of Appeals, said:

"The same thing must be true of infection caused by the puncture of a pimple. Unexpected consequences have resulted from an act which seemed trivial and innocent in the doing. Of itself, the scratch or the puncture was harmless. Unexpectedly it drove destructive germs beneath the skin, and thereby became lethal. * * * 'Probably it is true to say that in the strictest sense and dealing with the region of physical nature, there is no such thing as an accident.' Halsbury, L. C., in Brintons v. Turvey, L. R. 1905, A. C. 230, 233. But our point of view, in fixing the meaning of this contract, must not be that of the scientist. It must be that of the average man. Brintons v. Turvey, supra; Ismay v. Williamson, L. R. 1908, A. C. 437, 440. Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by courts."

The opinion of the trial court was cited and approved in the case last referred to. Numerous other cases could be cited, but we do not deem it necessary.

[3-5] The defendant pleaded as a defense section 2 of article 4, and section 3 of article 6, of its by-laws, which read as follows:

"Section 2. This association shall not be liable to any member of the accident department, nor to any person claiming by, through or under any certificate issued to a member, for the payment of any benefits or indemnity on account of disability or death * * * resulting from infection except as provided in section 3, of article 6, of these by-laws."

"Section 3. Whenever, as the direct result of an injury occurring solely by external, violent, and accidental means, the skin or the outer covering of the eye shall be abraded, cut or punctured, and there shall be introduced into the system through said abrasion, cut or puncture, and by the very instrument or means causing said abrasion, cut or puncture, any specific bacteria, which shall, within a period of ten days after said injury produce septicæmia, pyæmia or tetanus, or any other kind of blood poisoning or infection, the liability of the association for the payment of benefits or indemnity on account of disability, loss or death resulting therefrom shall in no case exceed the amount of five hundred dollars."

We are of the opinion that under the stipulation of facts these excerpts from the by-laws limit the recovery in this action to the sum of $500. Section 3 in our opinion covers just such a case as the one at bar. Our duty is not to make contracts, but to enforce them as made. The rule that, where an insurance contract is doubtful as to its meaning in some particular, the doubt should be resolved against the insurer, cannot be used to strike down a clause of a contract when the meaning thereof is reasonably clear. We are of the opinion that the plaintiff in this case must either recover $500 or nothing. We sustain the claim of the plaintiff that the means of death was accidental, upon the ground that the bacteria which caused the infection was upon the scarf pin, and we agree with the trial court that the result would be different if the bacteria were not on the scarf pin, but entered the wound made by it from some other source, because the deceased intentionally used the scarf pin, and the means of death would not have been accidental, except for the want of knowledge of the deceased that the pin was infected.

Several reasons are urged for the purpose of showing that the defendant can claim no benefit from section 3 above quoted:

1. It is claimed that section 2 of article 4, and section 3 of article 6, of the by-laws, when construed together, as they ought to be, simply

refer to death from infection, and that the death of deceased in the case at bar was not from infection, but from accidental means, namely, the use of an infected pin. It is true in a general sense, as we decide in this case, that the means of death were accidental; but it does not necessarily follow that death did not result from infection. On the contrary, it is stipulated that infection did cause the death of the deceased. Moreover, to sustain the contention now under consideration would render section 3 of no force or application, because no liability is incurred by defendant unless the injury or death is caused by accidental means. Therefore, the means being always accidental, there could be no injury or death from infection. In other words, by the express terms of section 3 it is to apply to injuries by accidental means, so that it would be unreasonable to construe it so as not to refer to injuries or death by accidental means, where infection causes the injury or death.

2. It is claimed that the words, "the skin or the outer covering of the eye," found in section 3, must refer to the eye alone, and not to the skin of the body. We see no reason for indulging in such a construction. The definite article "the," before the word "outer," shows that the language without doubt refers to the skin of the body and the outer covering of the eye.

It is said that the Supreme Court of Iowa in Ballagh v. Interstate Business Men's Accident Ass'n, 176 Iowa, 110, 155 N. W. 241, 157 N. W. 726, L. R. A. 1917A, 1050, decided that section 3, above mentioned, did not apply to a case of this kind. We do not understand that section 3 was pleaded as a defense in the case last cited, and therefore cannot see just how it became material to construe it. We are of the opinion that section 3 limits the liability of defendant, whether the death of deceased be ascribed to the original injury under the doctrine of proximate cause, or whether the infection be deemed a part of the injury, because said section describes exactly the case before us. It is claimed that the plaintiff was entitled to judgment on the pleadings. We do not think that this is so. We also think that, the plea of waiver or estoppel not having been made below, and the cause having been submitted under the stipulation expressly submitting the effects of section 3 upon the amount of recovery, in the event it should be held that the injury was sustained by accidental means, it is not open to the defendant in error to have the question presented in this court.

Upon the whole record, we are of the opinion that the judgment of the court below should be reversed, with instructions to enter judgment for the plaintiff in the sum of $500 and interest. No costs to be taxed in this court as against either party.

LEARY et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. January 16, 1919.)

No. 1640.

1. DEPOSITS IN COURT ⊜11—DISTRIBUTION OF FUND IN COURT—CLERK'S POUNDAGE.
   Where an intervener recovers a part of a fund in court, also claimed by the United States, the clerk's poundage on the part so recovered is properly deducted therefrom.
2. PRINCIPAL AND SURETY ⊜185—RIGHTS OF SURETY IN INDEMNITY FUND.
   The right of a surety on a bail bond to recover out of an indemnity fund provided by the principal his reasonable expenses in defending a suit on the bond does not extend to costs and fees expended in defending against a supplementary proceeding by the government to collect the judgment.
3. PRINCIPAL AND SURETY ⊜185—RIGHTS OF SURETY IN INDEMNITY FUND.
   A deposit of securities to indemnify the surety on a bail bond carries an implied warranty of title, but not that the title will not be questioned, and the surety is not entitled to charge the fund with the expense of successful litigation in defending his title as against his adversary, which was adjudged owner of the securities subject to his claim, whether the litigation is conducted by himself or the depositary.
4. COSTS ⊜164(1)—ALLOWANCES ADDITIONAL TO COSTS—ATTORNEY'S FEES.
   The losing party in a litigation cannot be charged with the expenses of his adversary beyond taxable costs which may be adjudged against him.

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

Suit in equity by the United States against Benjamin D. Greene and others, in which Daniel J. Leary and George Leary, administrators, intervened. From the decree, interveners appeal. Affirmed.

Aubrey E. Strode, of Amherst, Va., and J. T. Coleman, Jr., of Lynchburg, Va., for appellants.

Marion Erwin, Sp. Asst. Atty. Gen., for the United States.

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

KNAPP, Circuit Judge. The previous course of this litigation appears in the opinions of this court and the Supreme Court on former appeals. Leary v. United States, 184 Fed. 433, 107 C. C. A. 27; Leary v. United States, 224 U. S. 567, 32 Sup. Ct. 599, 56 L. Ed. 889, Ann. Cas. 1913D, 1029; Leary v. United States, 229 Fed. 660, 144 C. C. A. 70; United States v. Leary, 245 U. S. 1, 38 Sup. Ct. 1, 62 L. Ed. 113. A brief statement will disclose the questions now to be decided.

When Greene was arrested in 1899, charged with defrauding the government, he placed in the hands of Kellogg, his attorney, certain securities, represented by the fund afterwards paid into court, to indemnify Leary, appellants' intestate, for going on his bond. The last bond signed by Leary was forfeited, Greene having absconded, and in a suit thereon the United States recovered a judgment against his estate, which was paid on July 26, 1910, amounting then, with interest and costs, to $40,802.

Meanwhile, in 1903, the United States had sued Kellogg and others for an accounting, and to have the 400 shares of Norfolk & Western stock, standing in his name on the books of that company, declared to be its property, on the ground that the same, or securities exchanged for it, had been purchased by or for Greene with moneys of the United States which he had misappropriated. The Leary estate was not made a party to this suit, but in 1908, when the testimony had been taken and the case was ready for hearing, it filed a bill of intervention, setting up the agreement of Greene through his attorney to indemnify Leary, alleging that the Norfolk & Western stock constituted the indemnity fund, and praying that it be applied accordingly. Without reciting the subsequent proceedings, it suffices to say that the decision of this court on the second appeal (229 Fed. 660, 144 C. C. A. 70), affirmed by the Supreme Court (245 U. S. 1, 38 Sup. Ct. 1, 62 L. Ed. 113), determined with finality that "the estate of Leary has established a claim to the stock in question which is superior to the claim of the United States." It remains to determine the extent of that superior claim; that is, the reimbursement to which the estate is entitled.

[1] The decree under review allows the estate only the $40,802 paid by it on July 26, 1910, with interest from that date, less the sum of $30,000 paid on account in December, 1917, when the stock was sold by consent and the proceeds brought into court, and less also a clerk's poundage fee of 1 per cent., under section 828 of the Revised Statutes (Comp. St. § 1383). The balance of the fund, less the poundage thereon, was directed to be paid to the United States.

As this statutory fee is properly exacted from the person to whom the impounded money is paid, we think it was clearly correct to deduct 1 per cent. from the amount which each party received, and we perceive no reason why the government's share should be diminished by the poundage fee on the estate's share. Besides, if poundage be an item of taxable costs, like other required payments to the clerk, and recoverable as such from the losing party, as seems to be assumed in Blake v. Hawkins (C. C.) 19 Fed. 204, its allowance to the estate in this proceeding would be in effect to charge the government with costs, which is in no case permissible.

[2] The trial court held that the indemnity contract covered the reasonable expenses, including counsel fees, incurred by the estate in defending the suit of the United States on the forfeited bond; but the record indicates that those expenses had been paid by Greene It appears, however, that after the judgment in that suit was recovered some proceeding to compel its payment was instituted in the Surrogate's Court of New York, in which the Leary estate was then in process of administration. In resisting that proceeding the estate expended the sum of $591.46, admitted to be reasonable in amount, which it now seeks to have refunded. We deem it not doubtful that this claim was rightly disallowed. The liability of the estate was definitely established by the judgment, which was not challenged by appeal, and no good reason appears for attempting to de-

feat or delay its collection. This being so, it seems evident that the indemnity fund should not be charged with an unwarranted outlay.

We come, then, to the principal claim of appellants, rejected by the court below, namely, that the Leary estate is entitled, as against the United States, to be reimbursed for its expenses and counsel fees in prosecuting the intervention, and thereby establishing the validity and priority of its lien. The government first urges the objection, which applies also to the $591.46 above mentioned, that this claim cannot be considered because not set up in the amended petition, which, save that it prays for general relief, demands repayment only of the judgment obtained by the United States. This objection loses its force when the exact status of the litigation is taken into account. The first appeal involved merely the right of the estate to intervene, which the Supreme Court sustained, and nothing else was decided. The second appeal turned on the question whether the evidence adduced was sufficient to prove an agreement to indemnify Leary, and whether the indemnity fund was represented by the Norfolk & Western stock. On this question the trial court ruled against the estate; but it was held on appeal, as above recited, that the estate had established a claim superior to the claim of the United States. There was no determination of the scope of that claim, for occasion did not arise to construe the indemnity contract in that regard. It was therefore proper for the court below, to which the cause was remanded, to permit an amendment of the petition, or to treat it as amended, so as to include a claim which is but incident to the main demand of the intervention. We think it should be examined on the merits.

The contract of indemnity appears in certain letters which Kellogg wrote to Leary in reference to signing the bail bonds of Greene. In the first of these, under date of December 14, 1899, he specifies the securities which Greene had placed in his hands, "as indemnity to you for becoming his bondsman. * * * It is understood that I am to hold these until you are released from the said bond, or in case that your liability should be established, that it is to be applied in payment of your obligation." And later, in May, 1901, when another bond was required, he says: "It will be necessary to renew the bail given by you for Capt. Greene, and for which I hold the security for your protection." But how can it be said that this promise of indemnity and protection includes the expenses here in dispute? Such an outlay is certainly not within the express terms of the undertaking, and in the nature of the case could not have been contemplated by the parties. As the estate's right to reimbursement rests wholly and of necessity upon Leary's want of knowledge that the government could have any claim upon the stock pledged for his security, it is impossible to assert that the expenses incurred in contesting that claim, when it was subsequently made, were intended to be covered by the indemnity agreement; and that contention of appellants may be passed without further comment.

[3] It is argued that the claim in controversy should be sustained because Greene's pledge of stock carried an implied warranty of

title, and Leary acquired the rights of an innocent purchaser for value. If both propositions be accepted, and their correctness need not be questioned, we have to consider what warranty was implied by the pledge, and whether, as the matter turned out, Leary's estate had any cause of action against Greene. It seems to be well settled that in such case the implied warranty is, not that the pledgor has good title, but that good title will be conferred on the pledgee. There is no warranty that the property pledged will not be claimed by a third party, and therefore no breach of the contract, unless such a claim be successfully asserted. The warranty implied in the sale or pledge of personal property is like the covenant of general warranty in a conveyance of real estate, which is not broken except by eviction of the grantee under a paramount title; that is to say, the pledgor's implied warranty makes him liable to the pledgee only in case the latter loses the property to a stranger who establishes a better right to it.

In 35 Cyc. 416, where numerous decisions are cited, the rule in regard to the warranty implied on a sale of personal property is thus stated:

"A warranty of title refers only to the condition of the title at the time of the sale, and is a warranty only against a superior title, or existing incumbrances, and not that the title will not be disputed."

But Leary did not "lose the property." On the contrary, as the courts have conclusively held, he got a perfectly good title even as against the United States, with whose stolen money Greene had purchased the pledged securities. True, his title was assailed, and in defending it his estate incurred expenses of considerable amount for counsel fees and the like. But as the defense was wholly successful, and Leary's title adjudged to be superior to that of the adverse claimant, there was no breach of Greene's implied warranty of title, and consequently that warranty did not of itself make him liable for the expenses of the litigation. It follows, of course, that those expenses cannot be charged upon that share of the indemnity fund which, subject to the prior right of the Leary estate, belongs to the United States as in law the successor in interest of Greene. In short, the doctrine of implied warranty does not sustain the appellants' contention.

The further argument is advanced that in the government's suit to recover the stock Kellogg's attitude, as disclosed by his answer and otherwise, was unfriendly and even hostile to the Leary estate; that as trustee of the indemnity fund he failed to do what he should have done to assist and protect the estate; that in consequence it became necessary for the estate itself to intervene in that suit; and that therefore the estate is entitled to recover the expenses which it is alleged would have been allowed to Kellogg out of the fund if he had performed his duty. But this argument rests on an assumption which seems to us clearly erroneous. If Kellogg had from the first actively aided the estate, and in a contest in the original suit, substantially like that which actually followed the intervention, had established the validity of the Leary claim, on what theory would his expenses have been chargeable upon that part of the fund adjudged in

the same suit to belong to his adversary? In that event his expenses would have been payable from the moneys awarded to the estate, because incurred in benefiting the estate, but we are aware of no rule of law under which they could have been ordered paid out of the moneys awarded to the United States.

[4] In the last analysis the case at bar involves no unfamiliar principle. One of the parties to the controversy, the United States, claimed all the Norfolk & Western stock, now represented by the fund in court; the other party, the Leary estate, claimed the greater part of it. The courts have decided that the estate has the superior claim to such portion as will discharge the obligation incurred by Leary in becoming bondsman for Greene, and that the balance of the fund belongs to the United States. The contest has been greatly prolonged and the estate put to heavy expense. But the case is by no means exceptional in that respect. It usually happens that the successful litigant gets less in net results than is adjudged to be his due, because he must himself pay the lawyer who won his suit. The costs that can be taxed against the losing party—and none at all can be taxed against the government—are little more than nominal, and the winner is therefore out of pocket for the fees of his counsel. If this be unjust to the one found to be in the right, it is because the law gives him only the amount of his recovery and the scanty sum allowed as taxable costs. We find no authority for subjecting the defeated party to any greater liability. In Hauenstein v. Lynham, 100 U. S. 483, 491 (25 L. Ed. 628), the Supreme Court said: "It is a settled rule in this court never to allow counsel on either side to be paid out of the fund in dispute." To the same decisive effect are, among others, National Bank v. Whitney, 103 U. S. 99, 26 L. Ed. 443, 103 U. S. 104, 26 L. Ed. 561, Hobbs v. McLean, 117 U. S. 567, 582, 6 Sup. Ct. 870, 29 L. Ed. 940, Riddle v. Hudgins, 58 Fed. 490, 494, 7 C. C. A. 335, and Pike v. Cincinnati Realty Co., 179 Fed. 97, 103, 102 C. C. A. 391.

The claim for expenses here considered is clearly not within the terms of the indemnity agreement, and we are persuaded that it cannot be sustained on the theory of Greene's implied warranty of title, nor yet on the theory of subrogation to the supposed rights of Kellogg, if he, instead of the estate, had carried on the litigation. Whatever its hardship, it is simply the case of a successful suitor whom the law compels to pay his own counsel.

Affirmed.

UNITED STATES v. ONE SAXON AUTOMOBILE et al.

(Circuit Court of Appeals, Fourth Circuit. January 7, 1919.)

No. 1661.

INTERNAL REVENUE ⊂⊃42—REMOVAL OF LIQUOR TO EVADE TAX—FORFEITURE OF VEHICLE.

An automobile used in removing liquor on which the tax had not been paid, with intent to defraud the government of such tax, *held* subject to forfeiture under Rev. St. § 3450 (Comp. St. § 6352), providing for forfeiture of every "carriage or other conveyance whatsoever" used for such purpose, as against a mortgage taken by the seller of the machine who voluntarily gave possession to the purchaser, but who had no knowledge of its unlawful use.

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

Proceeding by the United States for forfeiture of One Saxon Automobile. From a judgment awarding priority to the lien of W. P. Mundy, the United States brings error. Reversed.

R. E. Byrd, U. S. Atty., of Richmond, Va.

G. A. Wingfield, of Roanoke, Va. (H. T. Hall, of Roanoke, Va., on the brief), for defendant in error.

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

WOODS, Circuit Judge. The collector of internal revenue, on January 19, 1918, seized one Saxon automobile in which Sandy Hairston was transporting spirituous liquors on which the tax had not been paid. Thereafter forfeiture proceedings were instituted under the following provision of R. S. § 3450 (Comp. St. § 6352):

"Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited: and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."

W. P. Mundy, the holder of notes secured by a deed of trust on the automobile, intervened, claiming that the proceeds of sale should be applied first to the satisfaction of his debt, thus raising the question whether the forfeiture displaced his lien or interest in the property. The facts were agreed on:

W. P. Mundy, a dealer, on August 10, 1917, sold the automobile to Luther A. Moore for $450, taking for the unpaid portion of the purchase money, payable in monthly installments, 13 notes, secured by a deed of trust covering the property, recorded August 20, 1917. At the

time of seizure by the collector, there was unpaid on the notes $190, of which $80 was overdue. By the terms of the deed of trust and under the laws of Virginia, Mundy had the right to require the trustee to seize the property and sell it in satisfaction of his debt. Hairston had borrowed the automobile from Moore, and was using it for the transportation of contraband liquor when it was seized. Mundy had not at any time information of the use of the automobile to carry contraband liquor, or of any intention so to use it. No claim was made by the purchaser, Moore.

The District Court held that the rights of Mundy under the deed of trust were unaffected by the forfeiture, and that the proceeds of sale should be first applied in satisfaction of his debt, and only the balance paid into the treasury.

No doubt has ever existed of the power of Congress to impose the penalty of forfeiture on property used to defeat the revenue laws, without respect to the guilt of the owner or his knowledge of the unlawful use. Such a statute for the raising of revenue, even when containing provisions of a highly penal nature, is still to be construed as a whole, and in a fair and reasonable manner, and not strictly in favor of a claimant. United States v. Sugar, 7 Pet. 453, 8 L. Ed. 745; United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555; United States v. Graf Distilling Co., 208 U. S. 198, 28 Sup. Ct. 264, 52 L. Ed. 452. A strong consideration against any forced construction of the statute to meet the hardship of a particular case is that the law provides for relief from the forfeiture in proper cases by an executive official, and courts should always indulge the presumption that his discretion will be wisely and justly exercised. Nevertheless, if the inference of intention to exempt from forfeiture the property of an innocent owner can be drawn by any reasonable and fair construction of the language of the statute, that construction will be adopted.

This rule of construction has been extended without dissent to protect the innocent owner of property from forfeiture, even when provided by a statute which expresses no limitation or exemption of any kind, where the property has been taken by a trespasser or a thief, or the owner has been deprived of the possession by forces of nature beyond his control. This is for the reason that no right of possession or custody can be acquired by or from a trespasser or thief, or by virtue of the forces of nature against the will of the owner. In such case, the owner of the property has never in a legal sense parted with any right of custody or possession, and hence no statute can operate against his title by reason of the use or custody or possession of the thief or trespasser, or his deprivation of it by the forces of nature. This reasoning obviously does not apply when the owner voluntarily parts with his possession and intrusts his ship or vehicle to another, for in that case the owner is charged with knowledge that the person to whom he has relinquished possession, or some one acquiring the possession from him, may so use the property as to defeat the collection of the revenue, and thus bring it under the condemnation of forfeiture. While the principle is not elaborated, this we think was the distinction in the mind of Chief Justice Marshall in Peisch v. Ware, 4 Cranch, 347, 2 L. Ed.

643. The principle was applied in holding that all previous liens on vessels are overridden by forfeiture in prize cases; the court saying, if it were otherwise, shipowners could in all cases defeat forfeiture by giving mortgages on their ships. The Hampton, 5 Wall. 372, 18 L. Ed. 659; The Battle, 6 Wall. 498, 18 L. Ed. 933; The Siren, 7 Wall. 152, 19 L. Ed. 129.

The same practical considerations apply with force to the use of automobiles in violation of the statute now before us. The enforcement of the revenue statute concerning transportation of liquor is difficult, because of the facility with which automobiles may be used for that purpose without detection. If one thus engaged in illicit transportation could protect his automobile from forfeiture on proof that the legal title was in some one else, or that some one else had a mortgage on it, the difficulty of enforcing the law would be greatly increased, and the penalty of forfeiture almost always evaded.

It seems to us the statute requiring forfeiture is explicit, leaving no room for construction. It is true that it is not violated unless the liquor is removed with intent to defraud the United States of the taxes. But, when fraud in the removal is shown, the statute provides that the conveyance used for the purpose shall be forfeited. There is no limitation or exception that the forfeiture shall depend upon proof of fraud in the owner of the conveyance or on any other condition.

This court, it is true, in United States v. Two Barrels of Whisky, 96 Fed. 479, 37 C. C. A. 518, decided in 1899, where the facts were in substance precisely the same as in this case, held in effect that the limiting words, "with intent to defraud," applied, not only to the act of transportation, but also to the use of the particular conveyance, thus making it a necessary condition of the forfeiture of any interest in the vehicle that the owner of such interest should have an intent to defraud. As reluctant as we are to overrule that decision, we can find no warrant in the statute for attaching this limitation to the use of the conveyance. The court cited in support of its conclusion United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555. An examination of that case leads irresistibly to the conclusion that it not only does not support the inference that under such a statute the innocent owner or lienor of the offending conveyance is exempt from forfeiture, but suggests exactly the opposite inference. The statute there under consideration provided as to an illicit distillery that:

> Any person "who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof," shall be fined and imprisoned. "And all distilled spirits or wines, and all stills or other apparatus, fit or intending to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, inclosures connected therewith, and used with or constituting a part of the premises; and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same," shall be forfeited to the United States. Act Feb. 8, 1875, c. 36, § 16, 18 Stat. 310 (Comp. St. § 5966).

By Rev. St. § 3305 (Comp. St. § 6085), every distiller who omits to keep books in the form prescribed by the Commissioner of Internal Revenue shall be punished by fine and imprisonment, and—

"the distillery, distilling apparatus, and the lot or tract * * * on which it stands, and all personal property on said premises used in the business there carried on, shall be forfeited to the United States."

The court held that the right, title, and interest of the innocent owner of the real estate was not forfeited by a violation of the law in conducting an illicit distillery thereon, because the statute expressly provided such forfeiture only against the right and title of persons who participated in or consented to the carrying on of a distillery. The court said that the two provisions respecting personal property and real estate each clearly defined its own restrictions, and the restriction inserted in one could not be imported into the other. With respect to the provisions for the forfeiture of personal property the court uses this language:

"In order to give it such effect as will show any reason for its insertion in the statute, it must be construed to intend, at least, that all personal property which is knowingly and voluntarily permitted by its owner to remain on any part of the premises, and which is actually used, either in the unlawful business or in any other business openly carried on upon the premises, shall be forfeited, even if he has no participation in or knowledge of the unlawful acts or intentions of the person carrying on business there, and that persons who intrust their personal property to the custody and control of another at his place of business shall take the risk of its being subject to forfeiture if he conducts, or consents to the conducting of, any business there in violation of the revenue laws, without regard to the question whether the owner of any particular article of such property is proved to have participated in or connived at any violation of those laws. The present case does not require us to go beyond this, or to consider whether the sweeping words 'all personal property' must be restricted by implication in any other respect, for instance, as to personal effects having no connection with any business, or as to property stolen or otherwise brought upon the premises without the consent of its owner."

In United States v. Brig Malek Adhel, 2 How. 210, 11 L. Ed. 239, it is said:

"It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offense has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws, and has been applied to other kindred cases, such as cases arising on embargo and nonintercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty, and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs." The Palmyra, 12 Wheat. 1, 6 L. Ed. 531; Dobbin's Distillery v. United States, 96 U. S. 395, 24 L. Ed. 637.

Other cases supporting the conclusion we have reached are United States v. One Black Horse (D. C.) 129 Fed. 167; United States v. Two Horses, Fed. Cas. No. 16578; United States v. Two Mules (D. C.) 36 Fed. 84; The Frolic (D. C.) 148 Fed. 921; United States v. Two Hun-

dred and Twenty Patented Machines (D. C.) 99 Fed. 559; New England Dredging Co. v. United States, 144 Fed. 932, 75 C. C. A. 572; United States v. 246½ Barrels of Tobacco (D. C.) 103 Fed. 791.

There are a number of decisions, like United States v. 1,150½ Pounds of Celluloid, 82 Fed. 627, 27 C. C. A. 231, Shawnee National Bank v. United States, 249 Fed. 583, 161 C. C. A. 509, and United States v. One Automobile (D. C.) 237 Fed. 891, in which courts have been able to find, sometimes by somewhat forced construction, such limitations on the forfeiture provided as to exempt an innocent owner or lienor. It is sufficient to say as to the statute now under consideration that such an exemption could only rest upon judicial insertion of limiting words not found in the statute.

Reversed.

SALYERS et al. v. UNITED STATES, for Use of INDIANA QUARRIES CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. February 19, 1919.)

No. 5038.

1. LIMITATION OF ACTIONS ⟸180(7)—OBJECTIONS AT TRIAL—MOTION TO STRIKE.
   Objection may be taken to an amendment to a petition, on the ground that it sets up a new cause of action barred by limitation, by motion to strike claim from the record and exclude it from consideration.

2. UNITED STATES ⟸67(3)—BONDS OF CONTRACTORS FOR PUBLIC WORK—LIMITATION OF ACTIONS.
   Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), giving persons furnishing labor or materials to a contractor for public work a right of action on the contractor's bond, creates a new liability and gives a special remedy; but the limitation of one year for bringing suit is a condition of the right conferred.

3. PLEADING ⟸248(4)—AMENDMENT—NEW CAUSE OF ACTION.
   Where plaintiff in the original petition on contractor's bond set up a claim for material furnished by him to a contractor, an amendment setting up a further claim for material furnished by another and assigned to him states a new and separate cause of action, although the amount prayed for in the original petition was large enough to cover both claims.

4. LIMITATION OF ACTIONS ⟸127(11)—DATE OF SUIT—CAUSE OF ACTION PLEADED BY AMENDMENT.
   Where plaintiff, having two causes of action, has stated but one of them in his original petition, although the amount demanded is large enough to cover both, an amendment setting up the second cause of action will not relate back to the date of the original petition, for the purpose of avoiding the bar of limitation, but will be governed by its own date.

5. UNITED STATES ⟸67(4)—BOND OF CONTRACTOR FOR PUBLIC WORK—ACTION ON BEHALF OF SUBCONTRACTOR—PLEADING.
   In an action on behalf of subcontractors on the bond of a contractor for a public building, under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), an allegation that the building was completed and accepted by the United States on a date named is a sufficient allegation of final settlement between the United States and the contractor.

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

*Rehearing denied May 12, 1919.

6. PLEADING ⟸236(5)—AMENDMENT—DISCRETION OF COURT.
Allowance of an amendment during trial, to conform the pleadings to the proof, is discretionary with the trial court.

7. APPEAL AND ERROR ⟸110—QUESTIONS REVIEWABLE—RULING ON MOTION FOR NEW TRIAL.
Ruling on a motion for new trial is not assignable as error in the federal courts.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by the United States, for the use of the Indiana Quarries Company and others, against Isaac N. Salyers and the National Surety Company. Judgment for plaintiffs, and defendants bring error. Reversed.

J. R. Files, of Ft. Dodge, Iowa (Mitchell & Files, of Ft. Dodge, Iowa, on the brief), for plaintiffs in error.

D. M. Kelleher, of Ft. Dodge, Iowa (Henry M. Hagan, of Chicago, Ill., and B. J. Price and Clarence M. Hanson, both of Ft. Dodge, Iowa, on the brief), for defendants in error.

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

BOOTH, District Judge. Action at law by the United States of America against Isaac N. Salyers and National Surety Company, commenced May 19, 1913, for the use of Indiana Quarries Company, under Act of Congress of August 13, 1894 (28 Stat. 278, c. 280), as amended by Act of February 24, 1905 (33 Stat. 811, c. 778 [Comp. St. § 6923]), requiring bonds by contractors on public buildings for the payment of labor and material. (The Quarries Company will hereafter be referred to as plaintiff.)

After the action had been commenced on behalf of the plaintiff, several parties intervened, alleging the furnishing of labor and material. By written stipulation of the parties the action was tried, in June, 1917, to the court without a jury, and resulted in judgments in favor of the plaintiff and the interveners; claim of plaintiff being reduced, however, by certain counterclaims by defendant Salyers, the contractor.

By the present writ of error it is sought to reverse the judgment in favor of plaintiff. Specifications of error relied upon are as follows:

First. Error in permitting the plaintiff to amend its petition in November, 1916, and in receiving evidence under said amendment.

The building for which the material was furnished was completed May 21, 1912, and, as stated, the action was commenced May 19, 1913, which was within the year provided by the statute. In its original petition plaintiff alleged that it had furnished certain stone to the contractors which had been used and not paid for; the value of the stone furnished was alleged to be $5,000, and the amount demanded was also $5,000. By the first amendment to the petition, filed June 20, 1916, plaintiff alleged that it had furnished to the con-

tractor stone amounting to $3,495.71, and that there was a balance due thereon of $1,736.59, for which amount judgment was demanded.

[1] The second amendment (being the one of November, 1916, and the one complained of) separated the claim of the plaintiff into two parts, or counts. In one count it was alleged that stone had been furnished by Perry-Mathews-Buskirk Stone Co. (hereinafter called the Perry Company) in the amount of $3,718.73, and that the claim of the Perry Company had been assigned to the plaintiff in November, 1910. In the second count it was alleged that stone was furnished to the contractor by the plaintiff in the amount of $606.62; and it was further alleged that there was due and owing upon both of said counts the sum of $1,736.59. Motion was made on behalf of the defendants to strike out the amendment of November, 1916, on the ground that it introduced a new cause of action. No ruling seems to have been preserved upon this motion. At the close of all the evidence, however, defendants moved to strike from the record and exclude from consideration that portion of plaintiff's claim based on assignment from the Perry Company, on the ground that said assignment, set up in said amendment, introduced a new cause of action, and that at the time of the filing of said amendment (November, 1916) the year for filing claims as fixed by the federal statute had expired, and that the filing of said amendment could not relate back to the filing of the original petition.

The method adopted by defendant in preserving its rights was appropriate. The filing of the amendment did not cut off the defense. Railway v. Wyler, 158 U. S. 285, 295, 15 Sup. Ct. 877, 39 L. Ed. 983.

[2] The contention of the plaintiff is that the amendment of November, 1916, did not set up a new cause of action, but simply restated in two counts the cause of action originally set up; one of the counts being on behalf of the plaintiff as original furnisher of material, and the other on behalf of the plaintiff as assignee of the claim of the Perry Company.

The bond required by the statute above cited performs a double function: First, to secure to the government a faithful performance on the part of the contractor; secondly, to protect persons from whom the contractor obtains labor and materials. U. S. v. Nat. Surety Co., 92 Fed. 549, 34 C. C. A. 526; U. S. v. Rundle, 100 Fed. 400, 40 C. C. A. 450. And the statute is to be liberally construed to effect the purposes within its scope. Ill. Surety Co. v. John Davis Co., 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206; U. S. v. Lowrance, 252 Fed. 122, — C. C. A. —.

But, while the statute creates a new cause of action, it does so upon the terms named in the statute.

"The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right con-

ferred and compliance with them is made essential to the assertion and benefit of the liability itself." Texas Cement Co. v. McCord, 233 U. S. 157, 162, 34 Sup. Ct. 550, 552, 58 L. Ed. 893.

Among the limitations in the statute is that of 12 months for bringing suit or filing claims. Texas Cement Co. v. McCord, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893; Ill. Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609; U. S. v. Boomer, 183 Fed. 726; Baker Contract Co. v. U. S., 204 Fed. 390, 122 C. C. A. 560; Eberhart v. U. S., 204 Fed. 884, 123 C. C. A. 180. The claims of the various persons furnishing labor or material are assignable. Title Co. v. Crane Co., 219 U. S. 24, 31 Sup. Ct. 140, 55 L. Ed. 72; U. S. v. Rundle, 100 Fed. 400, 40 C. C. A. 450; Title Co. v. Puget Sound Works, 163 Fed. 168, 89 C. C. A. 618. And each claim is separate and represents a distinct cause of action. Title Co. v. Crane Co., 219 U. S. 24, 35, 31 Sup. Ct. 140, 55 L. Ed. 72; Ill. Co. v. Peeler, 240 U. S. 214, 225, 36 Sup. Ct. 321, 60 L. Ed. 609.

[3] The two claims of the plaintiff and of the Perry Company being originally distinct and representing distinct causes of action, it remains to be considered whether by the amendment to plaintiff's petition of November, 1916, a new cause of action was introduced into the petition, or whether the cause of action represented by the Perry Company claim was already included in said petition. It has been noted that the amount demanded in the original petition was $5,000, and in the first amendment to the petition this amount was changed to $1,736.59, and that the amendment of November, 1916, retained this latter amount. The last amendment to the petition, therefore, did not change the amount demanded; but this is not determinative.

The tests to determine whether two causes of action are identical are fully stated in Whalen v. Gordon, 95 Fed. 305, 313, 37 C. C. A. 70, 79. Among those tests are:

"Will the same evidence support both? And will a judgment against one bar the other?"

Applying the first test to the instant case, it is plain that to support the cause of action stated in the original petition and in the petition as first amended, in addition to the formal proof of the giving of the bond and the completion of the contract and settlement thereunder, evidence was necessary (1) that the stone supplied had been furnished to the defendant; (2) that it had been furnished by the plaintiff; (3) that it had not been paid for. To support the cause of action set up by the amendment of November, 1916, in addition to the formal proof mentioned, evidence was necessary: (1) That the stone supplied had been furnished to defendant; (2) that it had been furnished by the Perry Company; (3) that it had not been paid for; (4) that the Perry Company had assigned its claim to the plaintiff prior to the expiration of one year from the completion of the contract and "settlement"; (5) that plaintiff was still the owner of the claim. Ill. Surety Co. v. Peeler, 240 U. S. 214, 225, 36 Sup. Ct. 321, 60 L. Ed. 609. It is clear, therefore, that evidence was needed to support the cause of action set up in the amendment different from and in addition to what was needed to support the cause of action set up either in the

original petition or in the original petition as first amended. The first test above mentioned has therefore not been met. Applying the second test: If plaintiff had gone to trial upon the original petition, or upon the original petition as first amended, and had obtained judgment in whatsoever amount it could have shown itself entitled by reason of itself furnishing stone to the contractor, it is plain that such judgment would not have been a bar to a recovery by plaintiff for other stone furnished by the Perry Company, the claim for which had been assigned to plaintiff; and the reverse is also clearly true, that the recovery on the latter claim would have been no bar to recovery on the former. The second test was therefore, not met.

[4] Furthermore, the amendment of November, 1916, was not a mere amplification or expansion of what was stated in the original petition, and therefore within the scope of the decisions. Railway v. Wulf, 226 U. S. 570, 576, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; Seaboard Air Line v. Renn, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. Ed. 1006; Friederichsen v. Renard, 247 U. S. 207, 38 Sup. Ct. 450, 62 L. Ed. 1075; Ill. Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609; Railway v. Scala, 244 U. S. 630, 37 Sup. Ct. 654, 61 L. Ed. 1360. But the amendment set forth a new and different state of facts which constituted a different cause of action, and came within the scope of the decisions. Railway v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983; Sicard v. Davis, 6 Pet. 124, 8 L. Ed. 342; Railway v. Cox, 145 U. S. 593, 604, 12 Sup. Ct. 905, 36 L. Ed. 829; U. S. v. Dalcour, 203 U. S. 408, 423, 27 Sup. Ct. 58, 51 L. Ed. 248; Whalen v. Gordon, 95 Fed. 305, 37 C. C. A. 70, and cases cited therein; Railway v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; Lang v. Railroad Co., 198 Fed. 38, 117 C. C. A. 146; Re Louisell Lbr. Co., 209 Fed. 784, 126 C. C. A. 508.

Finally, this amendment does not effect a mere substitution of parties plaintiff, nor of change of capacity in which plaintiff seeks recovery, so as to be within the scope of the decisions. Railway v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; McDonald v. Nebraska, 101 Fed. 171, 41 C. C. A. 278; In re Griggs, 233 Fed. 243, 147 C. C. A. 249; Franklin v. Conrad Stanford Co., 137 Fed. 737, 70 C. C. A. 171. But we have here an instance where the plaintiff having two causes of action has stated but one of them in his original petition, although the amount demanded is large enough to cover both of his causes of action, and then seeks by amendment to set up facts vital to and constituting the second cause of action. An amendment setting up such new and second cause of action will not relate back to the date of the original petition, but will be governed by its own date, and if the bar of the statute of limitations or a bar to the right to maintain such new cause of action has intervened, the new cause of action must fail. Texas Cement Co. v. McCord, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893; Ill. Surety Co. v. Peeler, 240 U. S. 214, 225, 36 Sup. Ct. 321, 60 L. Ed. 609; Baker Contract Co. v. U. S., 204 Fed. 391, 122 C. C. A. 560; Eberhart v. U. S., 204 Fed. 884, 123 C. C. A. 180.

Our conclusion is that the Perry Company claim was barred by the limitations in the statute before the filing of the amendment of November, 1916, and that it was error to deny the motion to strike out the evidence as to the cause of action originating in that claim.

The second specification of error relied upon reads:

"Error in permitting the witnesses Hagan and King to testify concerning the contents of the books of account of Alexander King & Co., for the reason that said testimony was incompetent, irrelevant, not the best evidence, and no proper foundation therefor had been shown."

Rule 11 of this court (188 Fed. ix, 109 C. C. A. ix) reads in part as follows:

"When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected."

Rule 24 (188 Fed. xvi, 109 C. C. A. xvi), relating to briefs, contains the same provision.

There is no compliance, and no attempt at compliance, with these rules on the part of the plaintiffs in error, either in the original assignments of error filed or in the specification of errors relied upon, set out in the brief, or in the subsequent "argument" contained in the brief. Because of this failure to comply with the rules, the second specification of error will not be considered.

[5] The third assignment of error challenges the ruling of the court that the allegations in plaintiff's petition that the work on the building was completed and the building accepted by the United States on or about the 24th day of May, 1912, was a sufficient pleading of the fact that there had been final settlement between the United States and the contractor, as required by the Act of Congress under which the action is brought. The defendant, in answer to one of the intervening petitions, admitted that settlement was made on the date alleged. Furthermore, there was introduced in evidence, without objection, a certificate, or statement, from the supervising architect as follows:

"Final settlement under the contract to which you refer was authorized May 21, 1912."

In our opinion both pleading and proof were sufficient. Ill. Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609; U. S. v. Robinson, 214 Fed. 39, 130 C. C. A. 432; Pederson v. U. S., 253 Fed. 622, —— C. C. A. ——.

[6] The fourth assignment of error challenges the action of the trial court in allowing an amendment to the petition during the trial, and after the testimony was closed, which amendment in substance alleged that the material for which recovery was sought was furnished through Alexander King & Co. as a materialman and subcontractor, whereas in the original petition it was simply alleged that it had been furnished through Alexander King & Co. The objection of the defendant to this amendment was that the legal meaning of the original allegation was that the material was furnished by the plaintiff through Alexander King & Co. as their agents, whereas the legal meaning of

the amendment was that the material had been furnished through King & Co. as a subcontractor. The importance of this objection lay in the fact that payments in considerable amounts had been made to King & Co.; and in the legal effect of those payments. But the amendment was asked and allowed in order to conform the pleadings to the proof, and it was discretionary with the trial court to allow it.

The fifth assignment of error relates to finding of fact in regard to counterclaim of the defendant Salyers. The sixth relates to finding of fact in regard to the claims of the interveners. The seventh to a ruling of the court refusing to appoint an architect to measure the number of cubic feet of stone in the building. They have all been examined, and no reversible error found.

[7] The eighth, and last, assignment of error is that the court erred in overruling a motion for a new trial. Such ruling cannot properly be made the subject of an assignment of error.

Because of error in allowing the amendment of November, 1916, to the petition and the introduction of evidence thereunder, judgment is reversed, and a new trial ordered.

PENNSYLVANIA CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2507.

1. CARRIERS ⟸38—INTERSTATE COMMERCE—REBATES.
   Claims for refunds for switching charges paid on prior inbound shipments into Chicago from the West could not be granted or enlarged by a subsequently enacted tariff, and hence the joint freight tariff, effective on the Pennsylvania line January 18, 1907, was not authority for a refund on inbound shipments received prior thereto.
2. CARRIERS ⟸38—SWITCHING CHARGES—REBATES.
   The Chicago Joint Minimum Switching Tariff, which became effective November 1, 1898, relating to absorption of switching charges and rebates, had no relevancy to switching charges on inbound shipments from the line of a Western road.
3. CARRIERS ⟸38—REBATES—ELKINS ACT.
   Actual discrimination between shippers is not a necessary element of a violation of the Elkins Act, as amended by the Hepburn Act (U. S. Comp. St. § 8597); departure from the published rate being sufficient.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

The Pennsylvania Company was convicted for violation of the Elkins Act, as amended by the Hepburn Act, and it brings error. Affirmed.

Timothy J. Scofield, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne, of Chicago, Ill., and J. Carter Fort, for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. Plaintiff in error was convicted under an indictment of five counts charging violation of section 1 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847), as amended by the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 586 [Comp. St. § 8597]), in which is provided:

"And it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given of discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

Each of the counts sets forth shipments in 1912 by the W. H. Merritt Company, of Chicago, of cars of grain aggregating 24, on each of which plaintiff in error unlawfully gave the shipper a rebate or concession of $2. That the rebate or concession of $2 per car was in fact received by the shipper from plaintiff in error is not controverted, but is sought to be justified.

The justification for these refunds made in connection with the shipments of 1912 is asserted to be that they arose out of bills paid in the years 1900 to 1906 by the former owners of the Merritt elevator, for switching to the elevator cars of grain arriving in Chicago over Western roads, and that, under the tariff then in force, charges paid by the consignees for switching to elevators cars of grain arriving in Chicago over Western roads would by Eastern roads be absorbed in or credited upon the freight charges from the elevator to Eastern points, for like tonnage of such grain carried by such Eastern roads, on presentation to the eastbound carrier of an expense bill showing the prior payment of such a switching charge.

There was in vogue in the city of Chicago during 1912 a system or transit arrangement under which, when cars of grain came into the city from Western points, they might be switched to and unloaded into a local elevator, and upon reloading the same or similar tonnage of like grain, for shipment to an Eastern point, the shipper might, on surrender of his freight bill for the inbound shipment to Chicago, secure the lower through rate from Western point of origin of an inbound shipment to point of destination of the outbound shipment. The cars described in the several counts were shipped out in 1912 from the Merritt elevator East over plaintiff in error's railroad, and, in order to obtain the advantage of a through rate, were stated to be the shipments of certain cars of grain shortly theretofore inbound to Chicago, and switched to and unloaded into the Merritt elevator at Chicago. The through rate through Chicago was thus secured; but thereupon the shipper also presented to this carrier further claims for $2 applicable to each of such cars so shipped East, predicated upon inbound switching charges to that elevator, of $2 per car which, as stated, had been paid

from 1900 to 1906; expense bills for each of such switching charges being presented to the carrier, and the $2 per car paid accordingly to the Merritt Company. It is upon the payment to the shipper of these claims or refunds of $2 per car that the indictment is predicated.

In the published tariff in force when all or most of the cars referred to in the indictment were shipped, it is provided:

"The period of time allowed for transit privileges will be 12 months from the date of inbound carriers' freight bills. At the expiration of the time limit transit privileges shall absolutely cease and full local rates, commodity or class, shall be assessed for any movement whatsoever, both into and out of the transit point."

Under this limitation, which became effective in September, 1912, an inbound Western grain shipment, made more than one year before the date of the outbound Eastern shipment, could not be used to obtain the benefit of the through rate, and an inbound switching charge incurred more than one year prior to the outbound shipment could not in any event be lawfully rebated or paid to the shipper upon the outbound shipment being made, unless, perhaps, by virtue of some previous tariff it became a lawful claim against the outbound carrier.

[1, 2] It is contended for plaintiff in error that the obligation of the outbound carrier to absorb or refund the inbound switching charge accrued under prior tariffs wherein there was no time limit, and that claims so arising could not be affected by tariffs subsequently adopted. But we must look to the tariff in force when the inbound switching charges were incurred and paid by the consignee, to determine whether or not there then accrued any such claim for refund of switching charges, which might then or thereafter be the subject of a refund.

We are referred by plaintiff in error to the joint freight tariff effective on the Pennsylvania line January 18, 1907, as authority for these refunds. It provides:

"When tonnage in grain or any products is shipped east or south via Pennsylvania lines from elevators, mills or malt houses located as above, which is equal to the tonnage in grain obtained in cars originally switched to such elevators, mills or malt houses the inbound switching charges of the Pennsylvania Company will be considered a part of the through rate and will be refunded."

Whether or not this tariff provision would authorize the refund at any time thereafter by the carrier of eastbound shipments of switching charges paid on prior inbound shipments from the West received after the tariff provision became effective, need not be considered, since the switching charges here in question were paid in the years 1900, 1902, 1903, 1904, and 1906, all prior to the effective date of this tariff. If a subsequently adopted tariff will not abrogate or limit claims for refund which accrued prior thereto, it is equally true that such claims will not be created or enlarged by a subsequently enacted tariff. Clearly this tariff of 1907 did not give rise to refunds for switching charges which were paid from 1900 to 1906.

The only other tariff appearing in evidence which seems to be seriously put forth on behalf of plaintiff in error in justification of the

payment in 1912 of these switching charges which accrued from 6 to 12 years previously, is the Chicago Joint Minimum Switching Tariff, which became effective November 1, 1898. The part relied on reads:

"A. All freight coming from warehouses, elevators or industries located on Western roads or other foreign connections, or from their tracks, will be subject to switching charges as per their switching tariffs, in addition to current rates from Chicago.

"B. Where any Western road's switching charge is not uniform to all Eastern lines, the Eastern line to which the higher charge is made may, if it so desires, absorb the actual difference to equalize such switching charge; difference of switching shall not be equalized by cartage, nor difference in location or distances equalized by switching, nor shall difference in location or distances be equalized by the payment of cartage, nor shall payment of cartage be made in lieu of switching.

"C. Where freight originates at warehouse or industries located directly on the tracks of an Eastern line, any other Eastern line taking such freight may (excepting traffic destined to Canadian territory, for which see special circulars), if it so desires, absorb all switching charges on same; difference of switching shall not be equalized by cartage, nor difference in location or distances equalized by switching, nor shall difference in location or distances be equalized by the payment of cartage, nor shall payment of cartage be made in lieu of switching."

Paragraphs A and B clearly have no reference to a situation like that here presented. Paragraph C, which relates to freight that originates at a Chicago warehouse on an Eastern line, and the absorption of switching charges by any other Eastern line which carries the freight, applies to the switching charges from the warehouse on the line of the Eastern road on which the freight originates to the line of the other Eastern road which carries the freight East, so that there may be parity between all the Eastern roads respecting shipments from a warehouse located on any one of them. It has no relevancy to switching charges on an inbound shipment to such warehouse from the line of a Western road.

We find nothing in the tariffs shown in evidence which affords any justification of these payments of $2 per car made to the shipper in 1912.

[3] It is contended that plaintiff in error could not properly be convicted of a violation of the amended Elkins Act, because there was no evidence that the privileges accorded to this shipper were denied to any other shipper, and that therefore there was no discrimination shown. The answer is that actual discrimination between shippers is not a necessary element of a violation of the amended Elkins Act. Vandalia R. Co. v. U. S., 226 Fed. 713, 141 C. C. A. 469 (7 C. C. A.); C., St. P., M. & O. Ry. v. U. S., 162 Fed. 835, 90 C. C. A. 211 (8 C. C. A.); C. & A. Ry. v. U. S., 156 Fed. 558, 84 C. C. A. 324, 26 L. R. A. (N. S.) 551 (7 C. C. A.)

The improper allowance and payment of $2 per car by the carrier to the shipper upon these eastbound shipments is such a departure from the published rate, and such a rebate or concession granted and given by the carrier, as is denounced by the amended Elkins Act.

The judgment is affirmed.

PITTSBURGH, C., C. & ST. L. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2508.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company was convicted of a violation of the Elkins Act (Act Feb. 19. 1903, c. 708, 32 Stat. 847 [Comp. St. §§ 8597–8599]), and it brings error. Affirmed.

Timothy J. Scofield, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne, of Chicago, Ill., and J. Carter Fort, for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. This cause was tried in the District Court with No. 2507, Pennsylvania Co. v. United States, 257 Fed. 261, — C. C. A. —, and the causes were here argued together. Barring the fact that the shipments and switching charges which were the subject-matter of the controversy in the respective causes were different, the controlling facts and principles are identical. What we said in our opinion filed concurrently herewith in the Pennsylvania Case is alike applicable here.

The judgment is affirmed.

FEDERAL LIFE INS. CO. v. KEMP et al.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1919.)

No. 2567.

1. INSURANCE ⟸146(1)—CONSTRUCTION OF CONTRACT—ELEMENTS FOR DETERMINATION.

While the terms of an insurance policy framed by the insurer are to be construed, if ambiguous, most strongly against him, even such ambiguous provisions are to be interpreted in the light of surrounding circumstances, with regard to the evident purpose of the parties and the nature of the general undertaking of the insurer towards its policy holders, whether the insurer be a mutual or a stock company.

2. INSURANCE ⟸367(2)—CONSTRUCTION OF POLICY—SURRENDER VALUES—DEDUCTION OF INDEBTEDNESS.

Where an insurance policy provided that, in case of default by the policy holder, he might accept a cash surrender value, a paid-up life policy, or extended insurance, and at the time of default in the payment of premiums the policy holder was indebted to the insurer for more than the cash surrender value of the policy, the right of the insurer under the policy to deduct the indebtedness applied to the surrender value in terms of extended insurance, and not merely to the cash surrender value.

3. INSURANCE ⟸367(2)—CONSTRUCTION OF POLICY—"INDEBTEDNESS ON ACCOUNT OF POLICY."

Where a life insurance contract provided for a cash payment of premiums annually of 50 per cent., the remaining part of the premium to be considered an indebtedness, such indebtedness was an "indebtedness on account of the policy," within a policy provision for deduction of indebtedness from the surrender value of the policy in case of default in payment of premiums.

In Error to the District Court of the United States for the District of Indiana.

Action by L. Scott Kemp and others against the Federal Life Insurance Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

James C. Jones, for plaintiff in error.

Frank C. Dailey, of Bluffton, Ind., for defendants in error.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. In an action by the children, assignees of insured, on a $10,000 twenty-payment life policy issued by a company which was reinsured by defendant, judgment was entered on a directed verdict for plaintiffs in the sum of $8,475.41, the face of the policy less the amount concededly due on a loan, plus interest. The facts are not disputed; the controversy turns on the construction of the policy and the accompanying certificate of loan, the essential portions of which are copied as an appendix hereto.

Concededly, the policy lapsed on December 31, 1910, for nonpayment of the eleventh premium, unless it was continued in force for the face amount under the extended insurance provision. The premiums were $365 annually for 20 years; pursuant to the terms of the premium loan certificate bearing even date with the policy and executed concurrently therewith, only one-half of the first ten annual premiums, $182.50 each, was paid in cash. When the eleventh premium was due, the unpaid one-half of the first ten premiums, with interest, amounted to $2,278.77. The insured died July 31, 1914. No application was made within 30 days or within 6 months after December 31, 1910, for any of the methods of settlement specified in paragraph 8 of the conditions. If the first ten premiums had been paid in full, the insured would have been entitled, at the time of default in payment of the eleventh premium, to extended insurance for 15 years and 233 days, and thus, at the time of his death in 1914, the policy would have been in force for its face amount. A like situation arises if the loan be deemed an obligation separate and distinct from the policy, and not to be deducted from the value of the extended insurance at the time of the lapse.

If, however, the surrender value at that time, whether expressed in dollars or extended insurance, is to be reduced by the amount of the then existing loan as an indebtedness on account of the policy, then, as the loan exceeded the then guaranteed cash values and loan values specified on page 3 of the policy, and also exceeded the then value of the 15 years and 233 days of extended insurance, testified to be $2,074.20, there was no value remaining for the purchase of any extended insurance.

Life insurance under such a policy as the one in question is based upon the creation out of the annual premiums of a reserve fund which at compound interest will equal the face of the policy at the expiration of a certain time, determined by certain mortality tables based upon experience. The annual premium charged is in excess of this amount; this excess provides for the expenses of the company and losses greater than those counted upon; out of any balance, dividends are paid and surpluses accumulated.

It is the reserve fund which enables the company to guarantee certain loan and cash surrender values at stated periods; and it is this same fund which enables it to offer, on a default, an extension of the insurance for definite periods without payment of further premiums. The reserve in whole or in part is used to pay a single premium for the extended term insurance, which the insured may thus purchase in lieu of surrendering the policy for cash or taking a pro rata amount of insurance, in case he is compelled to lapse the policy by his inability to keep on paying the stipulated premiums.

[1] An insurance company, like an individual, may disregard the fundamental elements of legitimate business and by contract agree to give its policy holders, or some of them, privileges which, if given to all, would inevitably result in time in insolvency; and if the contract clearly so provided, the folly of it would be no defense to its enforcement. But all contracts are to be interpreted in the light of the surrounding circumstances; and while the terms of an insurance policy, framed as they are by the insurer, are to be construed, if ambiguous, most strongly against him, yet even ambiguous provisions are to be interpreted with regard to the evident purposes of the parties and the nature of the general undertakings of the insurer towards its policy holders, and that, too, whether the insurer be a mutual or a stock company.

Even, therefore, if there were some ambiguity in the provisions of these form documents which constitute the contract, an interpretation which would necessarily result in eventually destroying the insurer and thus rendering performance of similar obligations to others impossible should not be given to it, if any other reasonable construction could fairly be given to the language used. The question in this case is: What "indebtedness on account of this policy" is embraced within that phrase as used in the cited passage from page 3 of the policy, and what "surrender value" does it reduce?

Plaintiffs contend that the loans covered by the premium loan certificate are independent of the policy and not intended to be covered by this clause; further, even if they are included therein, the "surrender value" to be reduced thereby in case of lapse is only the "cash surrender value" specified in the table on page 2 of the policy, and not the automatic alternative option of the extended insurance. Specifically, they urge that under this option the insurance, on lapse in the payment of the eleventh premium, was automatically extended for 15 years and 233 days for the face of the policy; that the unpaid half of the ten premiums constituted a loan, not enforceable directly as a debt, but only as a lien upon and payable out of proceeds of the policy on its maturity; if death occurred during this extension period, as it did occur, the face of the policy, less the loan, would then be payable; if, however, death should occur after the extension period, and when, therefore, the insurance would no longer be in force, while the company would not have to pay the insurance, it could not collect the amount loaned.

If these contentions are to be upheld, the practical result is this: That the company on December 31, 1910, had already paid out, by

way of a conditional loan, nearly the entire reserve held by it on the policy; that although it no longer had the money in hand to pay for the extended insurance for over 15 years, it was nevertheless bound to grant it practically without charge; that, if the insured outlived the 15 years, it would thus have made a gift of this insurance cost during that period, and only if he died during that period would it be repaid the loan. Such a contract, given to all policy holders, would inevitably bankrupt the company.

[2] In our judgment, these contentions are not to be upheld. Not only is a different construction of the policy consonant with sound business principles, fair and reasonable; it is, we believe, the only fair interpretation of the language, practically free of any ambiguity. The privileges accorded a defaulting policy holder are three. He may accept any one of them: The cash, paid-up policy good for life, or extended insurance good only for fixed periods, which he will be entitled to dependent upon the time of default, as specifically stated in the table of surrender values. This table is termed "Table of Loans and of Surrender Values Either in Cash, Extended or Paid-Up Assurance." While loans are necessarily cash, clearly surrender values may be cash, or a paid-up policy, or extended insurance; any of these is equally a thing of value to be given in exchange for the surrendered and defaulted policy.

What surrender value, then, is to be reduced if "an indebtedness on account of the policy" be outstanding at the time of settlement in case of default in premium? Surely whichever of the three may be selected. Concededly, if a cash surrender value were the option selected, the indebtedness would be deducted. The parties cannot reasonably be held to have intended that a paid-up policy or extended insurance could be taken in lieu of the cash, and that, in that event, the debt, which, under the loan privilege given in the table, might exceed the cash value and be nearly the entire reserve, might remain unpaid in whole or in part. The insurance, paid-up or extended, is a surrender value expressly specified as such in the table, exactly the same as the cash value. In Hay v. Meridian Life, etc., Co., 57 Ind. App. 536, 101 N. E. 651, 105 N. E. 919, the provisions were entirely unlike those in the instant case; furthermore the language was vague and ambiguous, and therefore properly interpreted in favor of the insured. Francis v. Prudential Ins. Co., 243 Pa. St. 380, 90 Atl. 205, is closer to the case in hand. While we cannot concur in the reasons given by the court for its conclusions, or in these conclusions, the case is distinguishable on the facts; for there the indebtedness was expressly stated to be deductible from the amount payable as extended insurance, not as here from the surrender value at the time of lapse, whether in cash, paid-up or extended insurance.

[3] Clearly, too, this premium loan is "an indebtedness on account of this policy." The premiums were $365 cash annually; the loan certificate, executed contemporaneously with the policy, expressly bound the maker to pay this premium in full, but only one half in cash, the other half to be secured by a lien on the policy. While the payments on the certificate were to terminate on the surrender or

expiration of the policy, the indebtedness, if any, theretofore created remained as a lien on the policy; as it was for a portion of premiums essential to have kept the policy in force, it was clearly "on account of this policy." We find no basis in the documents for limiting "an indebtedness on account of the policy" to the loans specified in the table of guaranteed loan values.

Anson v. New York Life Ins. Co., 252 Ill. 369, 96 N. E. 846, 37 L. R. A. (N. S.) 555, is not at all in point. The indebtedness there sought to be deducted was entirely extraneous; it arose out of the insured's transactions as a company agent.

The judgment must be reversed, and the cause remanded for retrial.

Appendix.

The policy provided for the payment of $10,000 "(less any indebtedness due the company on this policy)" on proof of death, while the policy was in force, "subject to the privileges and conditions stated on the second and third pages hereof, which are made a part of this contract."

The eighth paragraph of privileges and conditions, on the second page of the policy, reads as follows:

"If this policy shall become void by the violation of any stipulation or agreement, all payments made or accepted hereon shall be retained by and shall belong to the company, except that if after three full years' premiums shall have been paid on this policy, it shall cease or become void solely by the nonpayment of any premium when due, the owner will be entitled, on legal surrender of this policy within thirty days thereafter to one of the methods of settlement provided in the table upon the third page hereof at the date of surrender, as follows:

"1. Receive a paid-up life policy for the amount specified in the said table; or,

"2. Receive the amount specified in the said table as the cash value of this policy; or,

"3. Should no choice be made within said thirty days of one of the foregoing methods of settlement, and providing application is made therefor within six months from date of default of payment of premium, the owner of this policy will still be entitled to receive a certificate extending this assurance, for the face value of this policy, for the number of years and days specified in the said table, subject to the conditions regarding proofs of death specified on the face of this policy, provided that, if death occurs within three years from the date of such certificate and during the term covered by such extended assurance there will be deducted from the amount payable the amount of the premiums which would have been paid had there been no lapse."

On page 3 of the policy is a table headed "Table of Loans and of Surrender Values, Either in Cash, Extended or Paid-Up Assurance, and Additions at Death." While the table covers each year from three to twenty, only the tenth year is essential here. It reads:

At End of	Loan Values.	Cash Value.	Total Amount Payable at Death.	Extended Assurance.		Paid-up Life Policy.
				Years.	Days.	
10th Yr.	2,250.00	1,965.00	11,965.00	15	233	5,000.00

After the table on page 3, was the following:

"Any indebtedness on account of this policy outstanding at the time of settlement as provided by the terms of paragraph 8 of privileges and conditions upon the second page hereof, will correspondingly reduce the surrender value specified in the above table."

At the time the policy was issued, it was agreed that the insured might pay half of each annual premium, $182.50, in cash, and that the remaining half of the premium, with compound interest at 4 per cent., should become an indebtedness secured by a lien against the policy.

The agreement with respect to this, executed concurrently with the policy, is evidenced by the "Premium Loan Certificate" as follows:

"Premium Loan Certificate.

"Whereas, the Interstate Life Assurance Company, of Indianapolis, Indiana, has accepted an application, and issued, upon the statements contained therein, a policy of assurance upon my life in the sum of ten thousand dollars, I hold myself duly bounden to the said company in the sum of three hundred sixty-five and no/100 dollars, annually for twenty years, unless said policy be sooner terminated by death or surrender, payable upon the terms and conditions as herein provided.

"1. The true intent and purpose of this loan certificate is that I hold myself bound to pay for said policy of assurance a sum of money annually, the cash part of which shall be fifty per cent. (50%) of the premium thereon.

"2. In order that the terms and conditions of this loan certificate shall be made good, the company shall have a lien upon the policy of assurance upon my life, in payment for which it is given, to the extent of the annual differences between the cash paid and the full premiums, with four per cent. (4%) interest thereon, computed in accordance with insurance law and mathematics. In the event of the policy for which the loan certificate is given becoming a claim by death within twenty years from the date of this policy, there shall be paid thereon the profits apportioned thereto.

"3. The payments on the loan certificate shall terminate upon the surrender to the company of the policy upon which it is predicated, or at the expiration of twenty years from the date thereof.

"Signed and witnessed this 31st day of December, 1900.

"Stephen Bruce Kemp, Maker."

L. P. LARSON, JR., CO. v. LAMONT, CORLISS & CO. et al.

SAME v. MINT PRODUCTS CO.

(Circuit Court of Appeals, Seventh Circuit. July 30, 1918. Rehearing Denied January 15, 1919.)

No. 2476.

1. TRADE-MARKS AND TRADE-NAMES ⟸45—REGISTRATION—EFFECT—SUBSEQUENT REGISTRATION.

Where a trade-mark for a gum wrapper, consisting of an exhibited design containing the words "Peptomint" and "Gum," was registered with an explicit disclaimer of the words "Peptomint" and "Gum," the statutory right respecting "Peptomint" as one of the elements of the trade-mark was exhausted, the trade-mark statute containing no provision for reissue or amendment after issue, and the registrant could not thereafter, by subsequent registration, acquire any right respecting the word "Peptomint."

2. TRADE-MARKS AND TRADE-NAMES ⟸45—UNFAIR COMPETITION—COMMON-LAW RIGHTS.

Where a gum manufacturer's label was marked with the word "Peptomint" wreathed with sprigs of peppermint, and the quoted word was popularly taken as corrupt spelling of peppermint, and so pronounced, the manufacturer, in attempting to assert a common-law right to the

quoted word as an independent trade-mark, could not, after disclaimer of such word in the registration of his trade-mark, claim that such word was arbitrarily coined from "peptone."

3. TRADE-MARKS AND TRADE-NAMES ⇐93(3)—UNFAIR COMPETITION—EVIDENCE.
In an action based on unfair competition by a manufacturer in using the word "Peptomint" to simulate both in color and design the word "Pep-O-Mint" on plaintiff's candy labels, evidence *held* to require a decree for plaintiff.

4. TRADE-MARKS AND TRADE-NAMES ⇐93(1)—UNFAIR COMPETITION—REGISTERED TRADE-MARKS—PRESUMPTIONS.
In an action for unfair competition in the use of the word "Peptomint" to simulate plaintiff's word "Pep-O-Mint," that plaintiff's label bore the words "trade-mark registered," while the word "Pep-O-Mint" had not been registered, did not require a dismissal of plaintiff's bill, where such words were attributable to a legend on plaintiff's products that actually had been registered, and in view of the presumption that a suitor's hands are clean.

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

Action by the L. P. Larson, Jr., Company against Lamont, Corliss & Co. and others, and action by the Mint Products Company against the L. P. Larson, Jr., Company, with cross-bill by defendant against plaintiff in the last-mentioned action. From a dismissal of plaintiff L. P. Larson, Jr., Company's bill and cross-bill, it appeals; the appeals being consolidated. Modified and affirmed.

Frank F. Reed and Charles H. Aldrich, both of Chicago, Ill., for appellant.

James R. Offield and Charles K. Offield, both of Chicago, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. For alleged infringement of trade-mark and for alleged unfair competition appellant sued Lamont, Corliss & Co., selling agents of Mint Products Company. That company reciprocated with a like suit against appellant. In addition to taking issue by answer, appellant in a cross-bill again asserted that it was the aggrieved party. On final hearing appellant's bill against Lamont, Corliss & Co. and its cross-bill against Mint Products Company were dismissed for want of equity. With respect to Mint Products Company's bill a decree was entered that Mint Products Company was the exclusive owner of the trade-mark or name "Pep-O-Mint" and also of the word collocation and descriptive appearance of the wrapper inclosing its mint lozenges; that appellant had infringed said trade-mark or name and also had simulated said wrapper; and that appellant be enjoined—

"from engaging in unfair competition with Mint Products Company, and from putting up or selling mint lozenges under the trade name or mark 'Pep-O-Mint,' or any simulation thereof as to style of lettering or letter arrangement and design, or so wrapped in labels or contained in cartons that may be mistaken for the goods of Mint Products Company."

In 1912, appellant, after a year's business in chewing gum, registered the following trade-mark:

Appellant's verified statement alleged that the trade-mark consisted of the exhibited design and explicitly disclaimed the words "Peptomint" and "Gum."

In 1915 appellant filed a second application and thereupon procured the registration of the following trade-mark:

Appellant's verified statement alleged that the trade-mark consisted of the exhibited design and explicitly disclaimed the word "Gum." Inferentially appellant sought to assert a trade-mark right in the word "Peptomint" by saying:

"No claim is made to the word 'Mint' except in association with the word 'Pepto.'"

Appellees in 1913 began to make and sell candy lozenges, of various flavors, under the trade-mark "Life-Savers." Their lozenges were somewhat of the form of a life-buoy and were done up in cylindrical packages. Flavors were prominently marked by a peculiar style of printing, displayed along one side of the cylinders, "Pep-O-Mint," "Choc-O-Late," "Wint-O-Green," "Malt-O-Milk," "Cl-O-Ve," "Lic-O-Rice." Letters, white on a purple background, were graduated in size, the largest at the ends, the others diminishing toward the round O at the center.

In 1914 appellant notified appellees that they were infringing the trade-mark "Peptomint" by the use of "Pep-O-Mint" on their peppermint-flavored "Life-Savers." This was the first that appellees knew of appellant's claim of "Peptomint" as a trade-mark. Appellant began its suit in 1916 and counted upon the 1915 registration.

[1] In the trade-mark statute, as in the one respecting copyright, there is no provision for re-issue or amendments after issue. Consequently the 1912 registration exhausted the statutory right respecting "Peptomint" as one of the elements of the described mark. Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 30 Sup. Ct. 38, 54 L. Ed. 150. And so appellant must be held to its disclaimer.

[2] With respect to an asserted common-law right in the word "Peptomint" as an independent trade-mark, the record shows that appellant's gum was marketed in packages bearing the 1915 design in red, green and white. In so far as the word "Peptomint" was used alone, the use was oral; and appellant's own witnesses show that the printed word was popularly taken as a corrupt spelling of peppermint and was so pronounced. As the name of the flavor of appellant's gum, the word can have no standing as a common law trade-mark. And in view of the 1912 disclaimer, the common pronunciation of the word, and appellant's wreathing it with sprigs of peppermint, equity will not hear appellant now say that the word was arbitrarily coined from "peptone," a digestive aid. At all events appellant can reach the question of infringe-

ment only through the common pronunciation of the two words as peppermint. Appellees make no allusion to "peptone." All agree that "Pep-O-Mint" is peppermint.

Concerning unfair competition, appellees in marketing their candy lozenges did not in any way imitate appellant's gum labels and packages and did not attempt to palm off their goods as appellant's. They did not in any way molest appellant in its fair-trade rights, for appellant cannot be allowed trade rights in any form that would prevent appellees from marking the various flavors on their packages of "Life-Savers" as they did.

[3] In Mint Products Company case, we find that appellant has been guilty of unfair competition. In March, 1915, appellant went into the candy lozenge business. It put out peppermint lozenges in packages with red, green and white labels, which were practically identical with its "Peptomint" gum label except that the word "gum" was omitted. Of this label there was no complaint. But in December, 1915, appellant made a change. On its new label the word "Peptomint" is shown in white letters on a purple background, with the letters graduated in size to simulate "Pep-O-Mint" of Mint Products Company's label, and with the letter O elongated horizontally to give a spaced appearance. As this was after appellant had begun its warfare, the inferences are obvious. But, appellant says, no damage was done, no cause of action arose, because the record fails to show that a secondary meaning had attached to "Pep-O-Mint," indicating origin in Mint Products Company. When these candy lozenges are displayed in cartons the part having the name of the flavor is on top, so that the customer and the seller may readily pick out the flavor desired. From the evidence respecting the large amount of long continued advertising, the character of the advertising, and the volume and extent of the business, we have no difficulty in finding that the peculiar and distinctive style of marking the flavors, "Pep-O-Mint," "Wint-O-Green," and so forth, had come to indicate to purchasers that they were getting the goods put forth by Mint Products Company. If further proof were needed, it is found in appellant's deliberate appropriation.

[4] Appellant contends that the case against it must be dismissed because Mint Products Company's label bore the words "Trade-mark registered," while the record shows that "Pep-O-Mint," on which trade-mark infringement was based, had never been registered. There are two answers: First. Though a certified copy of registration was not produced, testimony was given to the effect that "Life-Savers" was a patented (registered) trade-mark. If so, the criticized legend should be attributed, as it may well be from its position on the label, to the trade-mark "Life-Savers." Second. The presumption that a suitor's hands are clean, continues until some one—the suitor himself, his adversary, or the court—shows that they are unclean.

But the decree against appellant is too broad. Mint Products Company can be allowed no exclusive ownership of the word "Pep-O-Mint" as a trade-mark. It was used to indicate the flavor of one of several kinds of "Life-Savers." What was owned was the distinctive style of wrappers and cartons, including the particular way in which the word

"Pep-O-Mint" was displayed. Further, the injunction and accounting must be limited to the proven violation, namely, the use of the label (with its accompanying cartons) put forth by appellant in December, 1915, identified as Exhibit C of the bill. Also, the general prohibition "from engaging in unfair competition with Mint Products Company" is to be deleted. To refrain from unfair competition is appellant's legal duty; but appellant should not be subjected to the possibility of contempt proceedings for undefined breaches of that duty. Swift v. United States, 196 U. S. 375, 396, 402, 25 Sup. Ct. 276, 49 L. Ed. 518.

Decree modified and affirmed.

KETCHUM v. PLEASANT VALLEY COAL CO.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1919. Rehearing Denied May 26, 1919.)

No. 5103.

1. MINES AND MINERALS ⟸42—VALIDITY OF PATENT—COLLATERAL ATTACK.
   A patent to coal land, issued to an entryman who, after filing his declaratory statement, but before making entry, conveyed the land, is not void, and its validity can be questioned only by the government.
2. ESTOPPEL ⟸27(1)—COAL LAND ENTRYMAN—CONVEYANCE.
   A coal land entryman, who conveyed the same for a valuable consideration after filing his declaratory statement, but before completing his entry, and who on receiving the patent delivered it to his grantee, is estopped to deny the validity of his conveyance, and a subsequent grantee from him with notice is equally estopped.
3. ESTOPPEL ⟸47—CONVEYANCE BY ENTRYMAN OF PUBLIC LAND—SUBSEQUENT PATENT.
   A patent for coal land, issued to an entryman who has previously conveyed his right in the land, inures to the benefit of his grantee, under Comp. Laws Utah 1907, § 1979.
4. ESTOPPEL ⟸93(8)—PERMITTING IMPROVEMENTS OR EXPENDITURES.
   Possession of land by a grantee for more than 20 years, during which time it expended large sums in improvements, is a bar to a suit in equity to recover the land by adverse claimants, who had knowledge of such possession and use.

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

Suit in equity by the Pleasant Valley Coal Company against Truman A. Ketchum. Decree for complainant, and defendant appeals. Affirmed.

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

R. G. Lucas, of Salt Lake City, Utah (W. H. Dickson, A. C. Ellis, Jr., Waldemar Van Cott, W. D. Riter, P. T. Farnsworth, Jr., and Ferdinand Ericksen, all of Salt Lake City, Utah, on the brief), for appellee.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

WADE, District Judge. By this action a decree is sought adjudging the plaintiff (in the District Court—the appellee here) to be the absolute owner of about 160 acres of coal land in Carbon county, state of Utah; and it is prayed that the appellant be barred from asserting title thereto. For clearness of statement, the parties will be designated as in the District Court, and the plaintiff—Pleasant Valley Coal Company—will be referred to as the "company."

The plaintiff in its petition based its claim for relief upon (a) the record title; (b) adverse possession; and (c) estoppel.

1. Both parties claim record title through one Marks, who, in May, 1888, filed a coal declaratory statement, which gave him the right to make entry of the land. In October, 1888, before he had made entry, he executed a deed of the land to one Williams, who purchased for the Pleasant Valley Coal Company, though this did not appear in the deed.

In March, 1889, Marks made application to make entry and to purchase said land from the government, which right was contested, but decided in favor of Marks, and on June 5, 1891, a patent issued to him, which patent he delivered to attorneys to be delivered to the company, which by conveyances, Marks to Williams (1888), Williams to Goss (1888), and Goss to the company (1892), all of which deeds were duly recorded, had acquired the record title to said property. The company had the patent recorded March 28, 1893.

The consideration for the aforesaid conveyance by Marks to Williams was "somewhere from $3,000 to $4,000" about one-half of which was paid at the time of the conveyance, and the balance of which was paid to Marks when he delivered the patent as aforesaid.

The evidence tends to show that, when Marks conveyed to Williams, it was understood that Williams was taking title for the company, and that it was agreed that Marks should proceed to procure the patent and turn it over to the company, and then receive the balance of the purchase price, which he did as aforesaid.

2. The claimed title of the defendant Ketchum also comes through Marks, who in 1913 made a quitclaim deed to one Sweet, who in 1915 executed a quitclaim deed to Ketchum. The deeds to Sweet and Ketchum being recorded, the plaintiff brought this action. Sweet, when he procured the quitclaim deed from Marks, paid him $200 and entered into a contract in writing, which recited, among other things, that—

"Whereas, the other valuable consideration mentioned in said deed was and is as follows: That the said party of the first part claimed to own, at the time of the execution of the said quitclaim deed, the lands hereinabove described; that certain other parties, including the Pleasant Valley Coal Company, a corporation, also claims to have certain right, title, and interest in and to said lands, and claims the ownership of said lands adversely to the said party of the first part, and the said party of the second part has agreed and by these presents does agree to prosecute the necessary actions against the said Pleasant Valley Coal Company and all other parties who now appear of record to claim ownership of or any right, title, or interest in and to said lands, for the purpose of quieting the title in said lands in himself under said quitclaim deed hereinbefore referred to; that said suits shall be prosecuted only as the said party of the second part is advised by counsel so to do. Said

suits shall be prosecuted diligently by said second party, and the said first party, on his part, agrees to furnish all evidence within his knowledge, for the purpose of aiding the said second party in the prosecution of said suit or suits."

It was then provided that, in case of an adjudication in favor of Sweet, the property should be sold, and Marks should have one-half the net proceeds of such sale.

An action was commenced by Sweet against the company in 1914, which he afterwards dismissed. On October 1, 1915, Sweet executed a quitclaim deed of the property to Ketchum, who paid Sweet $1,250 therefor. Ketchum also purchased for $2,500 the interest of Marks under the contract aforesaid. Ketchum had general knowledge of the claims of the company to the property, and specific knowledge by the terms of the aforesaid contract that—

"The Pleasant Valley Coal Company, a corporation, also claims to have certain right, title, and interest in and to said lands, and claims the ownership of said lands adversely to said party."

3. Ketchum, in order to avoid the effect of the deeds, Marks to Williams, and Williams to Goss, and Goss to the company, asserts that Williams, Goss, and the company were disqualified to make entry of the coal land.

[1] We do not find it necessary to decide this question. Ketchum is asserting a personal right to this property. He is not representing the government. The patent issued to Marks is not void. Under everything claimed by defendant, such patent would at most be voidable. The government alone could complain of the alleged invalidity. As was said by Justice Brewer in Hartman v. Company, 199 U. S. 335, 26 Sup. Ct. 63, 50 L. Ed. 217:

"Whether the government could challenge the conveyance we need not determine; for, if it had any right to interfere, it has not chosen to do so."

[2] Marks was qualified to make entry and receive the patent. Before doing so, however, but after making his declaratory statement, he for a valuable consideration executed a deed of said property to plaintiff's grantor. He would certainly be in no position to assert that there was fraud or illegality in the proceedings through which he acquired the patent, and his grantees are in no better position. No one will contend upon this record that the defendant has any rights as an innocent purchaser.

[3] 4. It is also claimed that, inasmuch as Marks, at the time of the conveyance to Williams, had no title (the patent not having been issued to him for more than three years thereafter), no title passed to Wiliams, nor to his grantees. It may be conceded that no legal title passed at the time of the conveyance, but when Marks received his patent, and delivered it to his grantee, and received the balance of the purchase price, certainly no title still remained in him which he could assert against his grantee, who had paid him for the land, and he could not convey any greater right than he possessed—certainly not to one not an innocent purchaser for value. Furthermore, having no title when he conveyed for a full and valuable consideration, when he acquired title (by the patent), such title inured to his grantee.

The statutes of Utah expressly so provide (Comp. Laws 1907, § 1979), and the rule of the Utah statute in no manner conflicts with any statute of the United States, but is consistent with well-settled principles of equity.

We find nothing in the numerous cases cited by counsel for defendant in conflict with these conclusions. Numerous cases are cited in which the courts denied relief, but in nearly every case the contract was executory, and specific performance was sought, but here the contract (of sale Marks to Williams) was executed, not only in the original conveyance, but by subsequent ratification. The District Court in its opinion well says:

"At the time that Marks received the balance of the purchase price, and delivered the possession of the patent, and ratified and confirmed his deed theretofore given, under the decision of the Supreme Court above cited (Hartman v. Butterfield Co., 199 U. S. 335 [26 Sup. Ct. 63, 50 L. Ed. 217]), he had legal right to alienate the said premises, and neither he nor his grantee, the defendant Ketchum, after the lapse of more than 20 years, should now be permitted to undo the contract and agreement thus executed, ratified, and confirmed."

[4] 5. Not only is defendant barred by contract conveyance and ratification, but in addition thereto the record shows that the company took possession of the property about 1892 under the Marks conveyance, and has held possession ever since, paid the taxes, and erected a storehouse, trestle, coal tipple, dwellings for employés, officers' houses, offices, power house, hospital, water tank, tram line, coke ovens, railroad tracks, power lines, etc., at an expenditure of about a quarter million dollars. Churches, schoolhouses, and other public or semipublic buildings have been erected upon this land under leases from the company. During the construction of most of these improvements, Marks and his grantees have been silent; it is now too late to ask to be heard in a court of equity.

The claim that only a portion of the land has been actually occupied by these improvements is without merit.

The judgment of the District Court is affirmed.

ANCHOR OIL CO. v. GRAY et al.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1919.)

No. 5177.

1. INDIANS ⟸16(3)—LANDS—LEASE BY ALLOTTEE—APPROVAL AFTER DEATH.
The authority of the Secretary of the Interior, under Act April 26, 1906, § 20, to approve and thereby to validate a lease by a full-blood Creek Indian allottee of his or her allotment, continues after his or her death.

2. INDIANS ⟸15(1)—LANDS—ALIENATION—DEATH OF ALLOTTEE.
The provision of Act May 27, 1908, § 9, that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of the said allottee's land, does not remove restrictions upon alienation by the acts of such allottee before his death, but leaves such acts subject to the same restrictions that existed while he lived.

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

3. INDIANS ⟸15(1)—RESTRICTIONS ON ALIENATION—DEATH OF ALLOTTEE.
The provision in Act May 27, 1908, § 9, that no conveyance of any interest of any full-blood heir in such land shall be valid, unless approved by the court having jurisdiction of the estate of the deceased allottee, is inapplicable to conveyances made by such heir before its passage and to those made by a full-blood Creek allottee.

4. INDIANS ⟸16(3)—LANDS—LEASE BY ALLOTTEE—APPROVAL AFTER DEATH—EFFECT.
Lease of allottee of the Five Indian Tribes of his lands, when approved after his death by the Secretary of the Interior, relates back to and takes effect as of the date of its execution, except as against any persons without notice, though it provides its term shall be from approval by the Secretary.

5. INDIANS ⟸16(4)—LEASE BY ALLOTTEE—INEFFECTIVE PROVISION.
Restriction on alienation by allottee of the Five Civilized Tribes of his land never being removed, provision in his lease as to what shall happen in that event never becomes effective.

6. INDIANS ⟸16(2)—STATES ⟸9—ADMISSION—REPEAL OF FORMER LAWS—INDIAN LEASES—RECORD.
Act March 1, 1907, declaring the filing in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory, of a lease of an allotment of Indian land, to be constructive notice, especially in view of it being a special act, is not repealed, annulled, or modified by admission of Oklahoma to the Union, by the recordation statutes of the territory or state (Rev. Laws Okl. 1910, §§ 1154, 1155), by the Enabling Act, the Constitution, or the Schedule to the Constitution of that State.

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

Suit by the Anchor Oil Company against W. H. Gray and others. Decree for defendants, and plaintiff appeals. Affirmed.

George T. Brown and Courtland P. Chenault, both of Tulsa, Okl. (John B. Meserve, of Tulsa, Okl., on the brief), for appellant.

Preston C. West, of Tulsa, Okl. (A. A. Davidson, C. S. Walker, and James B. Diggs, all of Tulsa, Okl., on the brief), for appellees.

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

SANBORN, Circuit Judge. This case involves the validity of three oil and gas mining leases of 80 acres of land—one made on December 5, 1914, by Jennie Samuels, a full-blood Creek Indian, the allottee and grantee thereof, who died on October 11, 1915. This lease was filed in the office of the United States Indian agent, now the office of the Superintendent of the Five Civilized Tribes, Union Agency, at Muskogee, Okl., on January 5, 1915, was approved by the Secretary of the Interior on October 21, 1915, and was first filed for record in the office of the county clerk or register of deeds of the county in which the land is situated on August 10, 1916. The defendants and appellees own this lease, and are in possession of and claim the right to mine the land for oil and gas thereunder.

The plaintiff and appellant, a corporation, claims a like right under two oil and gas mining leases, which it owns, of 60 and 20 acres of this land, made respectively by Feney Rogers and Lina White, full-

blood Creek Indians and the sole heirs of Jennie Samuels. These leases were approved by the county court having jurisdiction of the settlement of the estate of Jennie Samuels during the months of December, 1915, and January, 1916, and were recorded in the office of the county clerk or register of deeds of the county where the land is situated prior to August 10, 1916, when Jennie Samuels' lease was first recorded, and the lessees under the leases of Feney Rogers and Lina White had no actual notice of the lease of Jennie Samuels until after they had respectively purchased and paid value for them in good faith. The facts which have been recited were disclosed by the petition of the plaintiff, in which he prays for possession of the land, for an adjudication of the invalidity of the lease of Jennie Samuels, of the validity of the leases of her heirs, and for a recovery of damages on account of the possession and use of the land by the defendants. The court below dismissed the petition, upon the motion of the defendants, on the ground that the lease of Jennie Samuels was valid, and that the defendants' possession and their mining of the land thereunder were lawful.

[1-3] Counsel for the plaintiff assail this conclusion on the ground that the Secretary was without jurisdiction or authority to approve the lease of Jennie Samuels, a full-blood Creek Indian, after her death, and that, as his approval was not made until 10 days after she died, her lease became void. In support of this position they argue that the authority of the Secretary to approve and thereby to perfect oil and gas mining leases of their allotments by full-blood allottees of the Creek Tribe, which was granted by section 20 of the act of April 26, 1906 (34 Stat. 137, 145, c. 1876), ceased at the death of the allottee, by reason of the provision of section 9 of the act of May 27, 1908 (35 Stat. 315, c. 199):

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of the said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

But where the validity of a conveyance of land or of leases thereof is conditioned by the approval of different officers or by different restrictions at different times, the law in force at the time of the deed or lease determines the restriction upon its validity, and where at that date a specified officer is empowered to approve and validate it, that officer, or his successor in office, may lawfully do so after subsequent legislation has conditioned the validity of like conveyances or leases with the approval of a different officer or with different restrictions, and the true construction of section 9 of the act of May 27, 1908, is that it is prospective and not retrospective in effect, that it applies to conveyances and leases made after its passage and is inapplicable to those made before its enactment, and that the Secretary of the Interior had plenary authority to approve and validate the lease of Jennie Samuels after her death notwithstanding the provision of section 9 of the act of May 27, 1908. Scioto Oil Co. v. O'Hern (Okl.) 169 Pac. 483; Harris v. Bell, and authorities cited in 250 Fed. at page 214, 162 C C. A. 345.

Counsel insist, however, that the Secretary's power to approve the lease ceased because under section 9 of the act of 1908 the death of the lessor removed all restrictions upon alienation of the land. But that removal did not change the status of Jennie Samuels' lease, did not remove the restriction upon the alienation by her, for those restrictions persisted until she died, and she could not alienate her land after her death. She had leased her land, subject only to the approval of the Secretary, and her heirs, so far as her lease was concerned, stepped into her shoes upon her death. The lease estopped them, as it did her, from revoking it or conveying the land free from it, unless the Secretary, in the exercise of his judicial discretion, refused to approve it, and, when he approved it, the estoppel became absolute upon all of them alike.

[4] The only restrictions on alienation removed by her death were the restrictions on the alienation of the rights in the land which descended to her heirs upon her death, and those rights were inferior and subject to the rights of the lessees of Jennie Samuels to the full benefit of the lease, if it was subsequently approved by the Secretary. It was so approved, and then the lease became impregnable to the attacks of the heirs and those claiming under them with notice of the conditional lease. Scioto Oil Co. v. O'Hern (Okl.) 169 Pac. 483; Almeda Oil Co. v. Kelley, 35 Okl. 525, 130 Pac. 931; Pickering v. Lomax, 145 U. S. 310, 12 Sup. Ct. 860, 36 L. Ed. 716; Lykins v. McGrath, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485.

Another contention of counsel for the plaintiff is that the lease of Jennie Samuels was inferior in right to the leases of her heirs: (1) Because it did not take effect until it was approved by the Secretary, and that approval was made after the leases of her heirs had been made and had been duly approved; and (2) because the lease of Jennie Samuels itself provided that the term thereof should be ten years from the date of its approval by the Secretary of the Interior and that—

"In event restrictions on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease."

But whether or not the lease of Jennie Samuels was inferior to the lease of her heirs depends upon the question whether or not the lessees in the latter lease had constructive notice of the former lease, a question which will be hereafter considered. There was nothing in her lease, or in the conduct of the parties to it, to indicate any bad faith or any attempt to evade the restrictions on alienation imposed by the act of Congress, and her lease was neither void nor voidable because the parties made and delivered it subject to the approval of the Secretary before the term of the lease commenced to run. Subject to that approval the parties to this lease, by the execution and delivery thereof, estopped themselves, and those claiming under them with notice of the lease, from denying, revoking, or avoiding it, when approved by the Secretary, except for fraud or mistake; and, when it was approved by the Secretary, as against the parties to it and

those claiming under them with notice, it related back to and took effect as of the date of its execution by the parties named therein. Pickering v. Lomax, 145 U. S. 310, 314, 316, 12 Sup. Ct. 860, 36 L. Ed. 716; Lomax v. Pickering, 173 U. S. 26, 27, 19 Sup. Ct. 416, 43 L. Ed. 601; Lykins v. McGrath, 184 U. S. 169, 171, 172, 22 Sup. Ct. 450, 46 L. Ed. 485.

[5] Nor is there anything in the clause of the lease regarding the removal of all restrictions to reverse or modify this result, because all restrictions on alienation of the land never were removed until the Secretary approved the lease. The death of Jennie Samuels did not remove, but perpetuated, the restriction on her alienation of her land, for, after she died, the only act which she had done by which the land could be alienated was her lease, and the alienation by that lease was so restricted that it could have effect only when approved by the Secretary. Therefore the condition on which alone the clause of the lease was to take effect never was fulfilled, and the clause never became operative. Again, if all restrictions had been removed, and if this clause had become lawful, valid, and effective, its effect by virtue of the principle of relation would have been to have estopped Jennie Samuels and her heirs and those claiming under them with notice of the conditional lease from successfully assailing it; and the result is that the lease made by Jennie Samuels on December 5, 1914, and approved by the Secretary on October 21, 1915, was lawful and valid against all parties claiming under her or her heirs with notice that she had made such a lease.

[6] Counsel for the plaintiff, however, say that, nothwithstanding all this, it is entitled to prevail in this suit because it is a bona fide purchaser for value of the leases it owns, without any notice of the lease of Jennie Samuels until after it had purchased and paid for the leases under which it asserts its right to this property. They urge that the lease made by Jennie Samuels was not filed or recorded in the office of the county clerk or register of deeds of the county in which the land was situated until after the plaintiff had made and paid for its leases, and had duly recorded them and the other evidences of its title from the heirs in the office of the county clerk. This is conceded by the defendants. But the plaintiff's petition avers that on June 5, 1915, before the leases from the heirs under which the plaintiff claims were obtained, the lease of Jennie Samuels was filed in the office of the United States Indian agent, now the office of the Superintendent of the Five Civilized Tribes, Union Agency, at Muskogee, Okl., under and pursuant to the provision of the act of Congress of March 1, 1907, which declares that "the filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice" (34 Stat. 1026, c. 2285); and the defendants contend, and the court below held, that this filing charged the plaintiff and those under whom it claims with notice of that lease. Counsel for the plaintiff argue that this provision of the act of Congress was either repealed or superseded by the admission of the state of Oklahoma into the Union, and by the provisions of the Enabling Act of

Oklahoma, of the Constitution and of the Schedule to the Constitution of that state which became effective November 16, 1907, a few months after the act of Congress of March 1, 1907. This argument presents the second question in this case, the question whether or not the Act of March 1, 1907, was still in force when the plaintiff obtained its leases.

When the act of March 1, 1907, was passed, and when the Enabling Act, the Constitution of Oklahoma, and the Schedule to it took effect, there were in force in the territory of Oklahoma, and since have remained in force in the state of Oklahoma, these provisions with reference to the execution and record of instruments relating to real estate which may be found in sections 1154 and 1155, Revised Laws of Oklahoma 1910:

"No deed, mortgage, contract, bond, lease or other instrument, relating to real estate other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided." Section 1154.

"Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers or creditors." Section 1155.

The provisions of the Enabling Act, the Constitution, and the Schedule to it invoked, together with the statutes just recited, to nullify the provision of the act of Congress in question are these: Section 1 of the Enabling Act provides:

"That nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or to affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed." 34 Statutes at Large, 267; Revised Laws of Oklahoma of 1910, p. lxxiii.

Section 21 contains this clause:

"And all laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States." 34 Statutes at Large, 277, 278; Revised Laws of Oklahoma 1910, p. lxxviii.

Section 2 of the Schedule to the Constitution of Oklahoma declares that:

"All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law." Revised Laws of Oklahoma 1910, p. cxcix.

But careful study of these provisions of the statutes, of the Enabling Act, and of the Constitution of Oklahoma and its Schedule, and a comparison of them with that part of the act of Congress of March 1, 1907, which declares that the filing of a lease with the Indian agent

shall be deemed constructive notice, fails to convince that they either have or were intended to have the effect of repealing or superseding that provision. In the first place, none of them expressly or by the plain meaning of its terms repeals or modifies it or limits its effect, and the legal presumption from this fact is that neither the United States nor the state intended so to do. In the second place, the subject-matter of the Indians, their lands, the allotment and distribution of those lands to the Indians in severalty, the leases, sales, deeds, and disposition by the allottees of their lands, the restrictions upon their alienation thereof, the extent of the rights and privileges of their lessees and claimants to this land, were and had been for more than a century within the exclusive jurisdiction of the United States and beyond the jurisdiction of the states, except in cases where the United States had renounced or released its control, and the legal presumption, evidenced and sustained by section 1 of the Enabling Act, was and is that nation and state alike intended to maintain that relation and situation wherever they have not by the plain terms of their legislation disclosed a contrary purpose. And no legislation or action exhibiting such a purpose is perceived in the statutes, the Enabling Act, the Constitution or the Schedule, to which reference has been made.

Again, the portion of the act of the United States of 1907 relating to the constructive notice given to subsequent purchasers and others, by the filing with the Indian agent of a lease of an allotment of Indian land, was special legislation, limited in its terms and effect to a single subject, leases of Indian lands, and to a particular class of persons, those affected by such leases, while the statutes of Oklahoma upon this subject of the constructive notice resulting from the recordation of instruments relating to real estate were general in their nature, treating of all classes of such instruments and of all classes of persons affected thereby. It is a cardinal rule of the construction of statutes that specific legislation in relation to a particular class or subject is not affected by general legislation in regard to many classes or subjects, of which that covered by the specific legislation is one, unless it clearly appears that the general legislation is so repugnant to the special legislation that the legislators must be presumed to have intended thereby to modify or repeal it; but the special and the general legislation must stand together, the former as the law of the particular class or subject, and the latter as the general law upon other subjects or classes within its terms. State v. Stoll, 17 Wall. 425, 436, 21 L. Ed. 650; Washington v. Miller, 235 U. S. 422, 427, 428, 35 Sup. Ct. 119, 59 L. Ed. 295; Harris v. Bell, 250 Fed. 209, 216, 162 C. C. A. 345; Stoneberg v. Morgan, 246 Fed. 98, 101, 158 C. C. A. 324; Sweet v. United States, 228 Fed. 421, 427, 143 C. C. A. 3; Priddy v. Thompson, 204 Fed. 955, 958, 959, 123 C. C. A. 277, 280, 281; Christie Street Commission Co. v. United States, 136 Fed. 326, 333, 69 C. C. A. 464, 471. If the portion of the act of March 1, 1907, relating to the constructive notice resulting from the filing of a lease of an allotment of Indian land, and the provisions of sections 1154 and 1155 of the Revised Statutes of Oklahoma of 1910 had been

enacted by a legislative body of the same state, they might have stood and have been enforced together under this rule. By so much the more should they and must they so stand and be enforced, now that the one is the act of the nation, which has general and exclusive jurisdiction of the subject and class of which it treats, and the others are the acts of the state, which has jurisdiction over all similar subjects and classes, but none over this one.

In the opinion of this court the portion of the act of March 1, 1907, which relates to the constructive notice given to subsequent purchasers and others by the filing of a lease made by an allottee of an allotment of Indian land made by the United States, was neither repealed, annulled, nor modified by the subsequent admission of Oklahoma into the Union, by the recordation statutes of the territory or state found in Revised Laws of Oklahoma of 1910, §§ 1154 and 1155, by the Enabling Act, the Constitution, or the Schedule to the Constitution of that state. And if upon an independent investigation of the questions in this case any doubt had remained, the clear, concise, and conclusive opinion of the Supreme Court of Oklahoma in Scioto Oil Co. v. O'Hern, 169 Pac. 483 would have dispelled it.

Let the decree below be affirmed, with costs against the appellant.

RAYMER v. NETHERWOOD.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2666.

APPEAL AND ERROR ⊜273(11)—MATTERS REVIEWABLE—EXCEPTIONS.

Because of the dual functions of the trial judge sitting without a jury, to determine whether there is any substantial evidence to support one or the other party, and, if there is, then, whether it preponderates on one or the other side, the request or motion to adjudge either all the issues or some specific issues in favor of the requesting party or against the adverse party, to be reviewable, must make apparent that it is based specifically on the ground that there is no substantial evidence to sustain any other conclusion.

Evans, Circuit Judge, dissenting.

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

Action by Harry C. Netherwood against Charles W. Raymer. There was a judgment for plaintiff (253 Fed. 515), and defendant brings error. Affirmed.

Burr W. Jones, of Madison, Wis., for plaintiff in error.

John B. Sanborn, of Madison, Wis., for defendant in error.

Before BAKER, MACK, and EVANS, Circuit Judges.

MACK, Circuit Judge. A review of this case is challenged on the ground that no question of law is presented to us.

The case was tried under a stipulation waiving a jury. At the conclusion of the evidence, defendant requested numerous findings of

evidentiary facts, and the conclusion of law therefrom that no contract had been consummated between the parties, and that the action should be dismissed. To the refusal to grant these requests, and to the findings of a contract, the breach thereof, and that plaintiff was entitled to judgment, defendant excepted.

In Streeter v. Sanitary District of Chicago, 133 Fed. 124, 66 C. C. A. 190, Judge Jenkins carefully defined the reviewing power of this court. Expressions used in other opinions have, however, caused some uncertainty as to the proper method of securing such a review. The confusion is apparently due to the failure to discriminate between the several functions of the trial judge, and to make clear on the record the exact questions presented to him by motions or requests.

In a jury trial, under modern practice, a motion or request for a directed verdict challenges the right of the opponent to recover, on the ground that there is no substantial evidence which would support a verdict in his favor. The correctness of the ruling thereon, if excepted to, presents a question reviewable on writ of error. Clearly the like question, arising on trial without a jury, is reviewable, if in some way it be made clear that a similar ruling has been requested. A request or motion, whether for special or general findings, or, if by defendant, for a dismissal of the action, and an exception to the refusal thereof, or an exception to the findings in favor of an opponent, is not, however, sufficient to raise the question. Such a request, motion, or exception, without more, is the proper method of invoking or challenging the jury-supplanting function of the trial judge, to determine whether one or the other side is sustained by a preponderance of the evidence, a determination not reviewable on writ of error in a federal appellate tribunal.

Because of the dual function of the trial judge, sitting without a jury, to determine both whether there is any substantial evidence to support one or the other party and also, if there is, then whether it preponderates on one or the other side, the request or motion to adjudge either all the issues or some specific issues in favor of the requesting party or against the adverse party, to be reviewable, must make apparent that it is based specifically upon the first of these grounds, namely, that there is no substantial evidence to sustain any other conclusion. Then, and then only, as Judge Sanborn has clearly pointed out in Wear v. Imperial Window Glass Co., 224 Fed. 60, 139 C. C. A. 622 (8th C. C. A.), may the refusal of the trial judge to grant the request, if excepted to, be reviewed.

In the instant case, no such specific ground for the requested findings and motion was alleged.

Judgment affirmed.

EVANS, Circuit Judge (dissenting). The extent to which the holding goes in this case may be gathered only from a statement of the facts.

Plaintiff brought this action for damages for alleged breach of contract. The contract, if any, grew out of two letters, one, written by defendant in California, which may well be called the offer; the other, written by plaintiff at Madison, Wis., and termed the acceptance.

Whether the second letter was an acceptance of the offer found in the first was the sole disputed issue in the case. No question of fact, but simply one of law, was involved. Had a jury been drawn, the District Court, in disposing of the action, would have been compelled to direct a verdict.

Under these circumstances, it seems to me, it was the duty, as well as the privilege, of counsel to avoid the expense to litigants and to the government incident to a jury trial. On the other hand, the litigants' right to review the decision of the District Court should be as clear and as extensive as in case the idle formality of calling a jury was respected.

In either case any adverse ruling in the course of the trial, to which exception was taken, should be subject to review upon writ of error. Section 649 R. S., section 1587, Comp. Stat., did not take from the litigants the right to review the rulings of the lower court. This section was intended to give litigants the right to waive jury trials in law actions, and to give to the findings of the court the force of a verdict of a jury. Rulings on questions of law, properly presented, were subject to review in such a trial, the same as in a case of a trial by jury.

Had a jury been present, a motion to direct a verdict in defendant's favor would have saved the question here sought to be reviewed. Without the jury, a motion to dismiss should, I think, preserve the same right.

In the instant case, attorneys for plaintiff in error, following the Wisconsin state court practice, presented proposed findings of fact and conclusions of law. Their presentation constituted a request so to find. Defendant's attorneys did likewise. It was not a case where the court declined to make findings, but a case where the court, with proposed findings and conclusions from both sides, all bearing on the single disputed issue heretofore stated, adopted the proposed or requested findings of plaintiff. To this ruling, as well as to the court's failure to adopt its requested findings, defendant duly and seasonably excepted.

But defendant did more than merely request the court to make findings of facts and conclusions of law. At the conclusion of defendant's request the following appears:

"That the court find that no contract was consummated between the parties, and that the action should be dismissed, with costs in favor of defendant."

Was not this a motion to dismiss? Certainly its equivalent. Whether counsel moves the court or requests the court to dismiss an action is quite immaterial. No deception occurs in either case. The court must have understood, and opposing counsel understood, defendant's position. He was demanding a dismissal of the action. Refusal to grant the request, motion, demand, or what it may be called, made with other requests or alone, should certainly, and I think does, raise a ruling in the course of the trial, the correctness of which may be reviewed by an appellate court. See generally, upon this proposition, United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, Kan., 145 Fed. 144, 151, 76 C. C. A. 114; Felker

v. First Nat. Bank of Cincinnati, Ohio, 196 Fed. 200, 202, 116 C. C. A. 32; Humphreys v. Third Nat. Bank of Cincinnati, 75 Fed. 852, 21 C. C. A. 538; United States v. Robertson, 183 Fed. 711, 106 C. C. A. 149; Wear v. Imperial Window Glass Co., 224 Fed. 60, 139 C. C. A. 622; Meyer & Chapman State Bank v. First National Bank of Cody, 248 Fed. 679, 681, 160 C. C. A. 579.

I therefore dissent from the opinion of the majority of the court.

CONSOLIDATION COAL CO. v. MARCUM.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3163.

1. MASTER AND SERVANT ⟸286(19), 289(1)—ACTION FOR INJURY TO SERVANT—QUESTION FOR JURY.
   Issues of negligence and contributory negligence, in an action by a coal miner against the employer for personal injury, *held* properly submitted to the jury.
2. MASTER AND SERVANT ⟸146—RULES OF MINING COMPANY—WAIVER.
   A rule of a mining company, requiring operators of cutting machines to sound the roof of their working place before beginning work, and to prop it if evidence of weakness is found, may be waived by the company by employing a separate force to prepare safe places for the machines to work.

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

Action at law by L. A. Marcum against the Consolidation Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed

Ed. C. O'Rear, of Frankfort, Ky., for plaintiff in error.

John W. Woods, of Ashland, Ky., for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

WARRINGTON, Circuit Judge. Marcum recovered verdict and judgment against the coal company for personal injuries sustained while operating a coal-cutting machine for the company in one of its mines. Reversal is sought because of refusal to direct a verdict at the close of the testimony. Thus the only question for decision is whether the evidence was sufficient to justify submission of the cause to the jury.

[1] The injury occurred April 15, 1914, at Van Lear, Ky., in room 12 of mine 153, and was caused by the fall of a portion of the roof. The height of the room was between 4½ and 5 feet, and, according to plaintiff's testimony, the room was 22 feet wide and 250 feet long. The testimony substantially shows that the material of the roof was slate, though several witnesses say it was sandstone. The room was opened by mining and removing the coal probably a year prior to the injury, and the roof was meanwhile supported by numerous posts. The effect of this exposure to the air was to weaken the roof.

Under these conditions the company determined to make further removal of coal from one side of the room. Plaintiff and his assistant, who were operating a Sullivan electric-driven short-wall coal-cutting machine in another portion of the mine, were directed by the foreman and assistant foreman of the company to remove the machine to room 12 and to proceed with the cutting of coal. Some delay intervened, because the room had not been placed in suitable condition for such work. The company had in its employ another set of men who under direction of the foreman and assistant foreman were required, for example, to put a room of this kind in proper condition for the cutting of coal by a power-driven machine, and the company through its assistant foreman and the men used for that purpose undertook so to prepare room 12. This involved cleaning the room, removing props, and, if necessary, substituting other means of supporting the roof in order to furnish sufficient space and to make the place reasonably safe for bringing in and operating the coal-cutting machine.

Plaintiff and his assistant, however, were not satisfied that the place had been put in fit condition. The company caused further work to be done in the room; and there is testimony tending to show that its assistant foreman, Carmack, then told plaintiff the room was "in condition to cut," "in good shape," and peremptorily ordered him to do the work or leave the employ of the company. Plaintiff and his assistant then examined the room themselves, including sounding the roof, and became satisfied, though plaintiff testifies that he did not make as careful an examination as he would have made if he "had not had assurance from the (assistant) foreman that it was in a safe condition and had been fixed"; and relying, as he further in effect testifies, on Carmack's representation and yielding to the peremptory order, plaintiff with his assistant took the machine into the room and began to cut the coal. They continued the work between 20 and 30 minutes, driving the cutter into the coal about 5 feet and along its face from 8 to 12 feet, when plaintiff received his injury.

The pleadings present issues of negligence of the defendant and contributory negligence of the plaintiff, and thus involve the relative duties of the parties. The rule in a case like this is that a primary and nondelegable duty rests upon the employer to exercise reasonable care in furnishing the employé with a reasonably safe place to work. Dasher v. Hocking Mining Co., 212 Fed. 628, 631, 632, 129 C. C. A. 164 (C. C. A. 6). True, as the decision states, there are certain exceptions to the rule; and an exception is here urged under a claim that a custom existed at this mine which imposed the duty on the plaintiff himself to make the place safe, and, further, that the character of the work was such that its progress wrought changes in the condition of the place. The custom so claimed is inconsistent with the company's maintenance of a separate force of men, under direction of its foreman and assistant foreman, to prepare places of the kind in question for the work of coal cutting, and also with what the company actually did through these agencies toward placing room 12 in fit condition for the work. Besides, there is conflict in the testimony as to the existence of such a custom, and also as to causing any material change in the condition of the room either by installing the machine or by the

negligible time of operation and amount of work done prior to the injury. The most then that can be said of the exceptions relied on is that they presented questions of fact.

[2] Reliance, moreover, is placed upon a rule of the company:

"Machine runners and their helpers are instructed to carefully sound the roof of their working place before beginning work, and if any evidence of weakness is found in the roof, extra props must be set on each side of the machine and continued across the face of the room as the machine board is moved."

Marcum did not remember to have read the rule. Whether the rule was known to him or not, it happened that the examination he made of room 12 before bringing in the machine was in practical effect a compliance with the terms of the rule, so far as it can be applicable to this case. Both plaintiff and his assistant, as we have already said, sounded the roof of the room before beginning their work and without finding evidence of weakness. The rule does not require machine runners and helpers to put in place extra props, unless "evidence of weakness is found in the roof." Furthermore, the practice of the company to undertake through other agencies to provide safe places to work would indicate, and such seems to be the effect of the testimony, that it had not enforced nor relied on, but rather had waived the rule. As was said in Eagle Coal Co. v. Patrick, Administrator, 161 Ky. 333, 337, 170 S. W. 960, 962:

"Rules may be abrogated by failure to enforce obedience thereto, or they may be waived by the mine operator departing therefrom in the conduct of the operation."

There is testimony, however, tending to show that before plaintiff entered upon the work the company knew the roof was unsafe. Thus, according to some of the testimony, while the men regularly used for the purpose were engaged in removing props from room 12 and otherwise preparing it for the work of this coal cutting, they discovered several cracks in the roof and near the portion which subsequently fell upon plaintiff; they discussed the advisability of using a "header" or "cross-bar" to support this portion of the roof; apparently the plan would have been adopted if the necessary timber had been at hand; it was 250 feet away and a mule was available for drawing it to the place. A header consists of timber from 4 to 6 inches square and from 10 to 12 feet in length; it is placed across the weak portion of a roof, and an upright post is wedged under each end to sustain it; and thus space is obtained for operating the coal-cutting machine. In denying the motion for new trial, Judge Cochran said of the failure to provide headers:

"It seems to me that the situation called for the roof being supported by headers, and that it was gross carelessness not to so support it."

The charge of the court was clear and comprehensive; this is true also of the opinion rendered in denying the motion; and while we recognize the force of the learned counsel's argument for reversal, we cannot think the conclusion reached below can rightfully be disturbed.

Judgment affirmed, with costs.

ROSS v. SCHOOLEY.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2603.

1. STATUTES ⟸208, 211, 221—CONSTRUCTION—INTENT.
If a legislative intent can unmistakably be gathered from title, context, and common knowledge, it is as much a part of the act as if it were written out in the clearest words.

2. MASTER AND SERVANT ⟸111(1)—FEDERAL SAFETY APPLIANCE ACT.
In the Safety Appliance Act (Comp. St. §§ 8605, 8613, 8617) it is implied that a railroad is liable in a private suit for an employé's injury or death resulting from a violation thereof.

3. NEGLIGENCE ⟸6—VIOLATION OF STATUTE.
Every person for whose protection a statute sets up a particular standard of conduct is entitled to compensation for damages suffered through violation of that statute.

4. COMMERCE ⟸8(6), 27(5)—FEDERAL SAFETY APPLIANCE ACT—EFFECT OF STATE COMPENSATION ACTS.
Inasmuch as Congress has created the liability for damages for injuries or death resulting from violation of the Safety Appliance Act (Comp. St. §§ 8605, 8613, 8617), no state Legislature can alter or impair the federal right by passing compensation acts, and an injured employé is entitled to recover under the Safety Appliance Act, although at the moment of the injury he was not engaged in interstate commerce; the congressional power called into play being the power to prescribe the equipment of interstate carriers for protection of all persons upon such roads, regardless of their participation in interstate commerce.

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

Action by Pearl I. Schooley, administratrix of the estate of Otto Schooley, deceased, against Walter L. Ross, as receiver of the Toledo, St. Louis & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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

C. E. Pope, of East St. Louis, Ill., for plaintiff in error.

David K. Tone and Morse Ives, both of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Schooley, a brakeman on plaintiff in error's interstate railroad, met his death in Illinois by reason of defective couplers. Defendant in error recovered judgment for damages on account of the violation of the federal Safety Appliance Act. U. S. Comp. Stat. §§ 8605, 8613, 8617.

Because defendant in error omitted to aver and prove that decedent at the time of his injury was engaged in interstate commerce, the contention is made that the exclusive right and remedy are under the Illinois Workmen's Compensation Act, which was in force at the time of the accident. Hurd's Ill. Rev. Stat. 1916, c. 48.

If the accident had occurred while decedent was working in inter-

state commerce, plaintiff in error admits that the administratrix could have recovered for the violation of the Safety Appliance Act by reason of the express declarations of the federal Employers' Liability Act. U. S. Comp. Stat. § 8657.

[1] The pole star of statutory construction is the legislative intent. If a legislative intent can unmistakably be gathered from title, text, context, and the background of common knowledge, it is as much a part of the act as if it were all written out in the clearest words.

[2, 3] Liability to private suit for resulting injury or death is expressly declared in the Employers' Liability Act. In the Safety Appliance Act it is implied from the known frightful loss of lives and limbs due to the old link-and-pin couplings and defective automatic couplers; from the purpose stated in the title "to promote the safety of employés and travelers"; from the effect of the payment of damages as a spur to observance; from the direction to courts contained in section 8 of the act of 1893 (Comp. St. § 8612) that an injured employé "shall not be deemed to have assumed the risk"; from the proviso in section 4 of the supplemental act of 1910 (Comp. St. § 8621) in relation to "liability in any remedial action for the death or injury of any railroad employé"; and especially from the premise that the legislators had in mind the immemorial rule that every person for whose protection a statute sets up a particular standard of conduct is entitled to compensation for damages suffered through violation of that statute.

Under the Employers' Liability Act there is no need to count upon any state statute creating a liability for wrongful death, because that liability was expressly stated by the Congress. Inasmuch as the same legislative intent respecting liability is found in the Safety Appliance Act, the same result follows.

Recovery for wrongful death under the Employers' Liability Act is for the benefit of the next of kin, but the action can be brought only by the administrator; and as there is no federal machinery for appointing administrators, resort in that respect must be had to state business. But that necessity is of no greater consequence under the Safety Appliance Act.

[4] Inasmuch as the Congress has created the liability for damages for injury or death resulting from violation of the Safety Appliance Act, no state Legislature can alter or impair the federal right by passing compensation acts.

It is immaterial whether the injured employé was at the moment engaged in interstate or intrastate commerce, because the congressional power that was called into play was the power to prescribe the equipment of interstate carriers for the protection of all persons upon such roads, both employés and travelers, regardless of their participation in interstate commerce. A state Legislature, therefore, has no more power to curtail the federal right of an employé than of a traveler.

What effect a state compensation law has upon the right under the Safety Appliance Act of an employé, who was injured through defective appliances while coupling intrastate cars on an interstate railroad, has not been directly involved in any case in the Supreme Court cited by counsel or found by us. But our conclusion, which rejects a result

that would make the operativeness of the act dependent upon the legislative wills of the several states, and which aligns that act with the Employers' Liability Act in substantive and procedural effect, is supported by our understanding of Schlemmer v. Buffalo, etc., Ry. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; St. Louis, etc., Ry. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; Delk v. St. Louis, etc., Ry. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590; North Carolina Ry. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; Southern Ry. Co. v. R. R. Com. Ind., 236 U. S. 439, 35 Sup. Ct. 304, 59 L. Ed. 661; Texas, etc., Ry. Co. v. Rigsby, 241 U. S. 33, 33 Sup. Ct. 482, 60 L. Ed. 874; New York, etc., Ry. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139. And we find nothing in Minneapolis, etc., Ry. Co. v. Popplar, 237 U. S. 369, 35 Sup. Ct. 609, 59 L. Ed. 1000; New York, etc., Ry. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; or Louisville & Nashville R. R. Co. v. Layton, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931, cited by plaintiff in error, that constrains us to a different conclusion.

The judgment is affirmed.

BANK OF COMMERCE & SAVINGS v. MATTHEWS.

In re MATTHEWS.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1919. Rehearing Denied March 4, 1919.)

No. 2657.

1. BANKRUPTCY ⊂⊃407(5)—DISCHARGE—MONEY OBTAINED BY MEANS OF A MATERIAL FALSE STATEMENT IN WRITING.

Credit extended to a bankrupt by a bank through its cashier, who knew that the bankrupt was then insolvent, and who was acting solely in his own and the bankrupt's interest, was fraudulent and voidable, and the bank was not bound by its cashier's fraud, and could claim that the money was obtained by means of a material false statement in writing as to money not checked out, where the directors of the bank examined note signed by bankrupt and false financial statement attached thereto, and, relying thereupon, approved the loan.

2. BANKRUPTCY ⊂⊃468—QUESTIONS OF FACT—REMANDING CASE.

On appeal from an order discharging a bankrupt over an objection that the bankrupt had obtained money by means of a materially false statement in writing, where it was found that the master had erred in finding that the false statement was not relied upon by the bank in extending the credit, and it appeared the master had made no finding as to whether the statement in writing was known to be false by the bankrupt, a finding by the trial judge from the printed record that the bankrupt did not read the statement or know its contents will not be allowed to stand, and the order of discharge will be reversed, so that the uncontradicted testimony of the bankrupt to such effect can be heard and its truth decided upon an observation of the witness, as well as upon his testimony.

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

In the matter of Walter S. Matthews, bankrupt. From an order discharging the bankrupt, the Bank of Commerce & Savings appeals. Reversed and remanded.

Charles R. Brown, of Chicago, Ill., for appellant.

A. B. Dennis, of Danville, Ill., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

MACK, Circuit Judge. Discharge was granted appellee over appellant's objection alleging in substance that he had obtained certain money by means of a materially false statement in writing made by him to it for the purpose of obtaining the credit from it.

The special master, finding that the statement was not relied upon by the bank in extending the credit, recommended for this reason that the objection be overruled and the discharge granted. The District Judge, in approving the report and granting the discharge, based his conclusions upon his finding from the evidence that the bankrupt did not read the statement or know its contents, that he relied entirely upon the bank cashier to prepare a correct statement, and that, while the statement was untrue, the bankrupt had no intention of signing the false statement.

The undisputed facts as disclosed by the record are that the bank cashier, who, some time after the loan was made, absconded, had been the bankrupt's financial agent and was better acquainted with his affairs than the bankrupt himself. He alone acted, so far as the bank was concerned, in the granting of the loan. No one else was consulted. While the loan was made on a note of $5,000 signed by the bankrupt, only $1,500 of it was intended for or inured to the latter's benefit. The other $3,500 went to the cashier. The cashier prepared the financial statement which he had the bankrupt sign at the time that the $5,000 note was signed, telling him that it was a mere matter of form and that he himself would put up bank stock as collateral.

The bankrupt testified that he had not read the statement, did not know its contents, acted entirely and completely in reliance upon the cashier (whose real character at that time had not been discovered), and that, if he had known the contents of the statement, he would not have signed it.

[1] 1. If the money had been paid out at the time the note was executed, the conclusion of the special master that the loan was not made in reliance upon the statement would be sound. But the money was not then paid; the bank merely extended a credit to the bankrupt on its books. This credit, thus obtained through the cashier, who knew that the bankrupt was then insolvent, and who was acting solely in his own and the bankrupt's interest, was fraudulent and voidable. The bank under these circumstances was not bound by its cashier's fraud.

Subsequently, and before all of the money had been checked out by the bankrupt, the directors examined the note, the financial state-

ment attached thereto, and thereupon, clearly in reliance upon the false financial statement, approved the loan. The remaining unused credit subsequently checked out was therefore clearly extended at that time in reliance upon the statement. The master's finding is therefore erroneous.

[2] 2. Exception was taken to the master's report on the ground that he failed to find that the bankrupt knew that the statement made by him was false, and that it was intentionally so made. The master alone saw the witnesses. The determination of this question depended upon his judgment as to the credibility of the bankrupt. The bankrupt's direct statement as to the facts bearing thereon was not contradicted. If, seeing and hearing him, the master believed his story, a finding that the statement was not knowingly and intentionally false would have been proper; but, on the other hand, if the master did not find the bankrupt's testimony to be credible in this respect, the contrary finding would have been proper. We should have felt ourselves bound under all of the circumstances by the master's conclusion of facts on this point.

Under modern practice, as sanctioned by the new rules in equity, testimony is ordinarily taken orally instead of by deposition. A better opportunity is thus afforded to determine questions of fact dependent upon the veracity and credibility of witnesses. In this case, the trial judge, who found this ultimate fact in accordance with the bankrupt's testimony, did not have this opportunity. While we cannot say from the printed record that his conclusion is erroneous, nevertheless, in our judgment, full and complete justice can be done to all parties only if the finding be based upon an observation of the witnesses as well as upon the testimony.

The order will therefore be reversed, and the cause remanded to the District Court, with direction either to remit the matter again to the master for further report and findings on the evidence taken heretofore, together with such additional evidence as he may deem it proper to permit either party to present, or to take testimony in the District Court upon the question of the bankrupt's knowledge and intent.

GOFF v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1919.)

No. 5110.

1. CRIMINAL LAW ⟸563—SUFFICIENCY OF EVIDENCE—PROOF OF CORPUS DELICTI.

   Evidence *held* insufficient to sustain a conviction where, aside from statements made by defendant before his arrest, it was as consistent with the commission of a different offense as with that of the crime charged.

2. CRIMINAL LAW ⟸535(1)—DECLARATIONS BY ACCUSED—NECESSITY OF CORROBORATION.

   A conviction on statements of the defendant will not be sustained without corroborative proof of the corpus delicti.

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

3. INDIANS ⊂=38(5)—INTRODUCING INTOXICATING LIQUORS INTO INDIAN COUNTRY IN INTERSTATE COMMERCE—EVIDENCE.

The provision of Act May 18, 1916, making the possession of intoxicating liquor in the Indian country prima facie evidence of its unlawful introduction, does not apply where the charge is the carrying of liquor from outside the state of Oklahoma into that part which was formerly Indian Territory.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Joseph W. Woodrough, Judge.

Criminal prosecution by the United States against R. E. Goff. Judgment of conviction, and defendant brings error. Reversed.

Frank Lee, of Muskogee, Okl. (J. C. Denton, of Muskogee, Okl., on the brief), for plaintiff in error.

C. W. Miller, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

WADE, District Judge. Defendant was indicted for, and convicted of, the crime of introducing liquor from without the state into that part of the state of Oklahoma which was formerly Indian Territory. He was found by officers in Nowata, Okl., traveling in a Ford car equipped with a false bottom, having concealed in and about the car more than 280 pints of whisky and some beer. The indictment charged only that defendant "did introduce and carry into the county and district aforesaid, from without the state of Oklahoma," liquor found in his possession.

At the close of the evidence offered by the government, the defendant demurred to the evidence as insufficient to prove the crime charged, for the reason that the corpus delicti was not established, which demurrer was overruled, the defendant excepting. The defendant offered no evidence, the case was argued, the jury instructed, and a verdict of guilty returned.

[1] 1. The defendant by this appeal renews his contention that there was no evidence offered by the government, aside from the proven statements of the defendant, tending to prove that the liquor found in the custody of the defendant, was in fact brought into the state, and it is insisted that the statements or admissions made by the defendant are not alone sufficient to establish such fact.

Two elements are involved in the offense charged: (1) That the liquor was in fact brought into Oklahoma from some point without the state; and (2) that the defendant was the person who brought it in. A careful examination of the record discloses no fact or circumstance, aside from the statements of the defendant at the time of his arrest, tending to show that the liquor was introduced into the state at the time alleged by any one.

Nowata, where the defendant was apprehended, is located about 24 miles from the Kansas line, and at least twice that far from the

Missouri line. The careful concealment of liquor in a car with a false bottom was just as consistent with ordinary "bootlegging" as with introducing. There is proof that there was a large stock of liquor about this time at South Coffeyville, Okl. If, as suggested by counsel (though without any competent evidence to sustain such contention), the defendant procured the liquor at South Coffeyville with the purpose of retailing it in the state, his plan for concealment would probably be just as ingeniously devised, and his mode and direction of travel would probably have been the same.

There is no attempt to prove that there were not dozens of other places in that part of the state where the supply could have been obtained. The facts and circumstances (aside from the statements of the defendant) being just as consistent with guilt of some other offense, it cannot be held sufficient as proof of the particular offense charged.

[2] The defendant first stated to the officers that he was traveling from his home in Pittsburg, Kan.; but, after the liquor was discovered, he stated that he came from Joplin, Mo., and was on his way to Tulsa, Okl. The rule of this court as to the effect of statements or confessions, in establishing the corpus delicti, is as follows:

"A conviction upon extrajudicial confession, or acts or declarations of a prisoner, will not be sustained, without corroborative proof that the property was in fact stolen." Naftzger v. United States, 200 Fed. 494, 118 C. C. A. 598.

See, also, 4 Chamberlayne, Evidence, § 1600.

We do not hold that declarations of a party may not be considered in finding the corpus delicti; but, standing alone, they are insufficient, and other facts and circumstances cannot be said to be corroborative, when they point as directly to some other offense as they do to the crime charged.

[3] 2. Counsel for the government insist that possession of liquor in Oklahoma is by act of Congress of May 18, 1916, "prima facie evidence of unlawful introduction." 39 Stat. 123, c. 125. This court has already ruled adversely to this contention. Chambliss v. United States, 218 Fed. 154, 132 C. C. A. 112; Sellers v. United States, 222 Fed. 1023, 137 C. C. A. 666; Lewellen v. United States, 223 Fed. 18, 138 C. C. A. 432. And furthermore the case was not tried upon this theory.

The case is reversed and remanded to the District Court, with directions that a new trial be granted.

AMERICAN CAR & FOUNDRY CO. v. ROCHA.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1919. Rehearing Denied May 21, 1919.)

No. 5227.

MASTER AND SERVANT ⊂=185(27)—MASTER'S LIABILITY FOR INJURY TO SERVANT —SAFE PLACE TO WORK.

Where plaintiff was at work under a car, which had been raised from its trucks and blocked up, his employer owed him a positive duty to warn him before the car was moved, which could not be delegated to another employé, so as to relieve itself from liability for its negligence resulting in plaintiff's injury.

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

Action at law by Saropia Rocha against the American Car & Foundry Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William R. Gentry, of St. Louis, Mo. (M. F. Watts and Edwin W. Lee, both of St. Louis, Mo., and G. A. Orth, of New York City, on the brief), for plaintiff in error.

Edward W. Foristel and Jesse T. Friday, both of St. Louis, Mo., for defendant in error.

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

CARLAND, Circuit Judge. Rocha sued the foundry company to recover damages for personal injuries alleged to have been caused by the negligence of the latter. The plaintiff recovered a verdict, and defendant assigns error.

The only evidence introduced was that of the plaintiff. It showed that on the 17th day of May, 1917, the plaintiff, while in the employ of the defendant, was directed by a foreman to go under a railroad car, which had been raised from its trucks and was resting on some blocks, to tighten up some bolts and nuts. While the plaintiff was partially under the car, with his left leg over one of the axles of the truck, the foreman, without any warning to the plaintiff, caused the car to be moved by a derrick or hoisting machine. The movement caused the car to fall upon plaintiff, thereby breaking one of his legs. Counsel for defendant moved for a directed verdict in its favor, upon the ground that the foreman was a fellow servant of the plaintiff, for whose negligence the defendant was not liable. The same point was raised in other ways. This is the only question specified and discussed in the briefs of counsel.

The plaintiff's petition in substance alleged that the defendant was negligent in ordering the plaintiff under the car and in moving the same while he was still under the car without warning. The defendant's answer denied negligence and pleaded contributory negligence. The defense of fellow servant was not pleaded. We think it is immaterial

whether the foreman was a fellow servant of the plaintiff or not. In a case like the present it was the positive duty of the defendant to warn the plaintiff that the car was about to be moved. This duty could not be delegated to the foreman by the defendant, so as to relieve itself of liability for his negligence.

We do not deem it necessary to cite authority in support of a rule so well established.

The judgment below is affirmed.

McDOWELL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1919.)

No. 5218.

CRIMINAL LAW ⊂⊃753(1)—TRIAL ⊂⊃178—MOTION FOR DIRECTED VERDICT—EFFECT.

It is the practice in the Eighth circuit to regard a general motion or request for a directed verdict, in either a civil or criminal case, as challenging the legal sufficiency of the evidence for a contrary conclusion.

In Error to the District Court of the United States for the District of North Dakota; Martin J. Wade, Judge.

Criminal prosecution by the United States against James McDowell. Judgment of conviction, and defendant brings error. Reversed.

Sullivan & Sullivan, of Mandan, N. D., and E. T. Burke, of Bismarck, N. D., for plaintiff in error.

Melvin 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.

HOOK, Circuit Judge. James McDowell was convicted of perjury at the trial of one Joseph Couture for stealing a horse belonging to the United States. A writ of error in Couture's case was recently disposed of by this court. —— C. C. A. ——, 256 Fed. 525. At the conclusion of the evidence in this case, McDowell asked the court to direct the jury to acquit him. The denial of the request is assigned as error.

The bill of exceptions certified as containing all the evidence at the trial wholly fails to show false swearing by the accused. In fact, it does not appear that he even testified at the trial of Couture. Doubtless with this in mind, counsel for the government say that, as no grounds appear in the motion for a directed verdict, it will be presumed that there was sufficient evidence of guilt. Our practice has been to regard a general motion or request for a directed verdict as challenging the legal sufficiency of the evidence for a contrary conclusion, and we are constantly applying it. It is in harmony with the practice in the Sixth circuit (Louisville & N. R. Co. v. Womack, 97 C. C. A. 559, 566, 173 Fed. 752, 759), though not with that in the Seventh circuit (Adams v. Shirk, 43 C. C. A. 407, 104 Fed. 54). Counsel argue the

question whether the theft of the horse which was bought by or for an Indian was, in view of certain special circumstances and conditions, a theft of "property of the United States" within the meaning of the statute (section 47, Penal Code [Act March 4, 1909, c. 321, 35 Stat. 1097; Comp. St. § 10214]) under which Couture was prosecuted, but in the state of the record we do not think we should consider it.

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

BOATMEN'S BANK v. LAWS et al.

In re BRYANT, GORE & BOWMAN SALES CO.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1919.)

No. 197.

BANKRUPTCY ⊂=326—CLAIM OF STOCKHOLDER—STOCK LIABILITY—SET-OFF.

Where a creditor stockholder of a bankrupt corporation had a claim against the bankrupt for $20,853.94, and his indebtedness on his stock was $10,000, for which amount corporation's trustee in bankruptcy recovered judgment, after which the stockholder was himself adjudged a bankrupt, his assignee could not have the amount of the judgment credited on the amount of the assigned claim and dividends on the balance of the claim paid to it, but dividends on such claim were first applicable on the judgment until that should be extinguished, and then, if there were other dividends, they were applicable to payment of the claim.

Petition to Revise Order of the District Court of the United States for the Eastern District of Missouri; John C. Pollock, Judge.

In the matter of the Bryant, Gore & Bowman Sales Company, bankrupt. Petition by the Boatmen's Bank against C. R. Laws and others, trustees, etc., to revise order of District Court. Petition denied.

Sears Lehmann, of St. Louis, Mo. (Lehmann & Lehmann, of St. Louis, Mo., on the brief), for petitioner.

Lee Grant, of St. Louis, Mo. (Grant & Grant, of St. Louis, Mo., on the brief), for respondents.

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

CARLAND, Circuit Judge. This case will be considered on the petition to revise. The respondents, as trustees of the estate of Bryant, Gore & Bowman Sales Company, a bankrupt, obtained a judgment against one E. M. Bowman for a stock liability as a member of said company, in the sum of $10,000. Bowman had a claim against the bankrupt duly proved and allowed in the sum of $20,853.94. He assigned his claim to the petitioner. After the judgment was obtained against Bowman, he was adjudged a bankrupt, and his estate paid no dividends. The referee refuses to pay to petitioner any dividends, arising from the administration of the estate of the Sales Company on the Bowman claim, until sufficient of said dividends have been applied on the judgment against Bowman to extinguish the same.

Petitioner claims that the amount of the Bowman judgment should be credited on the amount of its claim as assignee of Bowman and the dividends arising on the balance of the claim, should be paid to it. In Moise v. Scheibel, 245 Fed. 546, 157 C. C. A. 658, this court decided that no dividends should be paid on the claim of Moise until his stock liability should be ascertained and paid. The proceedings in bankruptcy are to be conducted upon equitable principles.

The judgment against Bowman is an asset belonging to all the creditors of the bankrupt estate. The trustees cannot use it to pay one creditor. The only equitable way to proceed is to require the payment of the Bowman judgment into the estate and then distribute the proceeds between all creditors. Bowman being insolvent, the only method left is to apply dividends arising upon the Bowman claim to the payment of the Bowman judgment until it shall be paid, and then, if there are other dividends, they should be applied to the claim of petitioner. The case of Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559, is the only case cited in support of the petition to revise. So far as that decision is applicable to the question here involved it is in line with the conclusion here reached. It plainly decides that the claim of a creditor stockholder should not even be allowed until his indebtedness to the bankrupt has been collected by plenary suit. The opinion also states that if the indebtedness of the creditor stockholder cannot be collected, then the creditor's claim may be reduced by the amount of the debt; but this is far from saying that, if the trustee can reach any property, he may not take it.

The petition to revise is denied, with costs.

The appeal, No. 5214, is dismissed.

ILLINOIS PARLOR FRAME CO. v. GOLDMAN.

In re NATIONAL UPHOLSTERING CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1919.)

No. 2669.

BANKRUPTCY ⊂=165(3)—PREFERENCE—TRANSFER FOR PRESENT CONSIDERATION.

Where one, fraudulently induced to sell goods on credit, accepted from the buyer, within four months preceding a petition in bankruptcy against the buyer, a transfer of accounts in payment for the goods, the transfer was made in consideration of release of right to rescind and recover the goods, and was not a preference.

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

Suit by Jacob Goldman, as trustee in bankruptcy of the National Upholstering Company, against the Illinois Parlor Frame Company, to recover payments claimed as preferences. Decree for complainant, and defendant appeals. Reversed and remanded, with direction to reduce the amount by allowing credit for certain items.

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

Samuel B. King, of Chicago, Ill., for appellant.
Joseph Kamfner, of Chicago, Ill., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

MACK, Circuit Judge. While appellant gave bankrupt a line of credit to the amount of $1,000, it was induced to increase this subsequently to April 1, 1916, by certain material false and fraudulent representations of the bankrupt's manager, so that on June 9, 1916, the indebtedness amounted to $5,795.70. On that day, after discovery of the fraud, accounts aggregating in face value over $4,000 were transferred to appellant and were entered on the books as a cash credit. Thereafter additional accounts were transferred, certain goods were returned and credited at a fixed valuation, and certain additional goods were delivered to the bankrupt. Petition in bankruptcy was filed October 4, 1916.

On suit by the trustee in bankruptcy to recover preferences, the court, confirming the master's report, entered a money decree for the face value of the accounts and the fixed value of the returned goods, less the price of the goods sold to the bankrupt after June 9th.

1. Without detailing the evidence, in our judgment, it fully supports the findings of insolvency, preference, and appellant's knowledge thereof on June 9th.

2. Evidence of the goods sold to the bankrupt after April 1st and on hand June 9th was rejected by the master as immaterial, on the theory that taking payment or security on account of the entire debt was a confirmation, not a repudiation, of the earlier sales, and that, in that aspect, the payment must be deemed to have been made on an antecedent debt.

But on June 9th appellant concededly had a right to rescind the fraudulent sales and to recover back such of the goods as were then in the bankrupt's possession. Clearly a return of these goods would not be a preference; to the extent of their value, payment could no more effectuate a preference; neither transaction would diminish the estate to which bankrupt was then entitled. That appellant did not expressly assert a right of rescission is immaterial; it relinquished that right in confirming the sale; it then gave up a property interest equal to the value of the goods then on hand. To that extent the transfer was for a present consideration, and not preferential.

While the master has reported the evidence offered by appellant as to the goods then on hand, inasmuch as appellee has had no opportunity to controvert it, the decree will be reversed, and the cause remanded, with direction to reduce the amount of the decree against appellant by such sum as may be found to be the value of the goods sold subsequent to April 1, 1916, and on hand June 9, 1916, with interest thereon, and to permit appellant to file a claim as a general creditor for so much as may be found to be preferential.

KINDRED v. BLACK.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1919.)

No. 5240.

APPEAL AND ERROR ⊜=849(1)—REVIEW—CAUSE TRIED TO COURT.

Where an action at law was tried to the court, jury being waived, a general finding for one party made, with no requests for general or special findings or declarations of law by the other party, the appellate court can review only the rulings of the trial court on the admission and exclusion of evidence.

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

Action at law by William L. Black against Luther P. Kindred. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles W. German, of Kansas City, Mo. (James F. Getty, of Kansas City, Kan., and Haff, Meservey, German & Michaels, of Kansas City, Mo., on the brief), for plaintiff in error.

Roland Hughes and Francis M. Wilson, both of Kansas City, Mo., for defendant in error.

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

CARLAND, Circuit Judge. Black sued Kindred to recover damages for false representations in the sale of real estate. A jury being waived, the case was tried to the court, with the result of a general finding for the plaintiff. There were no requests to find either generally or specially, or any requests to declare the law, made by Kindred. In this state of the record there is nothing for us to review, except errors in the exclusion or admission of evidence, and the error in this behalf specified and discussed in the brief has no merit. Section 700, Rev. Stat. (Comp. St. § 1668); Keely v. Mining Co., 95 C. C. A. 96, 169 Fed. 598; Mason v. United States, 135 C. C. A. 315, 219 Fed. 547.

Judgment affirmed.

MINNEAPOLIS, ST. P. & S. S. M. RY. CO. et al. v. BARNETT & RECORD CO.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1919. Rehearing Denied June 28, 1919.)

No. 5101.

1. PATENTS ⊜=26(1)—INVENTION—NEW COMBINATION OF OLD ELEMENTS.

A new combination of old elements whereby an old result is obtained in a more facile, economical, and efficient way is as securely protected by a patent as is a new machine or composition of matter, provided the discovery and reduction to practice of the novel combination rose above the reach of the skill of the mechanic trained in the art.

2. PATENTS ⊜=243—PATENTS FOR COMBINATIONS.

When the advance toward the desideratum is gradual, and several inventors formed different combinations, which accomplished the result

sought with varying degrees of success, each is entitled to his own combination, as long as it differs from those of his competitors and does not include theirs.

3. PATENTS ⟸66—ANTICIPATION—PATENTS FOR COMBINATION.
That prior patents separately disclosed one or more of the elements of a later patent, while no one of them disclosed them all, does not necessarily establish anticipation by any of them.

4. PATENTS ⟸324(5)—DECISIONS SUSTAINING VALIDITY—REVIEW ON APPEAL.
Where a patent has been granted and sustained by a trial court, the legal presumption is that the decisions of the Patent Office and the court in an infringement case, were right, and they may not lawfully be reversed by an appellate court, unless there is clear and convincing proof in the record that they have made some serious mistake of fact or fallen into fatal error of law.

5. PATENTS ⟸53—ANTICIPATION—UNCOMPLETED INVENTION.
The mere conception of an invention and the drawing of plans and sketches thereof does not constitute one an inventor for the purpose of anticipating a later patent to another.

6. PATENTS ⟸174, 177—SCOPE—USES UNKNOWN TO PATENTEE.
When a patentee has plainly described and claimed his improvements or combinations, he has the right to every use to which they can be applied, and to every way in which they can be utilized, whether or not he was aware of them when he secured his patent.

7. PATENTS ⟸157(2)—CONSTRUCTION TO GIVE VALIDITY AND EFFECT.
It is one of the fundamental rules for the interpretation of contracts and grants, especially applicable to grants of patents, that in case of doubt or ambiguity that construction should be preferred which sustains and vitalizes, rather than that which strikes down and paralyzes.

8. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—GRAIN ELEVATOR.
The McQueen patent, No. 896,233, for a working elevator, *held* not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit in equity by the Barnett & Record Company against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company and the Tri-State Land Company. Decree for complainant, and defendants appeal. Affirmed.

Frank Parker Davis and Edward Rector, both of Chicago, Ill. (Thomas F. Wallace, of Minneapolis, Minn., on the brief), for appellants.

Amasa C. Paul, of Minneapolis, Minn., for appellee.

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

SANBORN, Circuit Judge. This appeal questions the decree of the District Court that Finlay R. McQueen was the original inventor of the combinations and improvements illustrated by letters patent No. 896,233, issued to him on August 18, 1908, on his application filed June 20, 1907, and particularly pointed out in the first and second claims thereof, that the plaintiff below, the Barnett & Record Company, a corporation, is the owner thereof and of all claims for the past use thereof, that the first and second claims of the patent are valid, that the defendants have infringed those claims, and that the plain-

tiff recover the profits the defendants have obtained and the damages the plaintiff has sustained by reason of the infringement.

In this court counsel for the defendants contend that the decree should be reversed, because the evidence establishes the facts that the patent of the combinations of claims 1 and 2 is invalid, that McQueen was not the first inventor thereof, and that the conception and reduction to practice of the combinations there claimed did not constitute invention. They concede, however, that if neither of these positions is tenable the defendants were guilty of infringement.

The combinations described and secured by the patent relate to improvements in working grain elevators as distinguished from storage elevators. They relate to that type of grain elevator in which the grain may be cleaned, graded, weighed, otherwise worked, and distributed as in working elevators, as well as received, stored, and shipped, as in storage and terminal elevators. At the time McQueen conceived his combinations, an approved type of such an elevator consisted of a workhouse, of circular grain bins, supported by walls or girders and columns above the workhouse, and of a cupola or tower of four or five stories above the bins, wherein the machinery for elevating, spouting, garnering, weighing, and cleaning the grain could be located and operated. Prior to 1905, when McQueen conceived his combinations, such working elevators had been generally constructed of wood or metal, although the basement or the structure beneath the bin floors had often been made of masonry or reinforced concrete. The reason why the bins in such elevators had not usually been constructed of masonry or reinforced concrete seems to have been that the weight of the latter was so great, that the expense of supporting them over the workhouse upon columns and girders or walls was so great, and the necessary columns or walls occupied so much space in the workhouse, that iron or steel, or even wood, bins had been thought preferable to masonry or concrete bins. The danger of fire, however, and the great amount of wood requisite to resist the pressure of the grain, gradually diminished the use of wood, and there were serious objections to metal as material for such bins. Unless the walls of metal bins were made very thick and heavy, or unless they were very strongly and heavily braced and tied with metal rods, they were liable to buckle, crack, or tear open, when one of two or more adjacent bins was emptied of its contents while the others were filled, on account of the pressure of the grain upon the vacant bin.

During the years between 1895 and 1905, the use of metal reinforced concrete had rapidly increased, and its advantages as a building material had become more and more evident, until builders of working elevators became anxious to construct grain bins for working elevators of reinforced concrete or masonry, but in the then state of the art very heavy and expensive walls, or heavy and expensive girders resting upon many columns, were indispensable to sustain bins of such material over a working house, and such walls, or columns and girders, were so expensive and so cumbered, and occupied so much space in the working house, that they practically prohibited the use of concrete or masonry bins in elevators of this type. In order to

make the use of such bins in such a working elevator practically and commercially possible, it was necessary to find, and demonstrate by reduction to practice, a way to construct, sustain, and operate masonry or metal reinforced bins over a working house without the prohibitive expense of the heavy walls or girders and the numerous columns occupying so much space, which in the then state of the art, were necessary to hold up such bins.

Up to the time that McQueen discovered the combinations of his patents, no one had succeeded in accomplishing this in the United States. McQueen discovered combinations of old elements that accomplished the desideratum, and embodied them in an actual, practical, monolithic structure by means of which the cost of such practical working elevators was reduced about from 12 per cent. to 25 per cent. Working elevators with concrete metal reinforced bins constructed in accordance with the claims and specification of his patent speedily came into common use, and achieved abundant commercial success, so that, when the defendant came to construct the infringing elevator, it selected and built its elevator on the principle of McQueen's combinations, which it embodied therein.

McQueen, in his patent, limited the material in which the bins of his combinations should be embodied to masonry or metal reinforced concrete, preferring the latter. Speaking, then, of concrete, although what is hereafter said is equally applicable to masonry, the principle of McQueen's combinations, and of the working elevator in which he embodied them, is the hanging or suspension above the working house of numerous cylindrical metal reinforced concrete grain bins, placed close together in parallel rows in two directions, so that each bin shall be supported at two diametrically opposite points only, and only by columns, made of the same material as the bins, founded on the heavy concrete basement floor of the working house, rising vertically through the working house and the bin floor, made of the same material, and extending, on diametrically opposite sides of each bin, between the tangentially abutting sides of it and the adjacent bins, unified and made into one monolithic structure with the adjoining bins respectively, between which each column extends from the top to the bottom thereof, by metal reinforced vertically extended connecting bodies of the same material, which include and become one with these columns and the adjoining bins respectively, and extend from top to bottom of the bins, each of which bins is also united at its two other tangentially abutting portions, along which no column rises, by like metal reinforced vertically extended bodies made in one with the two bins between which they respectively extend from top to bottom, so that the columns, the bins, the vertically extending bodies of metal reinforced concrete between the tangentially abutting portions of the bins, are all rigidly united and made into one homogeneous monolithic structure, hung upon and sustained above the working house, so that the bins are suspended only at two diametrically opposite points by the columns which have been described, and by those columns only which sustain the entire monolithic structure and the cupola above the bins, which was preferably made of metal and sup-

ported on columns, the foot of each of which was founded on the top of one of the extended vertical metal reinforced columns, which extended to the top of the bins and of the monolithic structure. McQueen also described in his specifications and claims the combination which has been described, with transverse tie walls extending from the top to the bottom of the monolithic structure, whereby portions of the spaces between the bins on opposite sides of the tangentially connected portions of the bins were cut off, and closed spaces were thereby provided between the bins for elevator legs through the monolithic structure from the cupola to the working house.

McQueen's two claims here in suit read in this way:

"1. The combination with a multiplicity of masonry bins having their axes arranged in rows in two directions and having their tangentially engaged sides rigidly united by masonry body portions, certain of which constitute column extensions, and supporting columns below said bins vertically aligned and united with said tangential column extension portions of said bins and serving to support the said bins only at two diametrically opposite points, substantially as described.

"2. The combination with a multiplicity of bins having their axes arranged in rows in two directions and on lines that intersect each other approximately at a right angle and having tangentially engaging sides united by vertically extended masonry body portions, certain of which constitute column extensions, supporting columns below said bins, vertically aligned and united with said tangential column extension portions of said bins and supporting said bins at two diametrically opposite points only, and certain of which bins are further connected by transverse tie walls that extend from top to bottom of said bins and form, on opposite sides of the tangentially connected portions of the bins, spaces through which elevator legs may be passed, substantially as described."

[1] This is a patent for a combination of old mechanical elements. It is not for the columns, or bins, or working house, or the masonry, or the metal reinforced concrete. It is for the novel combination of the various elements described and claimed, whereby the whole result is obtained in a more economical and useful way. A new combination of old elements, whereby an old result is obtained in a more facile, economical, and efficient way, is as securely protected by a patent as is a new machine or composition of matter, provided that the discovery and reduction to practice of the novel combination rose above the reach of the skill of the mechanic trained in the art. Seymour v. Osborne, 11 Wall. 516, 542, 548, 20 L. Ed. 33; Gould v. Rees, 15 Wall. 187, 21 L. Ed. 39; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 369, 131 C. C. A. 504.

[2] Counsel have spread upon the record an exhaustive display of the history of the art of constructing grain elevators, and of its state at the time when McQueen conceived and reduced to useful and commercial practice his patented combinations. This portrayal clearly discloses the fact that the advance toward the fortunate and successful working elevator which he conceived and constructed was gradual, and that in the progress of that advance mechanics and inventors at different times found different combinations whereby they approached the result of constructing useful working elevators with varying degrees of success. This history of the art brings this case under the familiar rule that when the advance toward the desideratum is

gradual, and several inventors formed different combinations, which accomplished the result sought with varying degrees of success, each is entitled to his own combination, as long as it differs from those of his competitors and does not include theirs. Railway Co. v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053; McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930.

[3] Patents, publications, and actual structures have been proved, some of which disclosed one, and others more, of the old elements of McQueen's combinations; but the fact that one of these disclosed one and another another or more elements of the patented combination, while none of them discloses all of the elements thereof, does not necessarily establish the fact that any of them anticipates the combinations of the plaintiff. Imhaeuser v. Buerk, 101 U. S. 647, 660, 25 L. Ed. 945; Bates v. Coe, 98 U. S. 31, 48, 25 L. Ed. 68; Owens Co. v. Twin City Separator Co., 168 Fed. 259, 265, 93 C. C. A. 561.

[4] The two claims of the patent here in suit have been sustained by the expert examiners of the Patent Office and by the learned judge below who tried this case. The legal presumption is that the decisions of these officers were right. Their decrees may not lawfully be reversed, unless there is clear and convincing proof in the record before us that they have made some serious mistake of fact, or have fallen into a fatal error of law in the determination of the questions before them.

No good purpose would be served by attempting to embody the history of this art, or to portray its state in 1905, when McQueen conceived his alleged invention, in this opinion. It will be sufficient to notice the prior patents, publications, and structures, which appear from the testimony to be those most closely resembling the devices of McQueen. Mr. Browne, the main witness and the expert for the defendants, testified that in his opinion patent No. 37,134, to George H. Johnson, issued December 9, 1862, came nearer than any others to showing the complete combination of claim No. 1 of McQueen's patent, but that he had found no prior patent, publication, or structure, which disclosed the entire combination of either the first or second claim thereof. This patent to Johnson clearly demonstrates the fact that he was trying by the improvements he describes therein as early as 1862 to find some way to remedy the defects of cylindrical iron grain bins. He writes in his specifications that previous to his invention storehouses for grain had been constructed of cylindrical iron bins, arranged vertically and in contact with each other, and that the spaces between the bins had been employed as supplemental bins, but that when the grain was drawn off from one of these iron grain bins the sides were apt to collapse, not being of sufficient strength to resist the pressure of the grain in the filled bins adjacent to them. To remedy this evil he described and claimed small cylindrical iron bins placed in the spaces between the larger bins, and wrote that, while that feature was applicable to iron cylindrical bins, he had shown it with other features, which he claimed as applied to a new construction of bins and cylinders formed of brickwork tied together by means of plates and rods of iron. He then described cylindrical

bins of brickwork, tied together by horizontal bond plates and vertical tie rods, "sustained on a suitable floor, by arches *D* and columns *E* of masonry, brickwork, or iron, as deemed expedient." But this structure of Johnson (1) did not constitute a working elevator, but a mere storehouse; (2) was not suspended or supported over a workhouse, leaving a broad open space for working the grain beneath the bin floor, but was sustained on arches and columns beneath the bin floor, occupying much of the space there; (3) was not sustained by columns founded on the concrete floor of the basement of a workhouse extended vertically through the bin floor and between the tangentially abutting portions of masonry or concrete bins to their tops, so that the bins were supported thereon only at two diametrically opposite points; (4) did not consist of a rigid union and a consolidation in one monolith of such vertical columns, bin floors, bins, body portions made of masonry or of metal reinforced concrete between the tangentially abutting portions of the bins, and hence it failed to disclose the principle or mode of operation of McQueen's combinations, or the means which attained the desired result, nor did it anticipate the combinations of either of the claims in this suit.

Among other alleged anticipations or in the evidence to sustain lack of invention to which counsel for the defendants refer are:

Patent No. 24,424, to Badger and Sampson, of June 14, 1859, for the substitution of brick, stone, or iron square or tubular grain bins for wooden bins, which discloses such bins standing on a platform supported by two sets of arches beneath them, sustained on columns beneath the arches. But this disclosure lacks (1) the exclusive location of the supporting columns vertically under the tangentially abutting portions of the bins; (2) the continuous columns extending from basement floor of workinghouse through the bin floor between the tangentially abutting portions of the bins to their tops; (3) the body portions extending vertically between the tangentially abutting portions of the bins through their entire length rigidly uniting in one monolithic whole the bins and the columns between the bins; (4) the hanging or suspension of the bins and the entire monolithic structure on the continuous columns made in one therewith only at two diametrically opposite points of the bins, and other less material elements of McQueen's combinations, while it portrays the double arches and the unnecessary columns under the bin floor which it was one of the objects of McQueen's improvement to dispense with.

Patent No. 777,730, to Jamieson, issued December 20, 1904, for a complex, confused, and complicated method of binding together concrete and metal in a grain bin structure consisting of columns and bins which lacks (1) the cylindrical bins; (2) the working house beneath the bins; (3) the suspension of the bins above the working house by continuous columns only at two diametrically opposite points of the bins; (4) the tie walls and the spaces for the elevator legs of McQueen's combinations.

Patent No. 662,452, of November 27, 1900, to James Macdonald, for combinations of cylindrical sheet metal grain bins in the form of nested bins in a storage warehouse which lacks (1) the work-

house; (2) the suspension of the bins above the workhouse; (3) the continuous columns from the basement of the workhouse to the top of the bins; and (4) the support of the bins only at two diametrically opposite points by continuous vertical columns founded on the heavy cement basement of the workhouse and extending up through the workhouse between the tangentially abutting portions of the bins to their tops rigidly united and made in one with them, and many other less material elements of McQueen's combinations.

All these and all the other less material patents presented by the record, have been carefully examined, but none has been found which comes nearer to disclosing the combinations of McQueen, or to an anticipation thereof, than the patent to Johnson which was first discussed, and this court is not persuaded that the Johnson patent, or that any of the patents disclosed in this record, fairly anticipated the combinations of the claims 1 or 2 of the patent to McQueen.

Counsel has cited as an anticipation of these claims the copyrighted book of the Architectural Iron Works of the year 1865 at pages 7, 60, 61, 62, which portrays the Brooklyn Iron Elevator. This iron elevator was a storage and transfer elevator constructed to store and transfer grain from cars to ships. It was built about 1865, and torn down about 1902. It was provided with cylindrical iron bins "made like boilers of riveted plate iron" arranged in rows at right angles, supported on a flat floor, which rested on iron girders, sustained by iron columns beneath the girders. It contained somewhere between 60 and 90 bins. The testimony is conflicting on the question whether the columns were located vertically beneath the tangentially abutting portions of the bins, or vertically beneath the centers of the bins. The evidence for the former location consists principally of the description in the book of the Architectural Iron Works and the testimony of witnesses who saw the elevator before it was torn down, or the site of it after its removal. The evidence for the latter location consists of the blueprints of the drawings, made by George H. Johnson, the engineer for the construction of the elevator, which were found after his death among his papers, and which showed the columns vertically under the centers of the bins, and the testimony of witnesses to the discovery of these plans and the preservation of them. There was also testimony upon each side of this question of witnesses relative to the interpretation or meaning of the disclosures in the book of the Architectural Iron Works and the plans and sketches which were introduced in evidence. All this evidence has been carefully and repeatedly examined. But in the light of the fact that the witnesses who saw the elevator testified more than 12 years thereafter, of their uncertainty as to the details of the construction, and of the unreliability of the memory of men after so many years, and of the established rule of law that the burden was upon the defendants to prove the location of these columns by clear, convincing, and satisfactory evidence, the proof in this record has failed to convince that the columns of the Brooklyn Iron Elevator were located vertically under the tangentially abutting portions of the bins, or that it embodied either the principle or the combinations of the first or second claims of the pat-

ent to McQueen. It lacks these material elements or attributes of McQueen's combinations: (1) The continuous columns of metal reinforced concrete or masonry extending from the basement floor of a working house beneath the bins up through the workhouse, the bin floor, and between the tangentially abutting portions of the bins to their tops; (2) the rigid union of the tangentially abutting portions of the bins, the columns between them and the body portions of the concrete extending from the top to bottom of the bins; (3) the construction out of metal reinforced concrete or masonry in one homogeneous monolithic whole of the continuous columns, the bins, the body portions between them, and the floor beneath them; and (4) the suspension and support of this monolithic structure by the columns only at two diametrically opposite parts of the bins; and the conclusion is that the Brooklyn Elevator failed to anticipate the patented combinations here in issue.

About the year 1901 at Buffalo, N. Y., an elevator was built, called the Dakota, wherein iron or steel cylindrical bins were supported by four continuous iron or steel columns to each bin, extending vertically between the abutting portions of the bins. It is persuasively argued that this elevator anticipates the combinations of McQueen, and demonstrates the fact that there was no invention in conceiving and reducing them to practice, because it required no exercise of the inventive faculty to merely substitute masonry or reinforced concrete for iron or steel in this elevator, or to reduce the necessary number of supporting columns 50 per cent. Conceding that there is ordinarily no invention in the mere substitution in the construction of a building or elevator of one equivalent building material for another, it is too broad a statement to declare that there may never be invention in the substitution of one building material for another, and that is well illustrated by the story of this art. Johnson in his patent in 1862 suggested and described cylindrical bins of masonry supported on a floor resting on masonry, brickwork, or iron. It was not, however, until some 40 years after that, that metal reinforced concrete came even into limited use for cylindrical elevator bins, and then these bins were not suspended above a workhouse by continuous columns made in one with them and with other parts of the structure, as in McQueen's combination, but they were based on heavy masonry walls, or on heavy girders and columns of metal beneath them. The uses and capabilities of reinforced concrete, well known in this year 1919, were so far unknown in 1862 that there can be no doubt that it would then have been a novel and useful invention to have conceived and reduced to practice an elevator building, according to the plan of McQueen. Johnson's patent does not appear to have brought within the reach of the skill of the mechanic a practical and useful working elevator made of metal reinforced concrete, or of masonry based on and supported by heavy walls and columns, until about 40 years after the date of his patent; and neither Johnson's nor any of the other patents or structures disclosed in this case, nor all together, appear to have enabled any one to conceive and reduce to practice or commercial use in this country such a metal reinforced solid monolithic

structure of either concrete or masonry suspended above a workhouse only at two diametrically opposite points of cylindrical bins by continuous columns between them, extending from basement of workhouse to the top of the columns wherein the bins, the columns, and the body portions between them are all consolidated together in one homogeneous whole, until McQueen conceived and made the combinations secured by this patent. The desirability of sustaining concrete or masonry bins on columns above workhouses had long been known. Iron elevators had been so sustained, but the skill of the mechanic had demonstrated no way of so sustaining the great weight of metal reinforced concrete or masonry bins without prohibitive cost. McQueen conceived and provided combinations whereby such bins could be and have since been suspended on columns over workhouses at a cost of from 10 to 25 per cent. less than the cost of metal elevators of like capacity. If the Dakota Elevaor had been built in accordance with McQueen's patent, about one-half of the columns could have been dispensed with, the usable space beneath them for cleaning and working grain could have been greatly increased and from 10 to 25 per cent. of its cost could have been saved. The examiners of the Patent Office and the judge below were of the opinion that, to one who had conceived and reduced to practice and commercial use combinations which evidenced so striking an advance in the art of constructing working elevators, the title of inventor ought not to be denied, and this court is convinced that there was no error of law or mistake of fact in that conclusion.

This result has not been reached without a thoughtful consideration of the testimony of witnesses and of the other structures, publications, plans, and sketches which this record contains. Mr. Browne, the expert and main witness for the defendants, testified that in his opinion the Brooklyn Iron Elevator more nearly resembled the structure of McQueen's combinations than any other structure disclosed by the evidence, and Mr. Carter, the expert for the plaintiff, testified that in his opinion the Dakota Elevator enjoyed this distinction. As neither of them anticipates the patented combination of McQueen in suit, and no structure more nearly resembling McQueen's elevator has been discovered by the court from the evidence in this case, it is unnecessary to discuss the other disclosures at length.

[5] There was an elevator built in 1903 or 1904 in the Montreal Harbor, known in the evidence as the Montreal Harbor Elevator, under the supervision of Mr. Harry R. Wait, who testified that he conceived and made the sketches or plans therefor in 1902. The plan was to make the bins of that elevator of steel, and to support them by columns of steel or iron combined with a filling of concrete, and to have them extend between the tangentially abutting portions of the cylindrical bins to the tops thereof. There was a conflict and controversy in the evidence over the question whether or not Mr. Wait conceived his alleged invention and made his plans for this elevator in the United States or in Canada; but, even if the concession were made that he conceived the plan and made the sketches, drawings, and plans for it in this country in 1902, it is certain that he did not re-

duce it to practice in this country, nor was it patented or described in any printed publication, within the meaning of section 2943 of the Revised Statutes, before McQueen, in the belief that he was the original and first inventor of the thing patented to him, filed his application for his patent. Now Wait's reduction to practice of his alleged invention by the construction of monolithic homogeneous elevators in Canada was therefore a nullity, so far as diligence in reduction to practice is concerned, and the only material steps he took before McQueen filed his application were the mere conception of an alleged invention and the drawing of plans therefor. But the mere conception and drawing of plans or sketches thereof is insufficient to prove one an inventor. And the result is that the Montreal Harbor Elevator does not constitute an anticipation of McQueen's patented combinations, and, moreover, the evidence in this case falls far short of that clear, convincing, and satisfactory proof required to warrant a finding by this court that Wait was the first inventor of the combinations of McQueen in view of the latter's patent therefor. Sections 4886 and 4923, Rev. St. (8 U. S. Comp. St. 1916, §§ 9430 and 9469); Detroit Lubricator Mfg. Co. v. Renchard, 9 Fed. 293, 296; Automatic Weighing Machine Co. v. Pneumatic Scale Corporation, 166 Fed. 288, 298, 92 C. C. A. 206; Westinghouse Machine Co. v. General Electric Co., 207 Fed. 75, 77, 126 C. C. A. 575.

Before reaching this conclusion the opinion of Judge Cassels in 13 Exchequer Court Reports, Canada, 186, was carefully considered. It does not, however, rule the material issues in this case, because his question was the validity of McQueen's Canadian patent, the Montreal Harbor Elevator was available in his case as evidence of anticipation of that patent, and the sections of the Revised Statutes of the United States which make that structure unavailable as such evidence in the case in hand did not govern there and were irrelevant to the issues in his case.

[6] It was suggested in the course of the argument that the specifications and drawings of the patent to McQueen disclosed girders under a floor beneath the bins, and thereby indicated that when he made his invention, and when he described and claimed it, he did not know or conceive that the continuous columns of his combinations would and did support the bins and floor below them, without or notwithstanding the girders. It is not probable that he was thus ignorant or thoughtless, because in the first and second claims of his patent he does not include the girders or the floor, and he certainly would have done so, if he had thought them indispensable to his patented combinations. Moreover, even if this want of perception of the benefits of his invention existed, it would not be fatal to his patent, for, when one has plainly described and claimed his improvements or combinations, and secured a patent for them, he has the right to every use to which they can be applied, and to every way in which they can be utilized to perform their function, whether or not he was aware of all these uses and methods of use when he claimed and secured his monopoly. Roberts v. Ryer, 91 U. S. 150, 157, 23 L. Ed. 267; Miller v. Eagle Mfg. Co., 151 U. S. 201, 14 Sup. Ct. 310, 38 L. Ed. 121;

National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 709, 45 C. C. A. 544.

The evidence and arguments of counsel for the defendants to the effect that the combinations of the second claim, which consists of the combination of the first claim with the transverse tie walls that extend from top to bottom of certain of the bins, and form on opposite sides of the tangentially connected portions of the bins vertical spaces through which elevator legs may be passed from the cupola through the concrete or masonry structure to the working house below, one on one side and the other on the other side of the tangentially connected portions of the bins, was anticipated by the Dakota Elevator, the Great Northern Elevator, the Rialto Elevator, and other structures, and by the patents to Johnson, to Macdonald, and to others, and was not patentable, have not been overlooked. But, as neither of these structures or patents contain the combination of the first claim of McQueen, it does not contain the combination of the elements of that claim and the additional elements of the tie walls and spaces for the elevator legs described in the second claim. The question is not whether or not the tie walls and the spaces for the elevator legs were anticipated or patentable considered by themselves, but whether or not the combination of them with the combination of the elements of the first claim was patentable, and the court is not persuaded that it was not.

[7] It is not unwise at times to recur to the nature, object, and effect of a patent, to call to mind the facts that it arises out of an offer of the United States to warrant to an inventor, in consideration of his making, reducing to practice, and giving to the public a new and valuable invention forever after, the exclusive right to use and vend it for a few years, that this offer must be followed by an acceptance by the inventor, not by words, but by the actual making, publishing, and reducing to beneficial use of such an invention and by proof thereof to the satisfaction of the United States before the patent can issue; that the patent, when issued, is the written evidence that such proof has been made to the satisfaction of the United States, and also of a contract of the United States to the effect that during the term of the patent it will secure to the patentee the exclusive right to vend and use the machine, device, or combination described and claimed in his patent. It is one of the fundamental rules for the interpretation of contracts and grants that, in case of doubt or ambiguity, that construction should be preferred which sustains and vitalizes, rather than that which strikes down and paralyzes. Reece Button-Hole Machine Co. v. Globe Button-Hole Machine Co., 61 Fed. 958, 962, 10 C. C. A. 194; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 712, 45 C. C. A. 544.

[8] It is also well to remember that such a patent or contract, and the enforcement of it, take nothing from those who are not parties to it. They have the same right and freedom to use all the devices and improvements that were known and available to them before the invention or discovery was made and patented, that they had before the patent was issued. For example, if the defendants think that any

of the devices or improvements or combinations disclosed in any of the numerous patents, publications, or structures they have introduced in evidence as anticipating the combinations patented to McQueen are equivalent or preferable to his, they may still use those, notwithstanding his patent, so that the enforcement of McQueen's patent contract cannot injure them, while the failure to enforce it deprives him of a part at least of the benefits warranted to him by the patent. The conclusion of the whole matter is that in the gradual advance of the art, to which reference has been made, the patentee McQueen was the first and original inventor of the novel and useful combinations described in his patent and claimed in the first and second claims thereof, that the defendant infringed these claims, and that the decree below must be affirmed.

It is so ordered.

ALVEY-FERGUSON CO. v. PETER SCHOENHOFEN BREWING CO.

PETER SCHOENHOFEN BREWING CO. v. ALVEY-FERGUSON CO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

Nos. 2586, 2589.

1. PATENTS ⊂⊃328—VALIDITY—CONVEYER.
The Alvey-Ferguson patent, No. 790,776, claims 7 and 8, for a conveyer, which discloses merely a joint use of two previously known elements, *held* void for want of invention.

2. PATENTS ⊂⊃328—VALIDITY—ELEVATOR.
The Alvey patent, No. 790,811, claims 1, 2, 3, 10, and 11, for an elevator for packages, *held* not anticipated and valid.

Appeals from the District Court of the United States for the Northern Division of the Southern District of Illinois.

Suit by the Alvey-Ferguson Company against the Peter Schoenhofen Brewing Company for infringement of two patents. From a decree (245 Fed. 762) dismissing the bill as to one patent, and granting relief to complainant as to the other patent, both parties appeal. Affirmed.

John W. Hill, of Chicago, Ill., for plaintiff.
Frank T. Brown, of Chicago, Ill., for defendant.

Before BAKER and MACK, Circuit Judges, and CARPENTER, District Judge.

MACK, Circuit Judge. Each party has appealed from that part of a decree which denies its contentions, in adjudging claims 7 and 8 in letters patent 790,776 invalid, and therefore dismissing the bill as to these claims, and in adjudging claims 1, 2, 3, 10, and 11 of letters patent No. 790,811 valid and infringed, and therefore granting the in-

junction as prayed in respect to them. Both patents were granted to Benjamin H. Alvey and assigned to the plaintiff, Alvey-Ferguson Company.

Patent No. 790,776 Conveyer.

Claim 7 reads as follows:

7. The herein described means for conveying articles from one room to the lower portion of the room below the same, comprising a spiral way which has its upper terminal in the lower room and a supplemental conveyer or slide for discharging articles upon the upper portion of said spiral way, said supplemental conveyer or slide extending off from the upper portion of said spiral way at an inclination upward therefrom, through an opening which is located at one side of said way and in the floor of the room above that containing said way, whereby the necessity of an opening in the floor for said spiral way is avoided.

Claim 8 differs from it only in describing the supplemental conveyer as detachable. Clearly the alleged invention of this patent is not that of a system. Nor is it described, as is the invention of the other patent, as forming part of a system. If the two patents together, or with other patents secured by Alvey, cover a conveyer system, pioneer or otherwise, that fact has no bearing on the validity of the claims in the patent in suit. That patent or rather the claims in suit must stand or fall independently of any others.

This patent relates, then, not to a general conveying system, not to an elevating of goods from one floor to another, but, as the patentee stated in his application, to the lowering of boxes, barrels, or other articles from one elevation to another by the force of gravity. The claims in suit are limited to the means for carrying articles from one floor to the next lower floor.

Each of these means, the spiral chute and the supplemental conveyer, was in itself old. The spiral way permits of a gentler inclination, and thus is a safer means of conveying fragile articles than a straight chute would be. The use of a straight slide running through the floor cut, instead of a continuous spiral, saves floor space, and, if detachable, it permits of the closing of the floor opening, whenever desired.

If, as plaintiff contends, the spiral way, though not specifically described in these two claims, is to be limited to one with a roller or some equivalent bed, and not to include a plain slide conveyer, because only the former is adapted to accomplish the stated object of uniform speed and a minimum of friction, there is nevertheless no novelty in it. In Alvey's own earlier patent No. 714,432, the bed of the conveyer was formed of rollers.

Each of the alleged advantages and functions pertains to one or the other of the two elements. No additional advantage is derived from their union. Whether the measure of co-operation in the successive action involved in the use of the two elements united saves the alleged invention from the charge of being a mere aggregation of elements, it is unnecessary to determine; for the conception of their joint use, even if novel, involves, in our judgment, no inventive thought.

Moreover, in Alvey's earlier patent, the conveyer, while Z-shaped,

or serpentine, instead of spiral—the latter was well known, Warner patent No. 380,707—is shown "in Fig. 1 as adapted to receive packages from an upper floor through an opening and chute." It is immaterial whether or not that chute is, as it there appears to be, detachable. The united action of the chute and conveyer is clearly represented. The substitution of a detachable chute or of a spiral conveyer or both involves no invention.

Patent No. 790,811 Elevator.

The claims in issue read as follows:

1. An elevator comprising a frame having approximately horizontal end portions and its intermediate part arranged at an inclination with its said end portions and gradually merging into the same, rollers constituting a portion of the track or way, a stationary portion arranged at the junction of an end and intermediate portion of the frame, and traveling means for conducting the articles upward along said track or way.

2. An elevator comprising a frame having approximately horizontal end portions and its intermediate part arranged at an inclination with its said end portion and gradually merging into the same, rollers constituting a portion of the track or way, a stationary portion arranged at the junction of an end and intermediate portion of the frame, means for conducting the articles upward along said track or way, and conveying means for conducting said articles to and from said elevator.

3. An elevator comprising a frame having approximately horizontal end portions and its intermediate part arranged at an angle with its said end portions and gradually merging into the same, a frame arranged at the junction of an end portion and said intermediate part and forming part of the track or way, rollers arranged to form a part of said track or way, a pair of connected endless belts for conducting the articles along said track or way, and means for holding said belts down adjacent to the junction of said end and intermediate portions.

10. An elevator comprising a frame having a track or way provided with rollers, upon which rollers travel the articles being conveyed, and a traveling conveying means having roller flights which are arranged above the first-mentioned rollers and engage the sides of said articles and push the same along said track or way.

11. An elevator comprising a frame, composed of side members and a track or way between said side members, said track or way having rollers upon which travel the articles being conveyed, and a traveling conveying means, comprising endless belts guided by said side members and independently rotatable flights or carriers connecting said belts with each other and traveling above said rollers and engaging the sides of the articles being conveyed.

Unlike the invention of the other patent, this elevator is specifically described as one "adapted to be used in systems of handling packages whereby packages may be most expeditiously and safely elevated from one floor to another of a warehouse" and as "adapted to form part of a conveying system wherein the packages are conveyed to it by a gravity conveyer which runs around or through the room and delivered by it to a similar gravity conveyer which runs around or through the room above."

The function of this power driven elevator is to raise packages including those of a fragile or breakable character safely, reliably and automatically from a lower to a higher gravity section or conveyer, with a minimum of manual attendance. The novelty in the construction of the elevator way is that it has only in part rotatable rollers;

a stationary or slide portion is substituted for rollers at a point intermediate the bottom horizontal end portion and the inclined portion.

Defendant at first had an all-roller way. The defendant, in a case in which Judge Veeder in the District Court for the Eastern District of New York (Alvey-Ferguson Co. v. John F. Trommer Evergreen Brewery, 260 Fed. 572) enjoined infringement of the only claims there in issue, 1, 2, 3, originally had an all-slide way; both defendants paid plaintiff the tribute of imitation by substituting for an unworkable structure its combined roller and slide way.

Berger, No. 391,223, chain conveyer for handling coal, bridged over the angle between the horizontal and inclined portions of the structure and avoided the danger of obstructions by rounding that break. But the structure is of a totally different kind and in no sense shows the combination of claims 1, 2, and 3; there is no roller portion and stationary portion, each forming part of the track; there are no traveling means for conducting articles over such a track. This combination of roller and stationary portions not merely prevents clogging, but it secures the elevation with a minimum of friction and danger of interruption through breakdown or accidental stopping. The elevator so composed is unitary in its operation; the parts co-operate to effectuate a useful purpose; the conception of such a combination was both useful and novel.

Moore, No. 252,960, machinery for laying railway tracks, uses a series of cars, each provided with an adjustable roller way on each side. He specifies that "the ties are pushed along over the rollers by men with spiked poles" and that "as the ways slope toward the front the ties begin to move forward, or will do so with slight help," until they reach the forward car, which is provided with an endless chain; this carries the ties forward and drops them over the front end. This structure is not an elevator, but a roller skid, down which rails and ties may be drawn. In no sense does it disclose the combination of claims 10 and 11.

Neither Friedman, No. 540,970, apparatus for conveying rolling packages, nor Baker, No. 668,079, conveyer, indicate plaintiff's rotatably mounted flights or carriers and their function. Plaintiff specifies that they "engage the packages to be elevated and are adapted freely to disengage themselves from packages which are not properly engaged therewith. Thus when, as frequently happens, at the receiving end of the device, a package instead of being in its proper position comes directly onto said flight, it is not dragged part way around the sprockets or onto the carrier, and then allowed to fall back, but, on the contrary, the roller turns freely on its shaft and travels from beneath said package without elevating the same and leaves it at the foot of the elevator in position to be properly engaged by the next succeeding flight."

Baker's arm is not a roller; it is merely a rounded support with or without a small roller at the top, likewise acting only as a support. In either case, the arm operates as a pusher only at the top of the incline, and there it either throws the package forward, instead of merely

gently moving it, or it passes under the package and allows it to fall back to its original position with a shock.

Friedman's roller has an entirely different function, to enable a barrel to be pitched while being rolled up an incline. It is adaptable only to barrels, and not to other packages. It rolls the barrel off the conveyer.

Plaintiff's rollers on the crossbars have the sole function of so moving packages not properly placed on the elevator that the next flight will properly engage them. The roller, in passing under the package, moves it slightly forward without danger to the package. They act thus in co-operation with the other parts of the structure, and produce a combination both useful and novel.

Infringement is practically conceded, if validity of the claims is established. The slight differences in detail are immaterial as to the claims in issue.

Decree affirmed.

MUNSON MFG. CO. v. DEERE & CO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2614.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—REVOLVING CLOD FENDER.

Munson patent, No. 1,025,420, claims 1 and 4, for an improved revolving clod fender for use with a corn cultivator, *held* not anticipated and valid, and infringed by a device of similar shape and operation, but constructed of malleable castings, instead of wire, as described in the claims.

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

Suit by the Munson Manufacturing Company, a partnership, against Deere & Co., a corporation, for infringement of patent No. 1,025,420. From a decree dismissing complainant's bill, complainant appeals. Reversed, with instructions to enter decree for complainant.

W. R. Bair, for appellant.

Albert H. Adams, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. The patent to Munson, No. 1,025,420, covering a "revolving clod fender," describes a device attached to a corn cultivator standing between the cultivator shovels and the plants; its function being to permit a quantity of fine earth to roll up close to and around, but not covering, the plants.

There have been two kinds of clod fenders—one, the stationary kind, consisting ordinarily of metal sheets interposed between the shovel and the plants; the other, to which appellant's device belongs, is known as the rotary clod fender. These fenders are disc-shaped devices formed with toothed or serrated edges and designed to turn on their axes by reason of the contact of the edge with the earth. The prior art con-

tained such fenders with openings or slots through which some fine earth could pass. The following illustrations will show types used prior to Munson's patent:

Fig. 1.

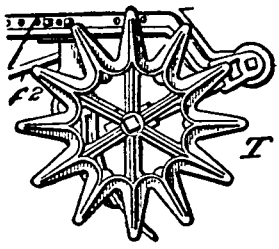


Fig. 2.

Fig. 3.

Fig. 4

The two claims in suit are 1 and 4, and they read as follows:

(1) A revolving clod fender, comprising a suitable hub and spokes radiating therefrom, said spokes being formed of looped wire secured to the hub at their open ends.

(4) In combination with a cultivator having spaced beams, stems fixed at their forward ends to said beams, said stems converging rearwardly and bent into parallel planes at their rear end portions, pivot bolts in rear end portions of said stems, and revolving clod fenders mounted on said pivot bolts and spaced apart, said fenders comprising radiating spokes of looped wire clamped together at their open ends.

That such slight changes would produce new results or new functions might well seem, on first impression, questionable.

It is claimed, however, and the evidence seems to support the claim, that the fender with the loop structure made it possible for the operator to better loosen the ground, and put the dirt close to and around the stalks of corn and at the same time quite effectively prevent the covering of the young plants.

More specifically, it was claimed that the fine earth is piled up around the stalks; that the loops which have been imbedded in the fine earth by reason of the operation of the shovels carry some of the earth upward and toward the plants; that where the plants, for some reason are knocked to one side by the dirt, the loops in the clod fender draw the leaves of the plant out from under the dirt, thereby avoiding stops by the operator to uncover the plants.

The evidence shows that plaintiff's device went into immediate and extensive use. While this may have been in part a matter of advertising and the result of appellant's energy in pushing its product on the market, it was not necessarily or entirely so. Appellee's experience confirms appellant's claims. It used rotating fenders in the early eighties and sold many between the years 1885 and 1890. Thereafter the rotating fender went out of the market and was not again used until 1916, when appellant's device came into use. Thereupon appellee, having the merits of the fender fully set forth to it by Munson, provided some of its cultivators with the infringing device, and its use by appellee multiplied with surprising rapidity.

The best prior art citations are Hench (Fig. 2), Eisenhart (Fig. 1),

and Allison (Fig. 3). Eisenhart's patent deals with cultivators, a fender merely being shown in the drawings. The patent to Hench also deals with improvements in cultivators; the disclosed fender being quite similar to the one which appellee adopted and later discarded. The Allison patent covered a fender (see Fig. 3), the claim being as follows:

"The arrangement of the rotary perforated clod guards *n n* combined with the plows *b b*, and beams *D D*, constructed and operating as herein set forth."

In his specifications Allison says:

"On the inside of each of the inside plows *b b*, I place clod guards, *n n*, which are little wheels suspended by rods *p p* to the plow beams, and made with spokes or open lattice work of any kind, to allow the finer soil to sift through as they travel alongside of the plows when at work, while the larger clods are turned aside and prevented from being thrown upon the young plants."

Appellant's assignor did not, of course, patent a revolving clod fender as such, but merely the specific construction or fender described in the claims quoted above.

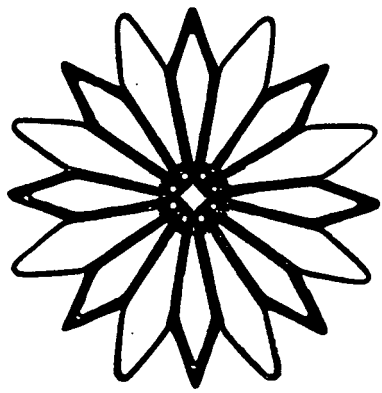
The file wrapper does not detract from the force of appellant's claims. The first claims filed were too broad and were rejected. Present claims 1 and 2 and others were then presented, and the examiner rejected original claim 4, because completely covered by present claim 1, stating that—

"Any novelty in the claim resides in the specific construction of the fender."

With this ruling claimant acquiesced. In this we find nothing inconsistent with appellant's present asserted position. We conclude both claims are valid.

Noninfringement.—Appellee bases its defense of noninfringement upon the use of the word "wire" in the two claims involved. That its infringing fender otherwise responds to the claims in question is not open to dispute.

Herewith is presented a figure of appellee's fender, with each alternate loop removed and loops taken from the Munson clod fender substituted.



Grant appellant's invention is not a pioneer, and his claims are limited, and that he deals merely with an improvement in a revolving fender, yet a fair application of the doctrine of mechanical equivalents, we think, compels us to include appellee's structure. With appellant's device before it, with its merits and advantages fully explained by a representative of the Munson Manufacturing Company, appellee constructed a fender which, outside of the material and the way it was made, is in all respects similar to appellant's fender. Appellee, however, makes its fender of malleable castings.

Although using the word "wire" in its claim, the patentee should not be restricted to this material, nor should appellee be permitted to escape infringement by reason of the substitution of malleable castings for wire. While the substitution of different materials may, under certain circumstances, avoid infringement by the user, such a conclusion could not well be reached in the present case. All the previously used revolving fenders were made of metal, some of steel, some of malleable castings. In the prior art citations of the Patent Office were revolving wire fenders. The novelty could not be said then to lie in the metal. The problem which Munson successfully attacked was solvable, not by the use of a particular metal, but by the construction of the loops. We think infringement is shown.

The decree is reversed, with costs, with instructions to enter a decree in complainant's favor for an injunction and an accounting.

ROSEMARY MFG. CO. v. HALIFAX COTTON MILLS, Inc.

(Circuit Court of Appeals, Fourth Circuit. January 7, 1919.)

No. 1647.

PATENTS ⊂=328—VALIDITY—POWER LOOM.

The Patterson reissue patent, No. 12,159 (original No. 722,243), for power loom, *held* void, as claiming broadly a combination of Jacquard mechanism with a plain power loom equipped with an automatic weft-replenishing device, which was not the patentee's invention.

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

Suit in equity by the Rosemary Manufacturing Company against the Halifax Cotton Mills, Incorporated. Decree for defendant, and complainant appeals. Affirmed.

William W. Dodge, of Washington, D. C., and Robert Fletcher Rogers, of New York City (Caskie & Caskie, of Lynchburg, Va., on the brief), for appellant.

Melville Church, of Washington, D. C. (Titian W. Johnson, of Washington, D. C., and Coleman, Easley & Coleman, of Lynchburg, Va., on the brief), for appellee.

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

ROSE, District Judge. The plaintiff, the Rosemary Manufacturing Company, is the owner of reissued letters patent No. 12,159, granted September 29, 1903, to Samuel F. Patterson. It charges infringement by the defendant, the Halifax Cotton Mills, Incorporated. The lower court dismissed its bill, and it has appealed.

If the patent is valid, its claims can be read upon the looms used by the defendant. The latter, however, denies validity, and in the alternative says it has a license. In the view we take of the first con-

tention, it is unnecessary to consider the second. In substance the claims are for a combination of Jacquard mechanism with a plain power loom equipped with automatic devices for replenishing or renewing the weft thread. The plain hand loom is milleniums old. More than a century has elapsed since men found how it might be driven by steam. The invention of Jacquard was made a hundred years or more ago, and for that length of time the combination of the Jacquard mechanism with the plain power loom has been in general use. As early as 1834 it was perceived that such a combination as the plaintiff now claims would be a great improvement in the art. In the year mentioned two British inventors obtained a patent for a loom which they thought embodied it. In point of fact their device did not work, and their machine does not anticipate the plaintiff's.

In many inventions there are two distinct steps: First, the conception of the general result wished for; second, the discovery of a way of obtaining it. In a large majority of cases, perhaps, the first may be obvious to every one interested in a particular art, and it is the second which calls for the exercise of inventive genius. But that is not always so. It may well be that two or more machines, appliances, or tools are old and well known. Some day it dawns on some one that, if they are combined, new and useful results will be obtained. It may be that, so soon as the advantages of the combination are understood, the means of bringing it about are within the capacity of any fairly skilled mechanic. In a third class of cases inventive genius may be required both in perceiving the combination that is desirable, and in finding out a practical way of making it.

In applying these platitudes to the instant case it will be seen that there is nothing new in Patterson's idea that the combination claimed by him would be useful. That was then at least 65 years old. All the greater would be the presumption of invention in one who after such a length of time found the way to attain the end. One who so succeeded could, it is true, not claim a monopoly of the combination, however brought about, because the conception of that combination was not his contribution to the art. But he would be entitled, not only to a patent for his way of making that combination workable, but also to an extremely liberal construction of his claim, so as to cover a broad range of equivalents. Unfortunately Patterson's claims are in fact for the combination, no matter how effected, and of that he was not the inventor. It is true that some of these claims apparently go somewhat into detail; but the patent does not clearly tell us in what the invention lies, unless it is in the combination, nor have we been able to discover in what other than such combination it is supposed to be found, although we have had the benefit of the testimony of highly qualified experts and of the briefs and oral arguments of able and experienced counsel.

The patent law requires the patentee to tell in what his invention consists. This is the rule, which we may not relax, even if we would; but this is a case which from every standpoint calls for its reasonable application. Why, after the desirability of the combination was perceived, did two-thirds of a century pass before it was effected. The

record shows that for 61 out of the 65 years no one knew how to supply one of the elements. It was not until 1895 that in the Draper-Northrop loom the world first saw an automatic weft-replenishing device successfully applied to even a plain power loom. Some years elapsed before its merits were fully recognized, and in 1899 Patterson says he conceived his invention. At that day all that was open to his appropriation was the method by which he successfully combined the new Draper-Northrop loom with the old Jacquard. If he had limited his claims to the way or ways in which he had achieved this end, the court and the public would have been able to say whether invention was displayed in what he did. In passing on that question he would have been entitled to whatever favorable presumptions were raised by the admitted success of his loom and the use of it by the defendant. As it is, his claims call for more than was open to his monopolization, and are in consequence invalid

Affirmed.

JACKSON v. ENID FOUNDRY & MACHINE SHOPS et al.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1919.)

No. 5151.

PATENTS ⇐328—NOVELTY—METER BOX.

The Jackson patent, No. 1,038,146, for meter box, *held* void for lack of novelty, in view of prior structures in analogous arts.

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

Suit in equity by John T. Jackson against the Enid Foundry & Machine Shops and others. Decree for defendants, and complainant appeals. Affirmed.

G. A. Paul, of Oklahoma City, Okl., and F. R. Cornwall, of St. Louis, Mo., for appellant.

Harry O. Glasser, of Enid, Okl., for appellees.

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

HOOK, Circuit Judge. This is a suit for infringement of patent No. 1,038,146, September 10, 1912, to John T. Jackson, for improvements in meter boxes. The trial court held the patent invalid for want of novelty, and the plaintiff appealed.

The structure described in the patent is composed of separate cast iron side and end members easily transportable in "knock-down" condition, and also arranged to be readily assembled and fastened for use in housing underground water meters, etc. It has no bottom, and the lid or cover is not in controversy. In setting up the box, the ends slip into grooves formed by ribs integral with and along each

perpendicular edge of the side pieces. The inner ribs are not continuous, but are broken near the top and bottom, so as to form recesses to accommodate lugs protruding from the end pieces and to allow them to lie close to the face of the sides. Ordinary stove bolts are passed through the lugs and corresponding holes in the sides. "The inner ribs prevent the end walls from moving inwardly, the outer ribs prevent the end walls from moving outwardly, and the bolts hold the walls together, so that they cannot be accidentally displaced." It was said by an expert for plaintiff that the essence of the invention consisted in the seating of the ribs at the corners of the box forming the grooved joint, with the lug out of contact with the inner rib, but in flat contact with the side walls.

We agree with the trial court that the structure was old in the analogous art of fire boxes of the ordinary domestic stoves. Aside from an old catalogue and physical exhibits received in evidence, common experience and observation teaches us that for very many years the sides and ends of fire boxes in heating and cooking stoves were made stable in practically the same way. In preventing the inward fall or movement of the ends of his meter boxes, plaintiff's noncontinuous or so-called recessed inner ribs of the sides perform in the same way the same function as the familiar lugs or shoulders of fire boxes, and the latter likewise accommodate the bolting device. Of course, the exterior or outside ribs or projections to prevent the cornering walls from falling outwardly were old in various forms.

The decree is affirmed.

LONDON-ARIZONA CONSOL. COPPER CO. v. GILA COPPER SULPHIDE CO.

In re UNION & NEW HAVEN TRUST CO.

(District Court, S. D. New York. January 2, 1919.)

1. RECEIVERS ⟸71—RIGHT OF MORTGAGEE TO INCOME FROM MINE.
   Where a receiver of a mining company has been appointed to conserve the assets of the company, and as such receiver is in receipt of the profits from the operation of the mine under a contract for the sale of its ore, such receiver as against a mortgagee not in possession of the mine is, under the statutes of Arizona, which require a mortgage to be foreclosed by action, entitled to receive and retain such profits.

2. RECEIVERS ⟸52—MORTGAGE FORECLOSURE—EXTENSION OF PRIOR RECEIVERSHIP.
   Where a clause in a deed of trust authorizes the trustee in case of default to take possession of the property covered thereby, and to collect the rents and profits thereof, such clause in an action in the federal court in which a receiver has already been appointed of the rents and profits is a remedy in foreclosure, which authorizes the court in which the receiver has been appointed to extend such receivership from the time of such application by the trustee under the mortgage for the benefit of the mortgagee. Until such application is made the rents and profits belong to the receiver of the mortgagor.

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3. RECEIVERS ⟸52—MORTGAGE FORECLOSURE—ANCILLARY APPOINTMENT OF RECEIVER.

As a court having jurisdiction over the property itself in the state wherein it is located may, in an action to foreclose a mortgage, appoint a receiver of the rents and profits, even where a statute of the state provides "all mortgages * * * shall, notwithstanding any provision contained in the mortgage, be foreclosed by action in a court of competent jurisdiction," an analogous application may be made to the court having jurisdiction over a receiver appointed in another jurisdiction in a suit to conserve assets of the corporation, and that court which has jurisdiction over that receiver may make an order ancillary to the foreclosure suit.

In Equity. Suit by the London-Arizona Consolidated Copper Company against the Gila Copper Sulphide Company. On motion by the Union & New Haven Trust Company, intervener, for order on receiver. Modified order granted.

This is a motion to compel the receiver appointed in a sequestration suit against a corporation to pay to the petitioner moneys collected under the following circumstances: The defendant, an Arizona corporation, executed a mortgage to the petitioner on April 1, 1913, of all its property, consisting of a copper mine in that state, then in possession of the American Smelting & Refining Company, under an agreement by which the latter was to extract the ore and pay the defendant stipulated sums. This mortgage contained, among other provisions, two: Article 13, permitting the mortgagee upon default to enter and collect the rents and profits and pay the principal and interest due; and article 14, permitting a similar entry with right of sale.

The interest upon this mortgage becoming due in April, 1918, a default also occurring in the covenant for a sinking fund, the mortgagee was asked under the mortgage by the bondholders to take possession, and on April 17th appointed an agent to take possession of the mine. The mortgagee on the same day wrote to the American Smelting & Refining Company advising them that it was taking possession through its agent, and demanding payment to itself under the contract between the defendant and the smelting company. To this the smelting company replied on the next day by a mere acknowledgment. On April 20, 1918, the mortgagee notified the defendant that it was taking possession under the mortgage, to which the defendant replied that it would hold the mortgagee responsible.

On April 22, 1918, the defendant consented to a judgment creditor's bill in sequestration of its assets in this district, and a receiver was appointed who was also appointed receiver under a similar bill filed in the United States District Court of Arizona on the 27th. The petitioner's agent did nothing by way of taking physical possession of the mine, but the petitioner filed a bill to foreclose the mortgage in July, 1918, which is still pending and which prays for possession under article 13 of the mortgage.

The moneys in question are those paid in the city of New York by the smelting company to the receiver under the mining contract and now held in a New York bank. They arose after his appointment and up to the filing of this motion. In August, 1918, the petitioner moved apparently in the Arizona foreclosure suit to be allowed to take possession of the mine under the mortgage, which motion was denied on December 14, 1918. The mortgage was expressly made subject to the contract between the defendant and the smelting company.

Origen S. Seymour, of New York City, for Union & New Haven Trust Co.

Wm. P. Maloney, of New York City, for receiver and Gila Copper Co.

LEARNED HAND, District Judge (after stating the facts as above). [1] The mortgagee's theory is that by article 13 of the mortgage it got the right to possession upon demand, after default, and that, even though it had no actual possession, its right to the rents and profits arose at that date. Dow v. Memphis R. R. Co., 124 U. S. 652, 8 Sup. Ct. 673, 31 L. Ed. 565. That was a bill to compel surrender of possession after default under a clause similar to article 13, and an account was allowed from the filing of the bill, which was treated as a demand. Now it is very doubtful whether the letter of April 20th from the mortgagee to the defendant can be treated as a demand for possession. On the contrary, it merely advised the defendant that it was "taking possession." Nor did it secure an attornment from the smelting company by its letter of April 17th and the latter's answer of April 18th, which was only an acknowledgment.

However, I do not think that it makes any difference whether the letters can be construed as a demand or as an attornment, because I regard article 13 of the mortgage, quite as much as article 14, as being a remedy for the foreclosure of the same. It is true that under article 13 there is no right of sale, but only to collect and apply the rents and profits in extinguishment of so much of the debt as may be due; but it is a remedy none the less to pay the debt out of the property, and it seems to me immaterial that no part of the corpus can be touched. In any event, I regard it as much within the scope of paragraph 4113 of the Arizona Civil Code, as article 14. That paragraph reads as follows:

"All mortgages * * * shall, notwithstanding any provision contained in the mortgage, be foreclosed by action in a court of competent jurisdiction."

That this covers foreclosure by sale was decided in Schwertner v. Provident, etc., Association, 17 Ariz. 93, 148 Pac. 910, and, while there is no decision upon the subject, I hold it to cover a provision like article 13. Hence that article cannot give a right of entry without suit. Teal v. Walker, 111 U. S. 242, 252, 4 Sup. Ct. 420, 23 L. Ed. 415.

[2] This being true, the receiver must be held to have collected the funds upon the account of the defendant at least until the filing of the bill of foreclosure. This was an independent bill, as I understand it, praying among other things that the mortgagee might be let into possession. At that time the property was in the actual possession of the smelting company to which the mortgage was subject, and, so far as any other possession was possible, in the possession of the receiver in the Arizona sequestration proceeding. Therefore in no aspect could the prayer be granted. The proper course was to apply in that proceeding for an order extending the receivership for the mortgagee's benefit in the rents accruing under the contract. Sullivan v. Rosson, 223 N. Y. 217, 119 N. E. 405; N. Y. Security Co. v. Saratoga Gas & Elec. Lt. Co., 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132. The prayer under these circumstances does not seem to me to fall within Dow v. Memphis Ry., supra, since it was incapable of being granted

as it stood. However, even if this be untrue, the mortgagee actually moved apparently in the foreclosure suit under that prayer for possession and has been denied. I cannot, therefore, recognize the prayer as a valid exercise of the right conferred under article 13 without directly contradicting this decision. Up to the present time, therefore, there has been nothing which has changed the status of the defendant, and its right, conceded not to exist until default, has not been changed after default. The money already accumulated will therefore not be held upon account of the foreclosure decree.

[3] Nevertheless, I see no reason why this motion should not be treated as one to extend the receivership for the benefit of the mortgagee so far as concerns any profits which the receiver shall first receive in New York. As to any profits received in Arizona, I must leave them to the disposition of that court; but article 13 should be made effective whenever it legally can.

Section 4098 of the Arizona Revised Statutes does not appear to me pertinent. In the case at bar the mortgage did by express terms authorize the mortgagee to take possession. The limitations on that right are that he must exercise it only by foreclosure suit; the substantive right nevertheless exists. Judge Sloan's affidavit is not to the contrary of this. He says that in his opinion the mortgagee cannot get possession, "unless an action is brought to foreclose the same in a court of competent jurisdiction and judgment awards him possession." This appears to me to mean that possession may be awarded in such cases. Where, however, there is already a third party in possession and a receiver entitled to receive the rents, an analogous application may be made to the court having jurisdiction over that receiver. And where the rents arising from a third party's possession are first received by a receiver appointed in this jurisdiction, this court which has jurisdiction over that receiver may make a similar order ancillary to the foreclosure suit. This seems to me the only way in which the rights secured by article 13 can under the circumstances be enforced. Enforced in some way they should be.

It is not clear just what was the purport of the decision of the motion decided in Arizona on December 4, 1918. I need only say that there is no evidence in the record that it concluded the mortgagee upon his right to avail himself of article 13. Such an effect is not to be presumed. Whether it was made in the foreclosure suit or in the sequestration suit does not appear, either; but I cannot see that that makes any difference.

Therefore the petitioner may take an order requiring the New York receiver to hold all moneys for the account of the final decree in the Arizona foreclosure suit which he has received and shall receive from the date of this application. Otherwise the motion is denied.

SPONGE DIVERS' ASS'N, Inc., v. SMITH, KLINE & FRENCH CO.

(District Court, E. D. Pennsylvania. March 12, 1919.)

No. 4260.

1. SALES ⟸168(2)—DELIVERY AND ACCEPTANCE—TIME FOR INSPECTION.
A purchaser of goods with right of inspection *held* to have a reasonable time after their receipt within which to inspect and exercise his option to reject the goods.

2. SALES ⟸182(4)—TIME FOR INSPECTION—QUESTION FOR JURY.
Whether a purchaser of goods exercised his right to reject the goods after inspection within a reasonable time after delivery *held* a question for the jury.

3. ASSIGNMENTS ⟸101, 138—ACTION AGAINST DEBTOR—QUESTION FOR JURY.
In an action by a seller to recover the price of goods sold for the benefit of a use plaintiff to which the account had been assigned with a bill of sale of the goods, where the goods had been returned to the legal plaintiff, actual notice of the transfer to use plaintiff *held* necessary to bind the purchaser, and whether such notice was received was a question for the jury.

At Law. Action by the Sponge Divers' Association, Incorporated, to the use of the Commercial Credit Company, against the Smith, Kline & French Company. On motion by plaintiff for new trial. Denied.

Julius C. Levi, of Philadelphia, Pa., for plaintiff.
James Collins Jones, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The rule for a new trial was taken by the plaintiff. The verdict was for the defendant. Ordinarily, in view of the conclusions we have reached, the case would be disposed of by an order discharging the rule and entering judgment on the verdict. The very capable counsel engaged in the cause have, however, deemed the questions involved of sufficient interest and importance to call for a searching discussion, and have discussed them with fullness and clearness. This more than justifies, it invites, a like fullness, and, so far as we can approach it, a like clarity in stating the conclusions reached and the reasons therefor.

There is in the case a legal plaintiff and a use plaintiff. There is no merit in the case of the legal plaintiff, or, accurately stated, the defense to the claim of that plaintiff is complete.

The case is one of a claim for goods sold and delivered. The defense is that the goods were bought subject to inspection, and upon inspection were rejected and returned to the legal plaintiff who retained them. The real plaintiff is the Commercial Credit Company, to whose use the action is brought. This company, as its name indicates, is one of those institutions which supply credit to manufacturing companies, such as the legal plaintiff, by financing them. This is done upon the system of buying the accounts of the manufacturers and giving notice of the ownership, thus putting upon the debtor the obligation to pay the credit company. The credit company further protects itself by having the manufacturer warrant the account to

be collectible, and by advancing, not the full face value of the account, but a part of it. When the transaction goes through without a hitch, it results in the credit company receiving back the moneys advanced, with interest to date of reimbursement, together with a charge for the service.

The transfer of the account in suit was evidenced by a formal assignment, which also operated as a bill of sale of the goods to which the account referred. Notice of the transaction was given the consignee of the goods by a statement of account accompanying the bill of lading, which statement had stamped upon it plain notice that the ownership of the account and also the title to the goods shipped were in the credit company. There had also been previous dealings of a like kind in which the right of the credit company to receive payment had been recognized and acted upon by the defendant.

A further fact disclosed was that the defendant had retained a relatively small part of the shipment. This they paid for under a stipulation that it was paid and accepted without prejudice.

Another fact in the case was that the goods had been forwarded in two shipments under dates which we will call May 18th and June 4th. These dates may not be accurate, but they will answer to present the point upon which their significance turns. The goods were not inspected until some time in June when the legal plaintiff was notified of the rejection, and after some correspondence the goods were shipped back about the middle of July.

This does not complete the statement of the pertinent facts, but it affords the opportunity to contrast the opposing theories of the parties, and the remaining facts may be best stated in connection therewith.

1. The theory of its case, in one of its aspects, as presented by the plaintiff, was that the defendant having retained a portion of the goods shipped had lost its right of rejection, as it was bound to reject all or accept all.

The opposing theory of the defendant was that the purchase was of sponges, and what has been called the "sponge etiquette" of the case demanded that the defendant retain and pay for the part of the sponges which they kept. This was in deference to a custom or rule of the trade in accordance with which the parties dealt in this instance as they had before. Sponges were known by quality as "pure" and "regular," and were so ordered; the buyer having the right to inspect and reject if the shipment was not up to what was known in the trade by these names. There was difficulty, however, in repacking sponges removed from the case for inspection without damage. In consequence, the requirement was that the consignee pay for the sponges thus inspected whether they were of the contract quality or not. These were the sponges which the defendant kept and for which it paid.

This question of how the goods which were kept came to be kept and the good faith of the defendant in exercising its right to reject was left to the jury, and we still think properly so. It is evident the trial judge did not have in mind that this feature of the case was in controversy. It seems now that the defendant wrote one or more let-

ters which on their face justify the comment of counsel for plaintiff that a grave question of the good faith of the rejection arose. This feature of the charge was a regrettable oversight, but as an appellate question it does not arise either formally or in substance. Not formally, because if the trial judge overlooked the significance of any letters written by the defendant attention should have been called to them. Not in substance, because there is a moral certainty the cause was decided upon an entirely different issue.

[1, 2] 2. The theory of the defense upon another feature of the trial was this: The shipment was, as before stated, returned to the legal plaintiff. When the fact was brought to the attention of the defendant that the shipment should have been returned to the use plaintiff, an effort was made to have the shipment sent back to the defendant. The legal plaintiff took this situation to the use plaintiff. Defendant very strenuously contended that the use plaintiff asserted the control which it had over the legal plaintiff to have the latter refuse to give up the goods. With such a fact finding made, the defendant invoked the doctrine that, as the rights asserted by the plaintiff were equitable rights, it was bound to do equity, and its conduct in this respect was so inequitable as to work a forfeiture of all its claimed rights. The doctrine invoked was the familiar "clean hands" doctrine. The trial judge refused, not, of course, to accept the principle, but to apply it. This was because there was no evidence on which to submit the fact finding. What the use plaintiff, however, did do was to send through its Philadelphia counsel the letter of August 21st. This meant, if it meant anything, that the right of the defendant to reject the goods was denied and acceptance of their return refused. The claim of the use plaintiff was based, not upon the fact that the return had been to the wrong person, but upon the proposition that the defendant had lost its right to reject by not making the rejection promptly. This made the decision of the cause to turn upon the sole issue of the right to reject. The jury were instructed that, if their minds led them to the conclusion that this was the determining issue, they might so decide the cause. In thus deciding it they were further instructed that the defendant had a reasonable time in which to assert its right to reject, and the jury were to find whether the right was exercised within a reasonable time. Both the plantiff and the defendant complain of this instruction. The verdict has removed all practical value from the complaint of the defendant.

The complaint of the plaintiff is: First, that the defendant did not have a reasonable time in which to inspect and reject, but must do so at once; and, second, that, even if it had such reasonable time, the question of reasonable time was not for the jury, but the court, and the court should have held the time to be unreasonable.

We are still of opinion that the defendant had a reasonable time in which to inspect and accept or reject, and that the question of what was a reasonable time was a jury question.

This is the practically important, and, in a sense, the real appellate, question now involved, because there is no doubt that the verdict turned upon this feature of the case.

[3] 3. The theory of the plaintiff upon a third feature of the case was that, admitting the duty of the use plaintiff to give notice of its rights to the defendant, this notice need not be actual notice, but that constructive notice would be sufficient, and that the notice given was such as to be the notice required by law.

In support of this proposition the following, among other authorities, are cited: 5 Corpus Juris, 978; Tritt's Adm'r v. Colwell's Adm'r, 31 Pa. 228; 29 Cyc. 1113.

The pertinence of this proposition will appear from this circumstance. The trial judge refused to charge, as requested by plaintiff, that the defendant had notice of all of the rights of the use plaintiff. As the rights of the use plaintiff were equitable rights dependent upon the fact of notice, the jury were charged that this notice must be actual notice, and the fact of notice was in consequence submitted to them to be found. This was accompanied with such comments that there can be no doubt of the finding upon this question, and that the point is without value as affecting the result of the trial. Nevertheless, if error, although probably innocuous error, there can be no certainty of this, and it would be reversible error. We adhere to the view before expressed that the fact, no matter how strong the evidence in support of it (and its strength was impressed upon the jury), was none the less a fact to be found by the jury.

A new trial is accordingly refused.

As the reasons for a new trial follow the points of charge, we submit with and as part of this opinion a discussion of each point.

UNITED STATES v. ROCK OIL CO. et al.

(District Court, S. D. California. April 9, 1919.)

No. A-53.

MINES AND MINERALS ⊂=36—OIL AND GAS LANDS—WITHDRAWAL FROM ENTRY—PROTECTION OF BONA FIDE OCCUPANTS.

The Pickett Act (Comp. St. §§ 4523–4525), declaring that rights of persons who at date of withdrawal of oil or gas lands are bona fide occupants or claimants thereof, and who then are in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by the order, so long as they continue in such prosecution, being a remedial statute, to be liberally construed to effect its purpose of enabling such bona fide occupants to continue their work to discovery and to acquire title, it is immaterial that, unknown to them, the one from whom they obtained possession had attempted to acquire more land than the law allows, or that they had not posted or recorded notice of intention to locate.

In Equity. Suit by the United States against the Rock Oil Company and others. Complaint dismissed.

Frank Hall and C. D. Hamel, both of San Francisco, Cal., for the United States.

A. V. Andrews, of Los Angeles, Cal., for defendant Rock Oil Co.

A. L. Weil, of San Francisco, Cal., for defendant General Petroleum Co.

Milton T. Farmer, of Bakersfield, Cal., for defendant Standard Oil Co.

BEAN, District Judge (sitting by special assignment). This is a suit to determine the defendants' right to the possession of the southeast quarter of section 23, township 31 south, range 22 east, Mt. Diablo meridian, in the state of California, and to extract and market the oil therefrom. The land is chiefly valuable for its oil contents.

In November, 1908, and prior to discovery, paper locations or declaratory statements were posted on the property in controversy, and also on the northeast quarter of section 26 in the same township, by one Burge, in the name of sundry persons claiming the several tracts under the placer mining laws; they being at the time vacant unoccupied mineral land of the United States open to entry.

In December, 1908, Burge entered into a contract with one Johnson for the development of both quarter sections by drilling for oil thereon, agreeing to give Johnson a certain portion in each tract in case of discovery. In January, 1909, Johnson assigned and transferred his interest in the development contract to T. R. Finley and 21 other persons, all qualified entrymen under the mining laws. Subsequently 6 of the original alleged locators conveyed their interest, if any, to Burge, and the other 2 executed and delivered to him a power of attorney, authorizing him to act for them. Thereafter, and in July, 1909, an agreement was entered into between Burge and Finley and associates, by which the latter surrendered to Burge their claims to the northeast quarter of section 26, in consideration of which Burge transferred and surrendered to them the land now in controversy.

Finley and his associates shortly thereafter entered into a contract with the Logan Oil Company for the development of the latter property, and the oil company was diligently engaged in work leading to discovery on September 27, 1909, when the land was included in the presidential withdrawal order of that date. Work of development continued after the withdrawal, and oil was discovered in December, 1909, involving an expense of a considerable amount of money.

The present defendants have succeeded to the rights of the oil company and Finley and his associates, without notice or knowledge of the alleged fraud, and upon the payment of large sums of money therefor. The government claims that they have no legal right to the property or its contents, because the original locations were fraudulent and void, being made for the purpose of enabling Burge to acquire more land in a single location than the law permits.

This position is strenuously controverted by the defendants. In addition they insist that, however that may be, Finley and his associates were given a legal interest in the property by the provisions of the Pickett Act. That they and the Logan Oil Company, holding

for them at the time of withdrawal, acted in good faith in acquiring possession of the property and without notice or knowledge of the fraudulent character of the Burge locations, if they were fraudulent, and were so acting at the time of the withdrawal is clear and undisputed from the testimony.

The government argues, however, that notwithstanding this fact they are not to be regarded as bona fide occupants or claimants within the meaning of the Pickett Act (Act June 25, 1910, c. 421), which provides that—

"The rights of any person who, at the date of withdrawal, * * * is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work." 36 Stat. 847. (Comp. St. § 4524).

This law is the first legislative recognition by Congress of a statutory right in an occupant of public oil lands prior to discovery. It was manifestly intended to and does expressly give to those coming within its provisions a legal status and a right to continue work of discovery with the attendant consequences. It is a remedial statute and should be liberally construed to effect its purpose (Consol. Mut. Oil Co. v. U. S., 245 Fed. 521, 157 C. C. A. 633), which was to protect bona fide occupants of public oil or gas lands who in good faith were, at the date of a withdrawal, engaged in work leading to discovery, by giving them the right to continue their work to a discovery, and thereafter to extract and market the oil, and to acquire title notwithstanding the withdrawal; and in my judgment it is of no consequence from whom such occupants obtained possession, if, as appears in this case, they were at the date of withdrawal claiming in their own right no more land than they would be entitled to take under the mining laws, and were acting in good faith and with an honest purpose to comply with the law. What right, if any, a transferee of a paper location would acquire as against a withdrawal before discovery, if the original location included more land than he could lawfully take under the mining laws is not here involved. But see Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Merced Oil Mining v. Patterson, 153 Cal. 624, 96 Pac. 90; Id., 162 Cal. 358, 122 Pac. 950.

The so-called locator of mineral lands has no legal status or right to the property against the government, prior to discovery, except such as is given by the Pickett Act. His right, if any, is a mere possessory one, protected and recognized, it is true, against forcible or clandestine entry by a third person, while he is in good faith making a discovery, although open to the entry of others by legal means for the purpose of location. Consol. Mut. Oil Co. v. U. S., supra. When, however, he relinquishes or transfers his possession to another before discovery, the land thereupon becomes subject to location by that other, if he is qualified to make a location. Finley and his associates were qualified locators of an association claim. They were more than eight in number, and under the arrangement between them no one was to receive a larger area of the land located than the law entitled him

to take. The fact that they did not post or record notice of an intention to locate the land is immaterial. The law does not provide for nor require such procedure, and moreover their possession of the property was of itself notice of their rights therein. Butte & Superior Copper Co. v. Clark-Montana Realty Co., 249 U. S. 12, 39 Sup. Ct. 231, 63 L. Ed. ——, decided by Supreme Court of U. S. March 3, 1919.

I can conceive no valid reason why, under the evidence in this case, they should not be deemed to have been bona fide occupants at the date of withdrawal within the meaning of the Pickett Act, although they may have innocently obtained possession in the first instance from some one who was attempting to acquire more land than the law permitted. Their right was not deraigned from, nor did it depend upon, the prior location, but upon the terms of the Pickett Act. They were occupying and holding in their own right and as persons lawfully entitled to acquire the property under the mining laws. Their possession was not tainted with the fraud, if any, of prior attempted locators, whom they did not represent, and in whose interest and for whose benefit they were not holding.

It follows that the complaint must be dismissed; and it is so ordered.

STATE OF OHIO ex rel. ERKENBRECHER v. COX, Governor of Ohio.

(District Court, S. D. Ohio, W. D. January 4, 1919.)

No. 163.

1. COURTS ⟸343—FEDERAL COURTS—MISJOINDER OF PARTIES PLAINTIFF—SUIT BY TAXPAYER JOINING ALL CITIZENS—EQUITY RULE—"JOINT CAUSES OF ACTION."

Under equity rules 26 and 38 (201 Fed. v, 118 C. C. A. v; 198 Fed. xxix, 115 C. C. A. xxix), in suit by a citizen of Ohio and of the United States, joining all citizens of the United States, against the Governor of Ohio, to enjoin transmission by him to the General Assembly of the state of a proposed amendment to the federal Constitution prohibiting the manufacture, sale, etc., of intoxicating liquors within the state, there is a misjoinder of parties plaintiff, as there would be if the suit were brought alone in behalf of plaintiff as taxpayer and all other taxpayers similarly interested; the causes of action not being joint within the rules.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Joint Cause of Action.]

2. INJUNCTION ⟸75—TRANSMISSION OF PROPOSED AMENDMENT TO FEDERAL CONSTITUTION TO STATE LEGISLATURE—ABSENCE OF EMERGENCY.

The suit of a taxpayer in a federal judicial district in the state of Ohio, also as a citizen of the state and the United States, joining with him all citizens of the United States, to enjoin the Governor of Ohio from transmitting to the General Assembly of the state the proposed amendment to the federal Constitution prohibiting the manufacture, sale, etc., of intoxicating liquors, involves no such extraordinary emergency or irreparable injury to constitutional rights as to induce the court to direct the writ to proceed and make a precedent, if necessary, in the sense of applying old principles to new states of fact.

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3. INJUNCTION ⊂⊃75—RESTRAINING TRANSMISSION OF PROPOSED CONSTITUTIONAL AMENDMENT—ABSENCE OF JURY.
A suit will not lie against the Governor of Ohio in behalf of a taxpayer in a federal judicial district of the state, suing as such and as a citizen of the state and the United States, and joining all citizens of the United States, to restrain the Governor from transmitting to the state Legislature the proposed amendment to the federal Constitution prohibiting the manufacture and sale of intoxicating liquors, since the Governor's threatened act of itself cannot injure plaintiff, as even in the absence of action by the Governor the Legislature can act on the amendment.

4. INJUNCTION ⊂⊃75—TRANSMISSION OF CONSTITUTIONAL AMENDMENT BY GOVERNOR—IRREPARABLE INJURY.
Since, if the proceedings in the federal Senate and House in relation to proposing an amendment to the federal Constitution prohibiting the manufacture and sale of intoxicating liquors were not in accordance with the Constitution, any citizen of Ohio may show to its General Assembly wherein they were violative of the Constitution, the action of the Governor of Ohio in transmitting to the Legislature for ratification the proposed prohibition amendment cannot result in irreparable injury to a citizen of Ohio and the United States.

5. CONSTITUTIONAL LAW ⊂⊃70(1), 73—SEPARATION OF POWERS OF GOVERNMENT—RESTRAINING TRANSMISSION OF PROPOSED CONSTITUTIONAL AMENDMENT TO LEGISLATURE.
The District Court of the United States, at suit of a taxpayer and citizen of the state of Ohio and the United States, joining as plaintiffs all citizens of the United States, has no power to enjoin the Governor of Ohio from transmitting to the General Assembly of the state for ratification or rejection the proposed amendment to the federal Constitution prohibiting the manufacture and sale of intoxicating liquors on any ground that the amendment has not been proposed in accordance with the Constitution, as the step would be an interference with the executive and legislative powers by the judiciary.

6. INJUNCTION ⊂⊃75—ABSENCE OF ADEQUATE REMEDY—PROHIBITION OF TRANSMISSION OF PROPOSED CONSTITUTIONAL AMENDMENT.
Merely because a citizen and taxpayer of Ohio and the United States has no adequate remedy or any remedy at law against an amendment to the Constitution of the United States prohibiting the manufacture and sale of intoxicating liquors, illegal because not proposed by Congress as provided by the Constitution, such citizen and taxpayer is not entitled to injunction restraining the Governor of Ohio from transmitting the amendment to the General Assembly of the state for action.

7. STATES ⊂⊃4—RESERVATION OF POWERS NOT DELEGATED TO UNITED STATES.
The addition to the Constitution of the United States of an amendment prohibiting the manufacture, sale, etc., of alcoholic liquors, is an amendment of the organic law, and not prohibited by article 10, reserving to the states or people the powers not delegated to the United States by the Constitution, nor prohibited by it to the states.

8. COURTS ⊂⊃282(1)—FEDERAL COURTS—SUIT NOT INVOLVING FEDERAL QUESTION.
A suit by a citizen and taxpayer of the state of Ohio and the United States, joining as plaintiffs all citizens of the United States, to enjoin the Governor of Ohio from transmitting to the state Legislature for action the proposed amendment to the federal Constitution prohibiting the manufacture and sale of intoxicating liquors, involves no federal question or deprivation of plaintiff's rights prior to the adoption of the amendment.

9. COURTS ⊂⊃328(1)—FEDERAL DISTRICT COURT—JURISDICTIONAL AMOUNT.
District Court of the United States *held* without jurisdiction of suit by a taxpayer and citizen of Ohio and the United States, joining as plaintiff all citizens of the United States, to enjoin the Governor of Ohio from

transmitting to the state Legislature for action the proposed amendment to the federal Constitution prohibiting the manufacture and sale of intoxicating liquors; the jurisdictional amount of $3,000 not being involved.

10. CONSTITUTIONAL LAW ⟸10—AMENDMENTS—"TWO-THIRDS OF BOTH HOUSES"—"HOUSE."

The requirement of Const. U. S. art. 5, that "two-thirds of both houses" shall propose amendments for adoption or rejection by the state Legislatures, means two-thirds of a quorum of each house, and not two-thirds of the whole membership of each, since "house" means a body of men united in their legislative capacity.

11. CONSTITUTIONAL LAW ⟸10—ADOPTION OF AMENDMENT—SUBSEQUENT ATTACK ON ADOPTION.

If the record of the proposal and adoption of an amendment to the federal Constitution can be attacked at all, it can be attacked after the adoption by the states of the amendment, and proceedings had to enforce legislation enacted to carry the amendment into effect.

In Equity. Suit by the State of Ohio, on the relation of Albert G. Erkenbrecher, against James M. Cox, as Governor of Ohio. Bill dismissed.

Aaron A. Ferris, of Cincinnati, Ohio, Everett P. Wheeler, of New York City, and Charles B. Wilby, of Cincinnati, Ohio, for plaintiff.

Jos. McGhee, Atty. Gen., of Ohio, L. D. Johnson, of Urbana, Ohio, Wayne B. Wheeler, of Washington, D. C., Simeon M. Johnson, of Cincinnati, Ohio, and James A. White, of Columbus, Ohio, for defendant.

HOLLISTER, District Judge. Albert G. Erkenbrecher, a resident of Cincinnati and a citizen of Ohio, requested the Attorney General of Ohio to bring this suit, and, having been denied, files this bill against James M. Cox, as Governor of Ohio, a citizen of that state and a resident in the Western division of the Southern district. The suit is brought by complainant—

"as such citizen and as a taxpayer in said district and interested in public welfare * * * in his own behalf and in behalf of the citizens of the state of Ohio, and other citizens of the United States who may desire to join in the action and contribute to the expenses of the suit."

The further allegations of the bill may be briefly stated:

The Governor has now in his custody, ready to be transmitted by him to the General Assembly of Ohio, at its next session beginning January 6, 1919, the proposed amendment to the federal Constitution, reading:

"Sixty-Fifth Congress of the United States of America.

"At the second session begun and held at the city of Washington, on Monday, the third day of December, one thousand nine hundred and seventeen.

"Joint Resolution Proposing an Amendment to the Constitution of the United States.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), that the following amendment to the Constitution be, and hereby is, proposed to the states, to become valid as a part of the Constitution when ratified by the Legislatures of the several states as provided by the Constitution:

"Article ——.

"Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

"Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress"

—which, in his ministerial capacity, and having no discretion, he threatens to and will transmit to the General Assembly, unless restrained by this court. The recital that "two-thirds of each House" concurred in the proposed amendment was and is untrue and misleading, in that, when the Senate of the United States finally voted on the proposed amendment it was composed of ninety-five members elected and qualified, of whom only forty-seven voted in favor of the proposed amendment, a vote less than two-thirds of the membership of that house; that when the vote was taken in the House of Representatives, its total membership was four hundred and thirty-four members elected and qualified, and that only two hundred and eighty-two members voted in favor of the proposed amendment, a vote less than two-thirds of the membership of that house.

The vote in the Senate and in the House was not in accord with, and was in violation of, article V of the Constitution of the United States, which reads:

"Article V.

"'The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article, and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

The transmission of the proposed amendment to the General Assembly "would operate as and be a fraud upon the citizens of Ohio and of the United States, in that it would certify that two-thirds of each House of the Congress had voted in favor of the alleged amendment, whereas less than two-thirds of each house had voted therefor."

From the beginning a large part of the revenue of the government has been derived from taxes upon distilled spirits, wine, and beer, which also have been subject to duties when imported, and that the revenue of the United States from excise duties upon these commodities during the fiscal year ending June 30, 1918 was $284,008,512.

The United States has encouraged the production of wine and beer

by giving premiums to the producers of these commodities, and also by discriminative duties upon imported wine and beer, with the result that over $1,000,000,000 have been invested in breweries, vineyards, the production of barley and hops, and the manufacture of wine. The by-products from the manufacture of beer are yeast cakes and brewers' grains, of nourishing quality as a food for cattle; such products amounting annually to over $20,000,000. The adoption and enforcement of the proposed amendment would destroy in part and impair in part the value of the capital so invested, and diminish the revenues of the government, which would necessitate the imposition of other taxes additional to those now levied and be a heavy burden upon the taxpayers of this country.

The proposed amendment is not in any legal sense an amendment to the Constitution, but, if ratified by three-fourths of the states, would tend to subvert the republican form of government established by the Constitution and ratified by the people, and would violate its spirit, intent, and meaning. Its ratification would be in derogation and in violation of the Tenth Amendment, reserving to the states and to the people all powers not delegated to the United States by the Constitution nor prohibited by it to the states, and; if ratified, would deprive citizens of liberty and property without due process of law, in violation of the Fourteenth Amendment.

The complainant has no other remedy except by injunction in equity, for which he prays, both preliminary and perpetual, enjoining James M. Cox, as Governor, from transmitting the proposed amendment to the General Assembly at its next or any subsequent session.

The issues so tendered are raised by the answer.

The case was argued and submitted December 24, 1918. Some of the briefs were filed later, the latest December 31st, and the case should be decided before Monday, January 6, 1919, the day on which the General Assembly of Ohio convenes. The time is short, but the court has been able to give some—it is hoped adequate—consideration to the issues now herein dealt with.

1. Counsel agree that, although the Governor's official residence is at Columbus, in the Eastern division of this Southern district of Ohio, yet he is a resident of Dayton, in the Western division, and that, so far as the defendant's residence is concerned, the bill is properly filed in the Western division.

[1] 2. Equity rule 26 (201 Fed. v, 118 C. C. A. v.) provides, among other things:

"But when there is more than one plaintiff, the causes of action joined must be joint."

Rule 38 (198 Fed. xxix, 115 C. C. A. xxix) reads:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

There is a misjoinder of parties plaintiff. Plaintiff sues as a taxpayer in this district, and also as a citizen of Ohio and of the United States interested in the public welfare, and as such joins with him all

the citizens of the United States. Some of these are no doubt taxpayers in this district, and some taxpayers in other parts of the United States. But it is probable that the majority of citizens of the United States are not taxpayers, though they are all interested in the public welfare. The taxpayer's interest is quite different from the public interest all citizens have in maintaining the integrity of the Constitution. One is a property interest; the other intangible and personal in its nature, having to do with political rights.

There is more than one plaintiff, and the injury for which the remedy of injunction is sought affects some of the plaintiffs in one way and all in another. These causes of action are not joint.

The bill, under its allegations, is not properly a "class action," because the classes claimed by plaintiff to be represented by him are different, as above stated. For these reasons the bill cannot be maintained.

Moreover, if the suit were brought alone in behalf of plaintiff as a taxpayer, and all other taxpayers similarly interested, there would be a clear misjoinder. The right of each is a separate, individual right, not a right common to all taxpayers. In any event, an injunction at plaintiff's instance will not issue to protect the others. Scott v. Donald, 165 U. S. 107, 115, 116, 17 Sup. Ct. 262, 41 L. Ed. 648.

[2] 3. If the plaintiff had sued solely as a citizen, claiming to represent also all the citizens of the United States, it might be said that all citizens have a common interest in safeguarding the Constitution and in the maintenance of its integrity to the last detail. But it is only in comparatively recent years that the writ of injunction was issued to protect other than property rights. Mugler v. Kansas, 123 U. S. 623, 672, 8 Sup. Ct. 273, 31 L. Ed. 205; In re Debs, 158 U. S. 564, 583, 584, 15 Sup. Ct. 900, 39 L. Ed. 1092.

It may be, if the threatened act of the Governor involved an extraordinary emergency, and, but for injunction, constitutional rights would be irreparably injured, the court would direct the writ to proceed, and make a precedent, if necessary, in the sense of applying old and well-established principles to a new state of facts (the subject is discussed at length in State of Ohio ex rel. J. M. Sheets, Attorney General, v. Hobart, et al., 8 Ohio N. P. 246, 269, 270); but this case presents no such emergency, and the writ will be denied.

[3] 4. Of course, the Governor has not in his custody the proposed amendment. What he has in his custody is a certified copy of the joint resolution of the Senate and House of Representatives proposing the amendment (which is set forth at length), signed by the Speaker of the House and the Vice President of the United States, certified by the Secretary of the Senate and by the Clerk of the House, in both of which is recited, "two-thirds of each house concurring therein." This certificate was sent to the Governor by the Secretary of State, who, through no requirement of law, but in compliance with custom, transmitted a similar copy to the Governor of each state.

The Constitution does not provide how the passage of such joint resolution may be promulgated, nor is there any act of Congress on the subject. The provision found in 1 Comp. Stat. 1901, § 205, p. 104

(Comp. St. § 303), has to do only with the promulgation, by publication by the Secretary of State in the newspapers, of the adoption of an amendment.

There is no requirement in the Constitution or laws of the United States imposing any duty on the Secretary of State to transmit to the Governor the evidence of the passing of such a resolution. Neither the Constitution and laws of the United States nor the Constitution and laws of Ohio impose any duty upon the Governor to transmit the certified copy of the joint resolution to the General Assembly of Ohio. The Governor admits his purpose to do so, and this suit is to restrain the threatened act. In so doing he does not act as Governor; he acts as a private citizen, who happens to be Governor at the time. If he should refuse, no one could compel him by mandamus to do so.

How, then, can he be enjoined, as Governor, from an act which is merely a convenient method of getting the information to the General Assembly in a somewhat formal way that the initial step for the proposed amendment had been taken by the two Houses of Congress? Of course, if the act itself of the individual was that which did the wrong; if the Governor, acting through no authority or requirement of law and in his individual capacity, would or could injure complainant, and there were no adequate remedy at law, and the complainant's injury would be irreparable, no doubt a court of equity would reach out its strong arm and prevent it. But such injury, if any, as the complainant may receive by the ratification of the amendment by the General Assembly of Ohio, is not done by the Governor in transmitting this certificate.

It is not open to doubt that every member recently elected to the General Assembly knows of the existence of the proposed amendment, and every one knows that the subject is of such interest in the state of Ohio, as well as elsewhere, that there are members of the General Assembly about to sit who will see to it that the subject is brought to the attention of the General Assembly. Moreover, it is the right of every citizen to petition the General Assembly, showing the purported passage of the joint resolution and asking for action thereon. Whatever injury, if any, may result by the consideration by the General Assembly of the proposed amendment, will follow, whether the Governor acts or not. The Governor's threatened act cannot of itself do plaintiff any injury of any kind, and therefore the suit will not lie against him.

[4] 5. The writ of injunction is an extraordinary remedy, to be issued only when the threatened injury, unless restrained, would be irreparable. If the proceedings in the Senate and in the House were not in accordance with the applicable provision of the Constitution, plaintiff, or any citizen of Ohio, by petition, if no member of the General Assembly acts, may show to the General Assembly, if it can be shown, in what respect they are violative of the Constitution. It cannot be assumed in advance that the General Assembly of Ohio will take any action violative of the Constitution of the United States. Moreover, if the two houses of the General Assembly should take a

vote on the subject, one cannot say in advance what the result would be. The proposed amendment may be rejected, because the members of the General Assembly may think the proceedings at Washington were not in consonance with the Constitution, or because of insufficient votes in the affirmative. Indeed, the General Assembly may take no action at all. So far as one state in the Union is concerned, out of the three-fourths necessary for the adoption of the amendment, it may be that the affirmative action of the Ohio General Assembly would be an injury to the plaintiff, if he were otherwise in a position to claim injury; but the writ of injunction does not issue to restrain acts which may or may not be injurious.

Moreover, if the plaintiff is injured, that injury does not arise until the proposed amendment is adopted by the respective Legislatures of three-fourths of the states. Who can say that that result will come to pass within the seven years the state Legislatures are given to act? The act of the Governor and the affirmative act of the General Assembly would not be an irreparable injury, or any injury, to the plaintiff, if the requisite number of states, by their Legislatures, did not adopt the amendment. However that may be, and whatever the extent of the injury to the plaintiff affirmative action by the General Assembly of Ohio might be, it cannot be said that the act of the Governor in transmitting this certified copy constitutes an irreparable injury to the plaintiff.

Since restraint on the Governor is the only relief sought, injunction must be denied, because no irreparable injury will result from what he threatens to do.

[5] 6. The case is anomalous. The judicial department of the government, either national or state, cannot interfere with the preliminary proceedings of either the executive department or the legislative department with respect to matters committed by the Constitution to their charge. So far as this court is aware, judicial action has never been taken, or even thought of, against any step of the legislative department leading up to the enactment of a law, however subversive of the Constitution. It is only after proceedings are taken to enforce the unconstitutional law that the courts are called upon to act at all; indeed, the question whether the courts had any power in such case was not settled until some time after the adoption of the Constitution. There are many, even now, who claim the judicial department has no power to declare a legislative act to be unconstitutional; the Supreme Court of the United States to the contrary notwithstanding.

By what right, then, can a court of the United States, or any court, interfere with the preliminaries preceding legislative action by the General Assembly of Ohio? The legislative department of Ohio consists of a General Assembly of two houses, with whose proceedings no court, national or state, is concerned until the time comes when, by some enactment, constitutional rights of citizens, lodged either in the national or in the state Constitution, have been injured. Surely the courts are not concerned with any preliminary proceedings leading up to legislation. This suit is against the Governor in his official capacity. Even if it is assumed that his threatened act is official, it is now held that this court has no power to enjoin him from acting.

[6] 7. It may be plaintiff has no adequate remedy, or any remedy, at law; but it does not necessarily result that for that reason alone he is entitled to an injunction. Plaintiff says his rights are injured by the failure of the houses of Congress, in passing the resolution, to observe the requirements of the Constitution, and, since he has suffered a wrong, there must be a remedy. His conclusion is good, but his premise is bad. His right does not arise, and the wrong is not suffered, until the Legislatures of three-fourths of the states have voted to adopt the amendment. Then will be the time for him to show, if he can, that the resolution of the two houses of Congress was no resolution at all, and the action of the states thereon a futility. For this reason, also, this suit cannot be maintained.

[7] 8. It is urged that such a subject as is involved here is within the powers reserved to the states or to the people, and article 10 of the Constitution is invoked:

"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."

Counsel do not favor the court with decisions on this subject, but, granting to the claim all that may be argued for it, it must be said that the members of the Senate and the members of the House are the representatives of the states and the representatives of the people, respectively, to whom is given the power to propose amendments to the Constitution, which become such only when the representatives of the people in three-fourths of the states concur. Reserved powers are so called because they have never been surrendered. When the requisite number of states concur, the people surrender to the United States additional power. It may be absolute, or it may be concurrent, becoming absolute only when Congress shows an intention of occupying the whole field embraced by the particular subject.

One of the declared purposes in the preamble to the Constitution is to "promote the general welfare." It is not necessary to dwell at length on the evils of the liquor traffic. Mr. Justice Field, in Crowley v. Christensen, 137 U. S. 86, 91, 11 Sup. Ct. 13, 34 L. Ed. 620; Mr. Justice Harlan, in Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. Everybody knows them. Even those interested in the business do not deny the wisdom of regulating the traffic, so as so far as possible, to minimize its evils. The states, in the exercise of police powers, may prohibit, and there seems to be no reason why the states should not surrender, in the method provided by the Constitution, further of their reserved powers, and thus delegate them to the national government. So, when the surrender is made by the people in the way provided, the amendment is by the people, in whom lay the power to make their Constitution, and in whom lies the power to change it, and to add to it for the public welfare, if they consider the subject to involve the public welfare.

But it is urged, as I understand it, that an amendment must be germane to that which it amends, and that there is no clause in the Constitution to which the proposed amendment is in any way related. Assuming, however, that it is not, yet one is not willing to go so far

as to say that the people have limited their right to surrender their power over any subject theretofore reserved, because unrelated to any power theretofore surrendered. The amendment goes to the Constitution as a whole, not necessarily to any particular clause in it. The Constitution is the organic and fundamental law, but that law may be changed, added to, or repealed, if that is done by the states and the people themselves in the way provided. Their power to better it, as they think, is not to be hamstrung by mere rigidity of definition of words. Adding something new to the organic law is an amendment of the organic law, in the judgment of this court.

[8] 9. Moreover, plaintiff's rights do not arise, and no wrong is done to him, until the attempt to delegate the reserved power is at least apparently consummated and something is done in the exercise of the power. The Legislature of Ohio may not ratify the proposed amendment. If it does, the Legislatures of three-fourths of the states may not ratify it. Who can tell? If the required number ratify, then will be the time, as hereinbefore said, for the plaintiff to assert his rights and seek to redress his wrongs. No present constitutional right is involved in this behalf, and the same may be said, once for all, of every alleged deprivation of constitutional rights in this case. This case, therefore, involves no federal question.

It is said in St. Joseph Co. v. Steele, 167 U. S. 659, 662, 17 Sup. Ct. 925, 926 (42 L. Ed. 315):

"A federal question, * * * to confer original jurisdiction on a Circuit Court of the United States, * * * must be a real substantive question, on which the case may be made to turn."

The suit must involve, necessarily, a question depending on the laws, Constitution, and treaties of the United States. Railroad v. Myers, 115 U. S. 1, 12, 5 Sup. Ct. 1113, 29 L. Ed. 319. Can it be doubted that, if plaintiff is defeated in this case, he may still raise the question after the requisite number of states has ratified, and Congress, or the state of Ohio, or both, have taken some action to render the amendment effective? He can show then, as well as he can now, if he can at all, the actual number of those present in each house when the vote on the resolution was taken.

"The suit must be such that some right, privilege, immunity, or title on which recovery depends will be defeated by one construction of the Constitution or laws, or sustained by a contrary construction." Simkins' Federal Equity Suit, 135.

By the decision of this case against him, the plaintiff loses no constitutional right.

[9] 10. The jurisdiction of this court is limited to actions involving $3,000, not including interest and costs. The bill alleges that the jurisdictional amount is involved. Looking at the plaintiff, or those he represents, as taxpayers, there is no allegation that any particular sum to him, or to any one of them, is involved; and considering the plaintiff, and those he claims to represent, as citizens of the United States seeking to remedy a political wrong, there is no amount of money involved.

It is alleged that the result of the Prohibition Amendment would be a loss to the government of many millions of dollars, which would have to be made up otherwise. That may be true temporarily, but it may also be that the results of prohibition will be such as to make a wealthier people, a people better able to bear the financial burdens of government, and that a temporary loss of revenue from this particular source would be more than counterbalanced by increased capacity to carry those burdens. It was said by Mr. Justice Grier in the License Cases, 5 How. 504, 631 (12 L. Ed. 256):

"If a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she would be the gainer a thousand fold in the health, wealth, and happiness of the people."

In any event, it is manifest that the increased burden would come through indirect taxation, impossible of ascertainment, highly vague and conjectural, and not of the kind measurable by the law. Moreover, if it were ascertainable, it would have to be shown that the loss to at least one citizen would amount to the jurisdictional amount, because individual claims of unjust taxation cannot be aggregated for the purpose of making a sum within the jurisdiction of this court.

Counsel for plaintiff expressly disclaim appearing for any one interested in the liquor traffic. Indeed, they say they have declined retainers from some so interested. They and their client take the high ground that their interest lies deeper than questions of property rights, and grows out of their love of country and their desire to protect it, by insisting that all the safeguards of the Constitution be maintained inviolate. The court believes them.

But, if they did represent such interests, it was settled by the Supreme Court long ago that no one has an inherent right to conduct that traffic, and if any one makes an investment in it, however large, he does it with the knowledge that such property rights as he would otherwise have in the business he has built up are necessarily overborne by the greater right of the public, through the exercise of police power, to enhance the public health, morals, and welfare. So no right of pecuniary value, or any value, is involved in this behalf.

It was said by Mr. Justice Matthews, in Barry v. Edmunds, 116 U. S. 550, 560, 561, 6 Sup. Ct. 501, 507 (29 L. Ed. 729):

"The amount of damages laid in the declaration, however, in cases where the law gives no rule, is not conclusive upon the question of jurisdiction; but if upon the case stated there could legally be a recovery for the amount necessary to the jurisdiction, and that amount is claimed, it would be necessary, in order to defeat the jurisdiction since the passage of the act of March 3, 1875, for the court to find, as a matter of fact, upon evidence legally sufficient, 'that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case' within the jurisdiction of the court. Then it would appear to the satisfaction of the court that the suit 'did not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.'"

When an injunction is sought, the amount in controversy is the value of the injunction. Bureau v. Sells (D. C.) 211 Fed. 379, 383. The injunction sought here has no pecuniary value to the plaintiff,

measured by any legal standard. Moreover, it has been hereinbefore shown that the act sought to be enjoined will not in itself deprive the plaintiff of any right, monetary, personal, or political.

It is this court's opinion, not upon "personal conviction," but on facts distinctly appearing, that the jurisdiction is only colorable, and does not really exist, and the bill should be dismissed upon this ground also.

11. It is urged for defendant that the certificate showing the concurrence of two-thirds of each house is conclusive, and reliance is had upon Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, in which it was held:

"The signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses that such bill has passed Congress; and when the bill, thus attested, receives the approval of the President, and is deposited in the public archives according to law, its authentication as a bill that has passed Congress is complete and unimpeachable."

It was said by Mr. Justice Harlan (143 U. S. 680, 12 Sup. Ct. 500, 36 L. Ed. 294):

"We are of opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either house, from the reports of committees, or from other documents printed by authority of Congress, that the enrolled bill designated 'H. R. 9416,' as finally passed, contained a section that does not appear in the enrolled act in the custody of the State Department."

Also (143 U. S. 671, 12 Sup. Ct. 497, 36 L. Ed. 294):

"Although the Constitution does not expressly require bills that have passed Congress to be attested by the signatures of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication.

"The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill thus attested has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him; and when a bill thus attested receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. * * * The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated, leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

The journals of the two houses, though required by the Constitution to be kept, were held not to be open for investigation in judicial proceedings. There is ground for holding that as against such a certificate as is involved here the court cannot enter into an inquiry as to the make-up of either house at the time the vote was taken; but, as it is not necessary in the disposition of this case to decide the question, no opinion is here expressed thereon, and the next inquiry goes to the merits of the question:

[10] 12. What is meant in article 5 by the expression, "Whenever two-thirds of both Houses shall deem it necessary?" It is argued that "two-thirds of both houses" means two-thirds of the members elected to those houses, and not two-thirds of a quorum. If this is right, then the joint resolution did not receive the necessary two-thirds in either house. It is argued with much force that, when the framers of the Constitution required action by a fractional part of the members to be effective with respect to certain subjects-matter, the fraction always had coupled with it the "members present." Article 1, § 3, par. 6, provides, in the trial of impeachments by the Senate:

"* * * And no person shall be convicted without the concurrence of two-thirds of the members present."

Article 1, § 5, par. 3, as to the demand for the ayes and nays:

"* * * And the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal."

As to making treaties, article 2, § 2, par. 2:

"* * * He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. * * *"

But, when the subject-matter is an amendment of the Constitution, or the passing of an act over the President's veto, it is required that "two-thirds of both houses" shall concur, as to one, and "two-thirds of that house" in which the bill originated shall agree to pass the bill over the veto, as to the other. This, it is said, shows conclusively the purpose to require, in these especially important matters, the concurrence of two-thirds of the entire membership, as distinguished from two-thirds of a quorum or two-thirds of those present.

What does "house" mean? Webster says:

"One of the estates of a kingdom assembled in Parliament or Legislature; a body of men united in their legislative capacity; as the House of Lords, or Peers, of Great Britain, the House of Commons, the House of Representatives."

So, when we speak of "both houses," we mean the members meeting in their legislative capacity. While passing such a resolution is not a legislative act, in the sense that it is the enactment of a law, yet it is action by the legislative bodies assembled in their legislative capacity. Indeed, a resolution is the first step in that which may result, as has often resulted, in establishing, and in that sense enacting, the fundamental law which is the supreme law of the land. In passing the resolution each house acts in the same capacity in which it enacts ordinary legislation; and when we say that a bill or resolution has passed the Senate or House, as the case may be, we mean that it has received the number of votes required for the transaction of business.

Section 5 of article 1 provides:

"Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business. * * *"

A part of the business of the Senate and of the House is to pass laws; a part of its business is to pass joint resolutions proposing amendments to the Constitution. If a quorum is present, they may transact that business. If a majority of a quorum in either house votes for a bill, it passes that house. If two-thirds of a quorum in each house votes for the resolution, it passes the house, in the ordinary course of the legislative business intrusted to it by the Constitution.

In United States v. Ballin, 144 U. S. 1, 5, 12 Sup. Ct. 507, 509 (36 L. Ed. 321) the Supreme Court, speaking through Mr. Justice Brewer, said:

"The Constitution provides that 'a majority of each [house] shall constitute a quorum to do business.' * * * Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the Constitution requires is the presence of a majority, and when that majority are present the power of the House arises."

And at page 6 of 144 U. S., at page 509 of 12 Sup. Ct. (36 L. Ed. 321):

"* * * The general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations; as, for instance, in those states where the Constitution provides that a majority of all the members elected to either house shall be necessary for the passage of any bill. No such limitation is found in the federal Constitution, and therefore the general law of such bodies obtains."

Among the many cases cited is State v. Deliesseline, 1 McCord (S. C.) 43, 49, in which it is said:

"For, according to the principle of all the cases referred to, a quorum possesses all the powers of the whole body; a majority of which quorum must of course govern. * * * The Constitutions of this state and of the United States declare that a majority shall be a quorum to do business; but a majority of that quorum are sufficient to decide the most important question."

Since the "body" is the "house," and a majority of a quorum transact the business of the house in passing a bill, so two-thirds of a quorum passes a resolution proposing an amendment. So it seems to this court.

If the plaintiff's contention is right, then if, through sickness or unavoidable cause, or because of vacancies, two-thirds of the authorized membership is absent, action on such a joint resolution could not be taken at all, and the "business of the house," a part of which comprehends resolutions, could not proceed in that behalf, although a quorum for the transaction of all the business of the house is present. If the framers of the Constitution had intended, by the use of the word "house," a different meaning from its universal meaning when applied to the ordinary business of enacting laws, it would seem that they would not have left such an important matter to conjecture and inference, and would have said "two-thirds of the membership of the house," rather than "two-thirds of the house." They knew very well what "house" meant, and so they said "two-thirds of the house," instead of making an express limitation, as they did in the other cases mentioned, to a fractional number of the members present.

It cannot be said successfully that the Constitution clearly intends that the two-thirds shall be of all the members of the house. It would seem that what was said by Mr. Justice Brewer is conclusive of the matter, that the exception is—

"in those states where the Constitution provides that a majority of all the members elected to either house shall be necessary for the passage of any bill. No such limitation is found in the federal Constitution, and therefore the general law of such bodies obtains."

One feels one is on firm ground when one stands with such an authority as Judge Cooley, who, in his treatise on Constitutional Limitations (chapter VI, p. 201), says:

"A simple majority of a quorum is sufficient, unless the Constitution establishes some other rule; and where, by the Constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of bills, two-thirds or three-fourths of a quorum will be understood, unless the terms employed clearly indicate that this proportion of all the members, or of all those elected, is intended."

See, also, Warehouse v. McIntosh, 1 Ala. App. 407, 56 South. 102; State v. McBride, 4 Mo. 303, 29 Am. Dec. 636; Southworth v. Railroad, 2 Mich. 287; Smith v. Jennings, 67 S. C. 324, 45 S. E. 821; Tucker on the Constitution, vol. 1, p. 327.

It is true that the principles of the Constitution are fundamental and are designed to be permanent. Chief Justice Marshall, in Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60.

"The great principle to be sought is to make the changes practicable, but not too easy, to secure due deliberation and caution, and to follow experience, rather than to open a way for experiments suggested by mere speculation or theory." Story on the Constitution, § 1827, citing (section 1830) No. 43 of the Federalist, in which Hamilton and Madison expressed similar views.

In Elliott's Debates, vol. 5, p. 431, Hamilton is reported to have said:

"The national Legislature will be the first to perceive, but will be most sensible to, the necessity of amendments, and also to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power, as the people will finally decide in the case."

Counsel for plaintiff frankly say:

"There was no actual definition anywhere in the Debates, so far as we have discovered, defining just what the term 'two-thirds' meant."

It is a remarkable fact that nothing appears in the Debates on the subject. No doubt "house" was considered, when used in connection with a proposed amendment, to mean what the word, as well understood, meant at that time in connection with the passing of laws by legislative bodies. Men of strong mind and patriotic purpose have entertained the same views as plaintiff, and the question has been raised many times.

In 1861 (36 Cong., 2d Sess., Journal, p. 383) it appeared:

"Mr. Trumbull raised a question of order whether, the joint resolution being a proposition to amend the Constitution of the United States, it did not require an affirmative vote of two-thirds of the members composing the Senate

to pass the same. The President decided that it required an affirmative vote of two-thirds of Senators present only. On appeal, the decision was sustained—yeas, 33; nays, 1."

On February 26, 1869, a Suffrage Amendment to the Constitution was proposed. The Senate voted yeas 39, nays 13. Upon a point of order made by Mr. Davis that, as the Senate consisted of 74 members, a vote of 50 was necessary to constitute two-thirds, Mr. Trumbull said that the same question was raised in Buchanan's administration, when, after a debate, Mr. Breckenridge in the chair, it was voted that the two-thirds required was two-thirds of the Senators present, if a quorum, and thereupon the view of Mr. Trumbull was adopted.

On the joint resolution proposing the amendment providing for the election of Senators May 11, 1899, Mr. Hill called attention to the language of article 5. In ruling upon the point of order the Speaker (Mr. Reed) said:

"The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision of the Constitution says 'two-thirds of both houses.' What constitutes a house? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a house to do all the business that comes before the house. Among the business that comes before the house is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the house is present the house is constituted, and two-thirds of those voting are sufficient in order to accomplish the object. It has nothing to do with the question of what states are present and represented, or what states are present and vote for it. * * *"

The vote on the resolution was—yeas, 184; nays, 11. Two-thirds of the whole house were not present. There were, at these times, great men and great lawyers in the Senate and in the House, men just as jealous of maintaining to the last degree the integrity of the Constitution as the plaintiff or his counsel or any one can be. They were satisfied that they were proceeding in the way the Constitution provided. If plaintiff is right, the joint resolution proposing the amendment which became the very first amendment to the Constitution had no constitutional sanction.

The court is not sufficiently advised to say how many of the amendments were proposed by resolutions passed by less than two-thirds of the membership of each house; but the joint resolution proposing the Fourteenth Amendment and the joint resolution proposing the Fifteenth Amendment were invalid, if plaintiff is right, and in the innumerable instances in which persons and property have been protected by the courts by virtue of the provisions of those amendments, the courts have had no sanction for their action.

It is argued that, when joint resolutions proposing these amendments were adopted, the 11 Confederate States had seceded, and were not in the Union. But the theory of the North, the theory to which no one held more firmly than Mr. Lincoln, was that the Southern States never were out of the Union. The original purpose of the North in the Civil War was to maintain the integrity of the Union and to compel the Southern States to maintain it. The abolition of slavery was wholly incidental.

There were just as many votes necessary in passing the joint resolution proposing these amendments as when the First Amendment was proposed and the last is now proposed. It is the judgment of this court that two-thirds means two-thirds of a quorum.

[11] 13. But counsel say:

"None of the prior amendments could possibly be affected by the decision of this case, because those prior amendments were ratified on a record which showed a compliance with the Constitution. This necessarily must be presumed. 'Omnia præsumuntur rite et solemniter esse acta.' Those prior amendments are like judgments by default, where a good defense on the facts existed and was not interposed. The judgments have become final, irrevocable, and unreversible, and have every force and effect."

One cannot agree with this. The "record" showing the compliance with the Constitution in those instances is no more solemn and conclusive after adoption by the states than it is before their adoption. If the record can be attacked at all, it can, in the judgment of this court, be attacked after the adoption by the states of the amendment and proceedings had to enforce legislation enacted for the purpose of carrying the amendment into effect.

For the reasons given, the bill will be dismissed.

In re POLLOCK.

(District Court, S. D. New York. July 1, 1918.)

1. ALIENS ⟸61—NATURALIZATION—ALIEN ENEMIES.
   Prior to Act May 9, 1918, an alien enemy, filing naturalization petition subsequent to declaration of war, could not be naturalized during war.
2. ALIENS ⟸68—NATURALIZATION—DECLARATIONS.
   Prior to Act May 9, 1918, declarations of intention made prior to September 27, 1906, were not available unless naturalization petition was filed within seven years from that date.
3. ALIENS ⟸68—NATURALIZATION—DISMISSING PETITION.
   Dismissal of naturalization petition, on ground not going to petitioner's fitness, does not prevent another petition from being based on same declaration of intention.
4. ALIENS ⟸61—NATURALIZATION—ALIEN ENEMIES.
   Under Act June 29, 1906, § 4, subd. 11, as added by Act May 9, 1918 (Comp. St. 1918, § 4352) and section 3 of Act May 9, 1918 (Comp. St. 1918, § 4352a), an alien enemy, filing naturalization petition before January 31, 1918, may avail himself of declaration of intention made prior to September 27, 1906, provided his certificate of naturalization is granted during 1918.
5. ALIENS ⟸68—NATURALIZATION—AMENDING PETITION.
   Alien enemy, filing naturalization petition before enactment of Act May 9, 1918, is entitled to benefit of that act, and may, before hearing, amend his petition accordingly.

In the matter of the petition of Hugo Pollock for naturalization. Application to amend petition. Motion granted to extent indicated.

Theodore J. Breitwieser, of New York City, for the motion.

Francis C. Caffey, U. S. Atty., of New York City (John E. Walker, Asst. U. S. Atty., of New York City, of counsel), opposed.

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

MAYER, District Judge. This is an application to amend a petition for naturalization, so as to base it on petitioner's declaration of intention made April 12, 1899, and "for an order granting a certificate of naturalization upon the petition so amended."

The facts bring up for construction certain provisions of a recently enacted statute and will be fully stated. Pollock, the petitioner, was born in Austria in 1866, and came to the United States in 1889, where he has resided continuously ever since. On July 12, 1899, Pollock made his declaration of intention to become a citizen in the court of common pleas, Philadelphia, Pa., where he then resided. On November 17, 1910, Pollock filed his petition for naturalization in this court, and that petition was set down for hearing for February 21, 1911. In November, 1910, Pollock, according to his affidavit, fell seriously ill and was confined to his bed for a long period—and beyond February 21, 1911—and was subsequently taken to a hospital to be operated upon, and for many months thereafter continued to be ill. On February 21, 1911, because of Pollock's failure to appear, the hearing set for that day was adjourned without date, and on March 25, 1913, the petition was dismissed for lack of prosecution. In the summer of 1913 Pollock learned that his petition had been dismissed, and was advised that his only course was to make a new declaration of intention. This he did on January 7, 1916, and thereafter, on January 7, 1918 (exactly two years having elapsed), he filed his petition for naturalization, which is now pending in this court. Meanwhile, and shortly before Pollock filed his pending petition, viz. on December 7, 1917, our government declared war against Austria.

[1, 2] As the law stood prior to the act of May 9, 1918, infra, (a) an alien enemy, who had filed his petition subsequent to the declaration of war against the country of which he was a subject, could not be naturalized during the war, and (b) in this circuit after the decision in Yunghauss v. United States (D. C.) 210 Fed. 545, dated January 26, 1914, and affirmed 218 Fed. 168, 134 C. C. A. 67, declarations of intention made prior to September 27, 1906, were not available to applicants, unless the petition for naturalization was filed within seven years after said date. Thus, when Pollock filed his petition on January 7, 1918, he was not eligible for naturalization because of either ground.

[3, 4] Congress, however, in order to meet the new situations and exigencies which the war had created, amended the naturalization laws in a number of important respects, two of which relate to and cover a case like that of Pollock's. By paragraph 11 of Act May 9, 1918, c. 69, 40 Stat. 542 (Comp. St. 1918, § 4352), amending section 4 of Act June 29, 1906, c. 3592, 34 Stat. 596 (Comp. St. § 4352), it is provided as follows:

"Eleventh. No alien who is a native, citizen, subject, or denizen of any country, state, or sovereignty with which the United States is at war shall be admitted to become a citizen of the United States unless he made his declaration of intention not less than two nor more than seven years prior to the existence of the state of war or was at that time entitled to become a citizen of the United States, without making a declaration of intention, or un-

less his petition for naturalization shall then be pending and is otherwise entitled to admission, notwithstanding he shall be an alien enemy at the time and in the manner prescribed by the laws passed upon that subject: Provided, that no alien embraced within this subdivision shall have his petition for naturalization called for a hearing, or heard, except after ninety days' notice given by the clerk of the court to the commissioner or deputy commissioner of naturalization to be present, and the petition shall be given no final hearing except in open court and after such notice to the representative of the Government from the Bureau of Naturalization, whose objection shall cause the petition to be continued from time to time for so long as the government may require. * * *"

From the foregoing it will be seen that, if the Bureau of Naturalization does not object, the court is authorized to entertain the petition of an alien enemy who made his declaration of intention not less than two years nor more than seven years prior to war with the country of which he is a native citizen, subject, or denizen. It will thus be seen that, if Pollock may avail of his declaration of intention of 1899, the court has power to entertain his petition.

The first question which arises is whether the dismissal for lack of prosecution requires that an applicant shall make a new declaration of intention. Such disposition only goes to the petition, and is, in principle, the same as cases where the petition is dismissed because of an incompetent witness. In re Wolf (C. C.) 188 Fed. 519. Both on principle and as the result of many years of practical construction, it is clear that, at least in cases where a petition is dismissed upon some ground that does not go to the fitness of the petitioner, such dismissal does not eliminate nor destroy the declaration of intention, and such declaration may be availed of in connection with a new petition.

Assuming that Pollock's petition may be amended (In re Denny [D. C.] 240 Fed. 845), or, in any event, by whatever form of procedure, that his declaration of 1899 may be considered, the next question is whether, because that declaration was made more than seven years prior to Pollock's petition of January 7, 1918, it can now avail him.

That question is answered by section 3 of the Act of May 9, 1918, which is as follows:

"Sec. 3. That all certificates of naturalization granted by courts of competent jurisdiction prior to December thirty-first, nineteen hundred and eighteen, upon petitions for naturalization filed prior to January thirty-first, nineteen hundred and eighteen, upon declarations of intention filed prior to September twenty-seventh, nineteen hundred and six, are hereby declared to be valid in so far as the declaration of intention is concerned, but shall not be by this act further validated or legalized." Comp. St. 1918, § 4352a.

The reason for the section supra is quite plain. There was a wide diversity of opinion in the United States and state courts in respect of the point considered in the Yunghauss Case, well illustrated by the different conclusions arrived at in the Yunghauss Case and in Re Valhoff (D. C.) 238 Fed. 405. All the cases in various courts are collated in United States v. Morena, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. 359, decided January 7, 1918, which sustained the conclusion stated in the Yunghauss Case. The Bureau of Naturalization did not accept the Yunghauss Case, entertaining, on the contrary, the opposite view, and issuing instructions accordingly. The result was that in

some jurisdictions applicants were naturalized, while in this and other jurisdictions those similarly situated were not.

After the Morena Case was decided, the United States could have begun appropriate proceedings to cancel the certificates of those who had been naturalized where the declarations of intention were more than seven years old. Doubtless there were many such cases, and Congress evidently desired to protect those who, in good faith, had obtained their naturalization certificates, and whose certificates were placed in peril because of the Morena decision.

At the same time it was doubtless the legislative intent to treat in the same way all applicants similarly situated in this respect. Congress certainly must have realized that it would not be just to validate certificates in one district or circuit, and at the same time deny the same privilege and opportunity to applicants in another district or circuit, just because the courts had differed as to the law—a difference only disposed of finally by the Supreme Court. Therefore it will be noted that under section 3 "all certificates of naturalization granted by courts of competent jurisdiction prior to December thirty-first, nineteen hundred and eighteen, upon petitions for naturalization filed prior to January thirty-first, nineteen hundred and eighteen," are validated so far as concerns declarations of intention prior to September 27, 1906. In other words, any applicant who filed his petition prior to January 31, 1918, may avail of a declaration of intention made prior to September 27, 1906, provided he moves promptly, so that his certificate of naturalization can and will be granted before the end of the year 1918.

[5] The amendment sought by Pollock is due to the fact that as the law stood on January 7, 1916, his declaration of 1899 was of no avail; but now that such declaration is available, by reason of a statute enacted after the date of his petition and before his hearing, he is entitled to the benefit of the new statute (In re Sterbuck [D. C.] 224 Fed. 1013), and also to the amendment for which he asks.

As amended, his petition comes within paragraph 11, supra, and the 90 days' notice therein provided will be given by the clerk.

Motion granted to the extent indicated.

WILLIAMS v. NEWMAN et al. (KOEHLER, Intervener).

(District Court, D. Oregon. March 31, 1919.)

1. PUBLIC LANDS ⊜106(1)—LAND DEPARTMENT—CONCLUSIVENESS OF FINDINGS.
   The Land Department's findings upon questions of fact are conclusive.
2. PUBLIC LANDS ⊜106(2, 3)—LAND DEPARTMENT—REVIEW.
   Land Department rulings, affected by a misconstruction of the law or by fraud, may be annulled by the courts.
3. PUBLIC LANDS ⊜106(1)—LAND DEPARTMENT—FINAL PROOFS.
   Questions involved by the presentation of final proofs by a homestead claimant, such as settlement, time of residence, cultivation, etc., are purely questions of fact, upon which the Land Department's decisions are conclusive.

4. PUBLIC LANDS ⟸97—LAND DEPARTMENT—PROCEDURE.
Under Rev. St. §§ 441, 453, 2478 (Comp. St. §§ 681, 699. 5120), the Secretary of the Interior may suspend action upon final homestead proofs while inquiring into questions of fraud attending the acquiring of the land.

5. PUBLIC LANDS ⟸106(1)—LAND DEPARTMENT—ADMINISTRATIVE POWERS.
While land is under the control of the Land Department, prior to issue of patents, the courts will not ordinarily interfere with departmental administrative procedure.

6. PUBLIC LANDS ⟸102—FINAL PROOF—COMPLETION.
Rev. St. § 2301 (Comp. St. § 4589), providing that patent shall issue two years after the receiver's receipt upon final entry, if no contest or protest be pending, is inapplicable, where the receiver sent the final proof to the Land Department without issuing a receipt or declaring the proof insufficient, and does not preclude cancellation of the entry more than two years after the receiver's action.

In Equity. Suit by Ahijah Williams against Tracy Newman and the Bernardin Timber & Manufacturing Company, in which Henry Koehler intervened as a defendant. Complaint dismissed.

This is a suit on the part of Ahijah Williams to have the defendants Tracy Newman and Bernardin Timber & Manufacturing Company declared trustees of the land in dispute for his use and benefit. The controversy grows out of the circumstance that Newman was accorded a patent to the land by the Land Department of the general government, when it is alleged that Williams was rightfully entitled thereto.

The facts are, substantially, that plaintiff entered the land, the same lying within the boundaries of the former Siletz Indian reservation, as a homestead, April 23, 1901. Subsequently, on December 11, 1903, he made final proof, after publishing notice of his intention so to do. The proofs show that he made settlement upon the land on May 15, 1900. A special agent of the land office appeared at the time and cross-examined him. At the close of taking the proofs, further action was suspended at the request of such special agent; the case having been referred to him for investigation respecting plaintiff's good faith in prosecuting his claim for a homestead. By a letter of the Assistant Commissioner, addressed to the register and receiver, of date September 28, 1907, it appears that no report of the special agent touching his investigation of the matter had then reached the Commissioner's office. The plaintiff at the time tendered $6, the usual commission required for the service. The tender was refused by the receiver.

The plaintiff testifies here that Bibee, the receiver, told him, after the proofs were submitted, that he was entitled to the patent and would receive it. Judge Galloway, who was acting for the plaintiff at the time, says, "There were no objections found to the proof that was furnished by the claimant;" and later, that the receiver "spoke that the proof was very excellent," but that it was not accepted, and was "simply sent up to Washington for the consideration of the Commissioner." That, in effect, is what really happened. The final proof was sent up to Washington, without the issuance by the register and receiver of the usual final receipt or certificate.

Nothing further seems to have been done in the premises until February 26, 1907, when one E. W. Reder filed in the office of the register and receiver a contest respecting plaintiff's homestead. This, it will be perceived, was more than three years and two months after plaintiff had made and tendered his final proof. The contest was allowed under direction of the commissioner. Hearing was had on the 6th, 7th, 8th, and 9th of January, 1908. The plaintiff appeared at the hearing and resisted the contest, which resulted in a recommendation by the register and receiver that the contest be dismissed, and that the homestead entry of plaintiff be held intact. From this recommendation an appeal was prosecuted by Reder to the Commissioner of the

General Land Office. Upon consideration by that officer, the decision of the register and receiver was, on February 15, 1909, reversed, and the entry of plaintiff was held for cancellation. An appeal was prosecuted to the Secretary of the Interior. That officer dismissed the contest of Reder. However, as the plaintiff had offered testimony at the hearing upon the contest, the right of plaintiff to maintain his homestead entry was also considered, and the entry was canceled. The decision was pronounced May 29, 1909. A motion for a review of this decision was denied September 2, 1909.

These departmental decisions were, on September 14, 1909, suspended by order of the Secretary of the Interior, because of a suit instituted by Williams in the Supreme Court of the District of Columbia to restrain further action of the Secretary. The order was, however, revoked March 11, 1910. On March 16, 1910, by further direction of the department, the local officers were again directed to suspend action on the entry of plaintiff, for the reason that the litigation had been reinstated, and on March 17th the department directed the Commissioner to reinstate plaintiff's entry. His entry was again canceled July 20, 1910. On March 27, 1911, plaintiff filed application for reinstatement of his entry under Act March 4, 1911, c. 272, 36 Stat. 1356. To this there was subsequently a protest by Newman, who had, on April 4, 1910, filed an application to make homestead entry on the land. The application for reinstatement was rejected by the Commissioner August 31, 1911. The order rejecting the application was later, namely, on October 16, 1912, reversed by the Secretary of the Interior, and a hearing was directed to be had between the parties, Williams and Newman, with reference to the alleged cultivation of the land by Williams. A hearing was accordingly had before the register and receiver, beginning March 15, 1913, resulting in a decisive rejection of the application of plaintiff for reinstatement. Plaintiff appealed from this decision, which was affirmed by the Commissioner February 14, 1914. Plaintiff again appealed to the department, with like result, the decision being rendered July 31, 1914. This ended the protracted litigation in the land office. The defendant Newman was allowed to proceed with his homestead entry, and subsequently obtained his final certificate and patent.

J. K. Weatherford, of Albany, Or., for plaintiff.

John K. Kollock and A. S. Dresser, both of Portland, Or., for defendants.

WOLVERTON, District Judge (after stating the facts as above). The crucial question involved in this controversy is whether the plaintiff is entitled to a patent under the proviso of section 7, following the amendment of section 2301, R. S., 26 Stat. 1099 (Comp. St. § 4589), which reads:

"Provided, that after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber culture, desert land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor."

It is the contention of plaintiff that what he did in making his final proof, and what the register and receiver did with reference thereto, was tantamount to the issuance of such final receipt, and that, more than two years having elapsed, and there having been no contest or protest interposed to the entry in the meanwhile, he was, and is now, entitled to the patent, by which all further controversy respecting the title to the land comprised by the entry is precluded.

Preliminarily, it should be premised that the Secretary of the Inte-

rior, within the functions of his office, and the Land Department, are intrusted with the sale and disposition of the public lands of the general government. The register and receiver are constituted officers of primary jurisdiction respecting the acquirement of public lands through the homestead and other like laws adopted by Congress for the sale and disposition of such lands. From these officers an appeal may be had to the Commissioner of the General Land Office, and from him to the Secretary of the Interior himself. Beyond this, a revision may be had by the President. So that there is provided a special tribunal, of a quasi judicial character, for determining the rights of all persons who seek to avail themselves of the laws of Congress for the acquirement of any of the public lands of the general government. Vance v. Burbank, 101 U. S. 514, 519, 25 L. Ed. 929; United States v. Minor, 114 U. S. 233, 243, 5 Sup. Ct. 836, 29 L. Ed. 110.

[1, 2] It has long since become settled law that the findings and judgment of the officers of the Land Department involving questions of fact only are conclusive, and cannot be otherwise inquired into, except upon appeal from one officer to another in that department. On the other hand, however, if error or mistake is committed in the construction or application of the law in any case, or if fraud is practiced upon such officers, or if they themselves are chargeable with fraudulent practices, their rulings may be annulled by the courts when a controversy founded upon their decisions arises between private parties. Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Shepley et al. v. Cowan et al., 91 U. S. 330, 340, 23 L. Ed. 424; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; Calhoun v. Violet, 173 U. S. 60, 63, 19 Sup. Ct. 324, 43 L. Ed. 614; and United States v. Minor and Vance v. Burbank, supra.

[3] There is no question of fraud presented here, either as it pertains to the defendant or the officers of the Land Department. The questions involved by the presentation of final proofs, namely, of settlement, time of residence, cultivation, improvements, and the like, are purely questions of fact, which were for the determination of the officers of the Land Department, and their decisions respecting such questions become final and conclusive upon the courts, under the law as above stated.

[4] Prompt action on his final proofs was not accorded the plaintiff, but the final determination of the officers of the Land Department was to reject his claim, the delay being caused by a suspension of action by the department because of the existence of supposed frauds affecting the claims of plaintiff and others in that locality. The effect of the suspension was to postpone a decision respecting plaintiff's final proofs, but not to deny him such decision ultimately. There can scarcely be a doubt of the authority of the Secretary of the Interior, under sections 441, 453, and 2478 of the Revised Statutes (Comp. St. §§ 681, 699, 5120), to suspend action in proceedings before the Land Department, in the interest of a just administration of the public lands, with a view to inquiring into any question of fraud attending the acquirement of such lands by private persons. Knight v. U. S. Land Association, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974.

[5] Nor will the courts ordinarily interfere with the Land Department in the administration of the public lands, while the same are subject to disposition under acts of Congress intrusting such matters to that branch of the government; or, to state the proposition more concretely, while the land is under the control of the Land Department, prior to the issue of patent, the courts will not interfere with such departmental administration. Garfield v. United States ex rel. Goldsby, 211 U. S. 249, 260, 29 Sup. Ct. 62, 53 L. Ed. 168; United States v. Detroit Lumber Co., 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499; and Love v. Flahive, 205 U. S. 195, 27 Sup. Ct. 486, 51 L. Ed. 768.

[6] In Lane v. Hoglund, 244 U. S. 174, 37 Sup. Ct. 558, 61 L. Ed. 1066, the court required the Secretary of the Interior to issue a patent where two years had elapsed after the issuance of the receiver's receipt upon final entry, there being at the time no pending contest or protest against the validity of such entry.

Had final receipt issued in this case at the time final proofs were made, that case would have been controlling here. But such is not the case. Nor can it be maintained, we think, that what was done was the equivalent of the issuance of such receipt. Before such receipt could have been properly issued, a decision of the register and receiver at least approving the proofs rendered was required. The decision was specially withheld under the direction of a special agent representing the Land Department until inquiry could be made touching supposed fraudulent transactions affecting this and other claims in the same vicinity. Nor was any decision rendered by these officers until after the Reder contest was heard in January, 1908, when they recommended that plaintiff's entry be held intact. This decision was on appeal reversed by the Commissioner, and plaintiff's entry was held for cancellation. An appeal was prosecuted to the Secretary of the Interior, who affirmed the holding of the Commissioner, and the entry was canceled. Beyond this, it is unnecessary to follow the proceedings reinstating the entry, and its ultimate cancellation by the Land Department, including the application for reinstatement under the act of March 4, 1911, and the final disposition of the application.

It is sufficient to say that, in all these contests and proceedings, the plaintiff was accorded a hearing, and was present, either by himself or counsel, and the officers of the Land Department extended to him the utmost opportunity for fully presenting his case upon the facts attending his final proofs, but with the final result that his entry was rejected and canceled, and that upon the ultimate issue touching whether he had cultivated the land during the time of his alleged occupancy as required by the homestead law as applicable to lands within the limits of the old Siletz Indian reservation. There was nothing in all these proceedings that can, by the most liberal view to be entertained respecting them, lead to the conclusion that there was action had or taken anywhere by the Land Department which was the equivalent of the issuance of the final receipt. What the receiver said about the proofs being good or sufficient can in no sense be construed as a decision by the register and receiver touching the sufficiency of such proofs. While there was great, and apparently unnecessary, delay at times by the of-

ficers of the Land Department in furthering the claim of plaintiff to final issue, it cannot be said that these officers, through misconduct or neglect, ultimately denied him the rights to which he was entitled within the doctrine of Lytle v. Arkansas, 9 How. 314, 333, 13 L. Ed. 153, and like cases.

The case of Cornelius v. Kessel, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482, is not in point. That case turned upon the cancellation of an entry without notice to the entryman, and upon a mistaken construction of the law. It was not a case, as this is, involving purely questions of fact which have been passed upon and settled by the Land Department.

It is unnecessary to review other cases cited by plaintiff. If the line of distinction between matters of law and questions of fact as dealt with by the Land Department is closely followed, it will be found that generally the adjudications are in accord.

It results that the complaint must be dismissed; and it is so ordered.

RAGAN v. SHEFFIELD et ux.

(District Court, D. Oregon. March 31, 1919.)

No. 7834.

1. PUBLIC LANDS ⟸103(1)—LAND DEPARTMENT—NOTICE OF HEARING.
   Any irregularity in serving a notice requiring an entryman to appear at a contest hearing is obviated, where the entryman appears and takes part in the hearing.

2. PUBLIC LANDS ⟸106(1)—CONTEST—CONCLUSIVENESS.
   Where an entryman, after offering final proof, opposes a contestant's claim before the receiver, and appeals to the Land Department from an adverse decision, he is concluded by the department's cancellation of his entry upon issues of fact.

In Equity. Suit by Howard H. Ragan against Charles E. Sheffield and Josephine B. Sheffield, his wife. Complaint dismissed.

Weatherford & Wyatt, of Albany, Or., and N. M. Newport, of Lebanon, Or., for plaintiff.

A. S. Dresser and C. E. Moulton, both of Portland, Or., for defendants.

WOLVERTON, District Judge. This is a suit on the part of complainant to have the defendants declared trustees of the Sheffield homestead, lying within the boundaries of the old Siletz Indian reservation, for the use and benefit of complainant. The litigation arises out of the issuance to Sheffield, one of the defendants, of a patent to the land in dispute; the complainant alleging that he was entitled to such patent, and that the Land Department wrongfully, and without authority of law, issued the same to Sheffield.

Ragan, the complainant, filed a homestead application on this land

August 22, 1900, and submitted his final proofs October 18, 1904. Action thereon by the register and receiver was suspended, by direction of the Land Department, on account of supposed fraudulent transactions affecting the claim along with others in the vicinity. The proofs were transmitted, however, to the Commissioner at Washington. A contest affidavit was filed in the land office at Portland, Or., by Sheffield, June 18, 1906. A notice was issued by the register, requiring parties interested to appear and give evidence respecting the contest October 1, 1906, at 10 o'clock a. m. The evidence shows that service was attempted to be made of this notice upon Ragan August 13, 1906. There is a dispute as to whether such service was ever regularly made. The service was never filed in the land office.

On September 20, 1906, the contest affidavit was transmitted to the Commissioner, and, after consideration by that officer, the contest was, on October 10, 1907, allowed, and returned to the local office for the purpose of a hearing thereon. On November 12, 1907, another notice was issued by the register, requiring Ragan to appear and offer his evidence on February 14, 1908, at 10 a. m. This appears to have been served on Ragan December 31, 1907; but neither the notice nor the service was filed in the land office.

A hearing was had in the local office on the 14th, 15th, and 17th of February, 1908, at which Ragan appeared in person and by his attorneys, Walter H. Evans and Veazie & Veazie, and offered testimony in his own behalf, and the cause was submitted to the register and receiver for their determination. The contest resulted in a recommendation by those officers that Ragan's entry be canceled. An appeal was thereupon prosecuted by Ragan to the Commissioner of the General Land Office, resulting, on March 9, 1909, in the approval and affirmation of the recommendation of the register and receiver. Ragan further appealed to the Secretary of the Interior, and the decision of the Commissioner was, on November 17, 1909, by that officer also affirmed. From this decision no further review was sought, and the entry was canceled April 12, 1910. This closed the case in the Land Department as to Ragan. Sheffield was thereafter allowed to make his homestead entry, and was, in due course, granted a patent.

[1] This case is very similar on the facts to Williams v. Newman, 257 Fed. 353, just decided. The only material difference between them consists in a lack of service of the notice requiring appearance at the contest brought on by Sheffield. Neither notice nor service appears in the files or records of the land office. The record does, however, show that Ragan appeared, in person and by counsel, at the contest hearing, and there gave evidence intended to controvert the contest, as well as to substantiate his own claim, and that the decision was against him. The decision was affirmed on his appeal, both by the Commissioner and by the Secretary of the Interior. The appearance of Ragan at the hearing obviated all irregularity attending the issuance of the notice requiring appearance at the hearing and the service thereof. If Ragan had not appeared at all, another and quite different question would have arisen. In all other respects, this case is controlled by the decision in Williams v. Newman.

[2] I may add that it is insisted here, as it was in the Williams Case, that when Ragan offered his final proofs he did all he was required to do, and that it was not essential that he go farther, in order to entitle him to a final receipt. The fact remains, however, that he did go farther, and that he submitted his cause for further examination and a final decision by the Land Department. That decision was against him, and, it being rendered on questions of fact only, he is concluded by it. Nor do the rules of the land office cited by counsel, relating to notice and service thereof, in the case of Schmidt v. McCurdy, 44 Land Dec. 568, help the complainant, for the reason that his appearing at the hearing and thus submitting himself to the jurisdiction of the department obviated, as we have previously said, all necessity and efficacy of notice and service. He thereby waived all such process, and the want of it affords no ground for his relief.

Complaint dismissed.

McGUIRE v. MUTUAL TRANSIT CO.

(District Court, W. D. New York. January 7, 1919.)

No. 1093.

1. SEAMEN ⟹11—DISABLED SEAMAN—DUTY OF SHIP TO FURNISH MEDICAL TREATMENT.
   A seaman, suffering from injury or illness in the service of a ship, is entitled to medical treatment and attendance, and the master is required to exercise reasonable judgment as to whether the ship shall stop in the nearest port to provide such care and medical attendance.
2. SEAMEN ⟹11—DISABLED SEAMAN—LIABILITY OF SHIP FOR NEGLECT.
   Whether a ship has fully discharged its duty of care and medical attendance to a seaman, who is injured or ill, depends upon the peculiar circumstances of each case.
3. SEAMEN ⟹11—ILLNESS OF SEAMAN IN SERVICE—LIABILITY OF SHIP FOR NEGLECT.
   A lake steamship *held* not liable for neglecting to give medical attendance and care to its steward, who became ill at Duluth with heart trouble, from which he died, where he declined to go to a hospital at Duluth and other ports, continued in service, assured the master that he was suffering from nothing serious, and there were no outward symptoms to advise the master to the contrary.

In Admiralty. Suit by Delia A. McGuire, as executrix of John J. McGuire, deceased, against the Mutual Transit Company. Decree for respondent.

Clinton, Clinton & Striker, of Buffalo, N. Y., for libelant.
Brown, Ely & Richards, of Buffalo, N. Y., for respondent.

HAZEL, District Judge. [1, 2] The rule applicable to this case has been admirably expressed, I think, in The Kenilworth, 144 Fed. 377, 75 C. C. A. 314, 4 L. R. A. (N. S.) 49, 7 Ann Cas. 202, by the Circuit

Court of Appeals for the Third Circuit, where it is said that a seaman, suffering from injury in the service of a ship, is entitled to medical treatment and attendance, and that the master is required to exercise reasonable judgment as to whether the ship shall stop in the nearest port to provide such care and medical attendance; and that whether such requirement is fully discharged depends upon the peculiar circumstances of each case. It is, of course, the master's duty to look out and care for the health of his crew, and when a seaman is ill, and no physician is on board, in certain circumstances it may be necessary to send him to a hospital, whether he requests it or not. The M. E. Luckenbach (D. C.) 174 Fed. 265.

[3] The evidential facts of the cases mentioned were much stronger than those with which we are now dealing. It appears that the decedent, McGuire, who was steward of the ship, became ill aboard ship at Duluth, and was suffering from heart trouble; but the master was not then or thereafter informed of the character of the disability, nor could he discern it for himself. On inquiry by the master as to his condition, McGuire made light of his condition, and continued to do so at various times thereafter, and declined to leave the vessel at Duluth for medical attendance, although opportunity was afforded him to do so. The master's solicitude was such that, after leaving Duluth, he daily inquired as to the steward's health, and, when informed that he was suffering with a cold, gave him cough medicine from the ship's medicine chest. At each interview the master was assured by the steward, who continued to attend to his duties, although another seaman was assigned to help him, that he was not suffering from anything serious, and there were no outward symptoms to the contrary. The mate, Fleming, testified that he regarded McGuire as a very sick man who should not have been at work, but who remained on duty because he would not give in. Such testimony, however, even though the master was apprised of the opinion of the mate, was not sufficient to prove that the master was lacking in the exercise of a proper degree of care.

The point is made that a physician should have been called to attend McGuire at various ports where the vessel stopped, but in view of the evidence that the defendant reiterated that his illness was not serious, and that he wanted to reach home as speedily as possible, and intended taking the train for Buffalo at Fairport, it does not seem to me that it can be fairly held that the master was lacking in care in yielding to his request. If his health at the Sault or at Detroit was such as to lead him to think that he required a physician, he could easily have asked for one, and steps no doubt would have been taken to procure one. To my mind, in the absence of more serious external symptoms, there is nothing to indicate a failure or unwillingness on the part of the master to perform his full duty toward the steward. Since there was nothing in the conduct or appearance of McGuire, so far as the evidence discloses, to give warning that he was likely to be stricken with heart failure, the master was not at fault for failing to leave him at one of the ports mentioned or to provide him with a physician.

The facts of The M. E. Luckenbach, supra, to which importance is attached by libelant, were essentially different. In that case the fireman was suffering with typhoid fever, and, with the knowledge of the master, was unable to appear for work or inspection; another man being employed in his place. He had requested a doctor in Colon, and had asked to be sent to a hospital; but the master of the ship had informed him that it was not a desirable place to leave him, and that he would take him to Newport News. The court held that it was not even necessary for libelant to ask for a doctor, or request to be sent to a hospital, where the illness was such that it was apparent that the attention of a physician was required. In this case the illness was not apparent, and in my opinion the evidence does not justify the inference that the death of the decedent was due to failure by respondent to properly discharge a duty owing to him as a seaman, and therefore the libel is dismissed.

It was urged by respondent that no cause of action existed at common law or under the maritime law for the wrongful act in question, and that the statute under which the action is brought is not pleaded, but in view of the conclusions reached, this need not be passed upon.

In re PYATT.

(District Court, D. Nevada. December, 1918.)

1. BANKRUPTCY ⟸391(1)—POWERS OF COURT—ALIMONY.
   A bankruptcy court cannot prevent a state court from inflicting contempt punishment upon a bankrupt, refusing to comply with the state court's order regarding alimony.
2. BANKRUPTCY ⟸421(5)—DEBTS DISCHARGEABLE—ALIMONY.
   Alimony due or to become due is not a debt dischargeable in bankruptcy.
3. BANKRUPTCY ⟸41—VOLUNTARY BANKRUPTCY—SOLVENT PERSONS.
   A solvent person may voluntarily have his property distributed among his creditors under the Bankruptcy Act (Comp. St. §§ 9585–9656).
4. BANKRUPTCY ⟸48—DISMISSAL—DIVORCE.
   A voluntary bankruptcy proceeding will not be dismissed, because instituted to escape payment of alimony and contempt proceedings in a state court, since a dismissal would merely invite involuntary proceedings against the bankrupt and result in no particular advantage to his wife.

In Bankruptcy. In the matter of George Pyatt, bankrupt. On motion to dismiss the proceedings. Denied.

Marois & Burrows, of Reno, Nev., for bankrupt.
Hoyt, Gibbons, French & Henley, of Reno, Nev., for trustee.
Mack & Green, of Reno, Nev., for Mrs. May Ella Pyatt.

FARRINGTON, District Judge. [1, 2] In February of the present year George and May Ella Pyatt were married. After living together a short time, Mrs. Pyatt obtained a divorce on the ground of

cruelty. In the decree she was awarded alimony at the rate of $50 per month. The decree was rendered May 7th. October 14th George Pyatt was in this court adjudged a voluntary bankrupt. November 16th Mrs. Pyatt filed a motion to dismiss the bankruptcy proceedings on the ground they were commenced for the purpose of defeating the order of the state court requiring Pyatt to pay alimony. This motion was resisted by Marois & Burrows, attorneys for the bankrupt, and also by Hoyt, Gibbons, French & Henley, attorneys for the trustee in the bankruptcy proceedings.

Numerous witnesses were examined, and from the testimony it is quite evident that Pyatt began bankruptcy proceedings, hoping thereby to prevent his former wife from collecting alimony. In fact, on the 30th day of October there was filed in the bankruptcy matter a petition in which he asked that Mrs. Pyatt and her attorneys be enjoined and restrained from taking any steps to have him punished for contempt, in that he had failed to pay installments of alimony, as directed by the state court. That court, when it ordered him to pay alimony, was acting within its authority. If for any reason the order was erroneous, the error was one to be corrected in that court, or in the Supreme Court of Nevada. This court has no appellate or revisory jurisdiction in such cases. It is powerless to prevent the state from punishing Pyatt for refusing to obey such an order, or to relieve him from his obligation to pay installments of alimony. Alimony due or to become due is not a debt dischargeable in bankruptcy. Collier on Bankruptcy, p. 438.

On the hearing of the motion the testimony of the witnesses tended to show that the bankrupt's assets exceeded his liabilities. The bankrupt's schedule, however, shows assets, including exemptions, amounting to $2,397.70, and liabilities amounting to $6,702.49, and names 20 creditors. Under section 4 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 547 [Comp. St. § 9588]), any person, except a municipal, railroad, insurance, or banking corporation, is entitled to the benefit of the act as a voluntary bankrupt.

[3] It has frequently been held that a creditor cannot intervene to oppose an adjudication under an ordinary voluntary petition in bankruptcy on the ground that the would-be bankrupt is insolvent. The act does not require that the bankrupt should be insolvent. A solvent person may have his property distributed among his creditors in the manner provided by statute, if he so desires. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. B. R. 1; In re Jehu (D. C. Iowa) 2 Am. B. R. 498, 94 Fed. 638; In re Ives (C. C. A. 6th Cir.) 7 Am. B. R. 692, 113 Fed. 911, 51 C. C. A. 541; In re Carleton (D. C. Mass.) 8 Am. B. R. 270, 115 Fed. 246; Collier on Bankruptcy, pp. 141, 840, 856.

I am aware in the Carleton Case, supra, Judge Lowell states that in the District Court of Massachusetts, in an unreported case, it was held that a creditor may have an adjudication set aside, if the whole proceeding is a fraud on the act, and an abuse of process. Neither the facts nor the reasoning in that case are disclosed, so it is impossible to say how the rule was applied, or what embarrassment to a particular

creditor occasioned by a voluntary bankruptcy proceeding was deemed sufficient to require a court to set aside an adjudication.

If an insolvent person owing more than one debt files a voluntary petition after his property has been attached by one of his creditors, the latter undoubtedly is embarrassed, for otherwise he might have collected his claim in full; still it would be impossible to regard the proceeding as a fraud on the act. An unworthy motive for the exercise of a legal right is not sufficient to extinguish the right.

[4] In the present case Pyatt sought to interpose bankruptcy proceedings between himself and impending punishment for contempt committed in the state court. To that punishment he is still amenable, and Mrs. Pyatt's claim for alimony cannot be extinguished or discharged by this court in the bankruptcy proceedings. Pyatt can obtain the benefit of no exemptions here which would not have been good in the state court, if bankruptcy proceedings had not intervened. Mrs. Pyatt was not embarrassed in a greater degree than an attachment creditor would be by a voluntary petition in bankruptcy interposed by his debtor.

While I am satisfied that his purpose in invoking the assistance of this court was to stay proceedings in the state court, if possible, and thus thwart his former wife in her attempt to collect alimony, I cannot overlook the fact that Pyatt has numerous creditors whose interests must be considered. These creditors are represented by the attorneys for the trustee, who strenuously object to a dismissal. If the motion is granted, undoubtedly the creditors will straightway file an involuntary petition; and, inasmuch as Pyatt has been guilty of an act of bankruptcy, I am at a loss to see how an adjudication can ultimately be avoided. To dismiss these proceedings is simply to invite involuntary proceedings, without any particular advantage to Mrs. Pyatt.

The motion to dismiss will therefore be denied.

UNITED STATES v. DOWNEY et al.

(District Court, D. Rhode Island. April 19, 1919.)

No. 451.

1. CONSPIRACY ⟸24, 27—GIST OF OFFENSE—COMMISSION OF CRIME CONSPIRED TO BE COMMITTED.

The conspiracy to defraud the United States of money, in violation of Criminal Code, § 37 (Comp. St. § 10201), or to commit an offense against the United States, in violation of section 35 (section 10199), is the gist of the offense, without reference to whether the crime or fraud is consummated or agreed upon by the conspirators in all details, as the conspiracy may be complete, though its object is still in contemplation.

2. CONSPIRACY ⟸33, 43(10)—TO DEFRAUD UNITED STATES—INDICTMENT.

As the offense of conspiring to defraud the United States, in violation of Criminal Code, § 37 (Comp. St. § 10201), may be complete, though the mode or details of execution are not fully agreed upon, it is impracticable

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

and unnecessary for the indictment to set forth the object of the conspiracy with the same particularity of detail as in cases of completed acts constituting a past offense.

3. CONSPIRACY ⟸37—CONSPIRACY TO COMMIT CRIME—DISTINCTION FROM OFFENSE ITSELF.
Conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy.

4. CONSPIRACY ⟸43(5)—INDICTMENT—ALLEGATION OF OVERT ACTS.
Though the allegations of overt acts may not be used to enlarge the scope of a conspiracy, they may be regarded as meeting objections to the generality of the charge in the indictment, and as giving specifications of the completed acts done pursuant to the conspiracy.

John F. Downey, Wallace Spink, and George L. Keene were indicted for conspiracy to defraud the United States, and for conspiracy to commit an offense against the United States, and defendants Downey and Spink respectively demur. Demurrers overruled.

Harvey A. Baker, U. S. Atty., of Providence, R. I.
Alexander L. Churchill, of Providence, R. I., for defendant Spink.
McGovern & Slattery, of Providence, R. I., for defendant Downey.

BROWN, District Judge. [1] This indictment under section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]), charges in the first count a conspiracy to defraud the United States of a large sum of money, and in the second count a conspiracy to commit an offense against the United States; i. e., a violation of section 35 of the Criminal Code (section 10199). In each count the conspiracy is the gist of the offense, without reference to whether the crime or fraud which the conspirators have conspired to commit was consummated, or was agreed upon by the conspirators in all its details. The conspiracy may be complete, though acts which are the object of the conspiracy are still in contemplation.

"Certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy." Williamson v. United States, 207 U. S. 425, 446–449, 28 Sup. Ct. 163, 171 (52 L. Ed. 278); United States v. Rabinowich, 238 U. S. 78, 85, et seq., 35 Sup. Ct. 682, 59 L. Ed. 1211; United States v. D'Arcy (D. C.) 243 Fed. 739; United States v. Baker (D. C.) 243 Fed. 741; Dahl v. United States, 234 Fed. 618, 148 C. C. A. 384; Lew Moy v. United States, 237 Fed. 50, 150 C. C. A. 252; United States v. Franklin (C. C.) 174 Fed. 161.

[2, 3] As the offense defined by section 37 may be complete, though the mode or details of execution are not fully agreed upon, it is of course impracticable and unnecessary for the indictment to set forth the object of the conspiracy with the same particularity of detail as in cases of completed acts constituting a past offense, and this rule seems to have been applied even where the offense which was the object of the conspiracy had been consummated. But conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy (United States v. Rabinowich, 238 U. S. 78, 85, 86, 35 Sup. Ct. 682, 59 L. Ed. 1211), and the distinction in the rules of pleading is well settled.

[4] Though the allegations of overt acts may not be used to enlarge the scope of the conspiracy, yet they practically meet many of the objections to the generality of the charge of conspiracy. They inform the defendants in much detail of the particular matters upon which proof will be offered, and thus give specifications of the completed acts done in pursuance of the conspiracy and during its continuance.

Upon the authority of the cases above cited, it appears that the defendants are sufficiently charged in each count with a violation of section 37 of the Criminal Code.

The demurrers of the defendants are respectively overruled.

UNITED STATES v. DOWNEY.

(District Court, D. Rhode Island. April 22, 1919.)

No. 452.

1. INDICTMENT AND INFORMATION ⊜73(1)—INCONSISTENCY—FRAUDULENT PROCURATION OF REWARD—PLACE OF OFFENSE.
   In an indictment for fraudulently procuring payment of a reward by the United States for apprehension of a deserter under the Selective Service Act, a description of defendant officer's place of service is not inconsistent with the express allegations of the place of the commission of the offense.

2. CRIMINAL LAW ⊜113—JURISDICTION OF DISTRICT COURT—FRAUDULENT PROCUREMENT OF REWARD.
   Under Judicial Code, § 42 (Comp. St. § 1024), a District Court has jurisdiction of a prosecution for having fraudulently procured payment of a reward by the United States for having apprehended a deserter under the Selective Service Act, though the fictitious claims or vouchers were made in the district and transmitted to an officer in another district.

3. INDICTMENT AND INFORMATION ⊜63—CONCLUSION OF LAW—MIXED STATEMENT OF LAW AND FACT.
   Allegation that a certain person was not then and there such a deserter under the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k), etc., as entitled defendant to payment of a reward, in an indictment for having fraudulently procured payment of the reward for apprehension of such a deserter from the United States, *held* not a conclusion of law, but a mixed statement of law and fact.

4. UNITED STATES ⊜123—PROCURING REWARD FOR APPREHENSION OF DESERTER—BURDEN OF PROOF.
   By alleging that a certain person was not a deserter under the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k), the United States, in a prosecution for having fraudulently procured a reward from it for apprehension of such a deserter, assumes the burden to show that the person named did not come within the description of a person or deserter for whose apprehension and delivery a reward was legally payable.

5. INDICTMENT AND INFORMATION ⊜111(4)—NEGATIVE ALLEGATION.
   An indictment for having fraudulently procured payment of a reward by the United States for apprehension of a deserter under the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k), which indictment stated generally that the person apprehended was not such a deserter that his apprehension entitled defendant to reward, cast upon defendant

no undue burden in preparing his case, and was sufficient, though not specifically negativing each provision of the statute or regulations which might justify the presentation of such a claim against the United States.

6. UNITED STATES ⇐121—FRAUDULENT PAYMENT OF REWARD BY UNITED STATES—HONESTY OF CLAIM.

To render defendant guilty of having fraudulently procured payment from the United States of a reward for the apprehension of a deserter under the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k), it was not essential that a bill, voucher, or other thing used as a basis for the claim should contain fraudulent or fictitious statements, but whether the claim was genuine and honest must be determined in view of all the facts surrounding it.

7. UNITED STATES ⇐123—FRAUDULENT PROCUREMENT OF REWARD BY UNITED STATES—INDICTMENT.

An indictment for having fraudulently procured payment of a reward by the United States for the apprehension of a deserter under the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k) need not state the circumstances surrounding the presentation of the document or voucher which was the basis of defendant's claim, or the nature of any other document accompanying or supporting it.

John F. Downey was indicted for an offense against the United States, and he demurs to the indictment. Demurrer overruled.

Harvey A. Baker, U. S. Atty., of Providence, R. I.
McGovern & Slattery, of Providence, R. I., for defendant.

BROWN, District Judge. [1, 2] The indictment properly charges that the offenses were committed within the territorial jurisdiction of this court. A description of the officer's place of service is not inconsistent with the express allegations of place of commission of the offenses. Furthermore, even should it be assumed that the fictitious claims or vouchers were made in this district, and were transmitted to an officer in another district, this court would have jurisdiction. Judicial Code (Act March 3, 1911, c. 231) § 42, 36 Stat. 1100 (Comp. St. § 1024); Burton v. United States, 202 U. S. 344, 371, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; Bridgeman v. United States, 140 Fed. 577, 72 C. C. A. 145.

[3] The allegation that a certain person "was not then and there such a deserter under the Act of May 18, 1917, known as the Selective Service Act [40 Stat. 76, c. 15 (Comp. St. 1918, §§ 2044a–2044k)], and the public resolutions and acts amendatory thereof, and the regulations issued thereunder by the President of the United States, as entitled said John F. Downey to the payment of such a reward," etc., is objected to as stating a conclusion of law; but this is a mixed statement of fact and law, rather than a mere conclusion of law.

[4, 5] By making this allegation the United States assumes the burden of showing that as matter of fact the person named did not come within the description of a person or deserter for whose apprehension and delivery a reward was legally payable, pursuant to the provisions of law referred to. The burden of establishing a negative is upon the United States, not upon the defendant; for if a prima facie case

be made against him, negativing all lawful grounds for a claim of reward, he may meet it on a single ground only. This general mode of statement casts upon the defendant no undue burden in preparation. There seems to be no greater uncertainty in this form of allegation than if the indictment had negatived specifically and separately each of the provisions of statute or regulations which state the facts under which a reward is payable.

[6] It is not essential that the bill, voucher, or other thing used as the basis for the claim should, in and of itself, contain fraudulent or fictitious statements, but whether the claim is genuine and honest must be determined in view of all the facts and circumstances surrounding it. Dimmick v. United States, 116 Fed. 825, 54 C. C. A. 329.

[7] It is argued that a necessary requirement of the regulations is the presentation on form 1021 of a certificate, and that without this a fraud could not have been consummated; but the making of the document or voucher is a separate thing from its presentation, and it does not appear necessary that the indictment should state the circumstances surrounding its presentation, or the nature of any other document accompanying or supporting it.

Assuming that various provisions of the regulations may be involved, it is evident from the defendant's brief on demurrer that by reference to the statutes and regulations named in the indictment counsel have been sufficiently informed to prepare a defense, and that the accusations are quite as definite as if the United States had specifically negatived each and all of the provisions of statute or regulations which might justify the presentation of claims against the United States for the payment of the sums set forth in the indictment.

Demurrer overruled.

ACKERMAN et al. v. SANTA ROSA-VALLEJO TANNING CO.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3230.

1. SALES ⟸174—BREACH BY BUYERS—RIGHT TO INSIST SELLER SHOULD HAVE PERFORMED.
   Where the seller of leather backs shipped an installment in accordance with the contract, and three days after payment for the installment was due the buyers announced their intention to continue to hold back payment until the order was completed, the seller had a right to stand on the terms of the contract and refuse performance until the buyers themselves performed, and the latter, having failed to comply with the terms of payment, cannot insist the seller should have proceeded and completed the contract in the manner specified.
2. SALES ⟸179(4)—DELAYED ACCEPTANCE OF GOODS—WAIVER OF DEFECTS AND CONTRACT REQUIREMENTS.
   Delayed acceptance by the buyers of goods once rejected was a waiver of defects and of contract requirements as to quality of the merchandise.
3. SALES ⟸82(1)—CONSTRUCTION OF CONTRACT—PAYMENT.
   A contract for the sale of leather backs, reading, as to payment, "2%—30 days f. o. b. Vallejo," required payment within 30 days of the date of shipment from the seller's tannery, and, if paid sooner, called for a deduction of 2 per cent.
4. SALES ⟸54—TIME AS OF ESSENCE.
   As a rule, the parties to mercantile agreements, as contracts of sale between dealers, are held to have intended to make time the essence of the contract.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Robert S. Bean, Judge.

Action by J. E. Ackerman and Max Brummel, individually and as copartners doing business under the firm name and style of Ackerman & Brummel, and Ackerman & Brummel, a copartnership, against the Santa Rosa-Vallejo Tanning Company. To review a judgment for defendant, plaintiffs bring error. Affirmed.

This is an action on a contract for purchase and sale of leather backs. The cause was tried without a jury. Findings and conclusions were made in favor of the tanning company, defendant in error. Ackerman & Brummel, plaintiffs in error, brought writ of error.

The contract in question was entered into December 16, 1915, and is in the form of a letter addressed to Ackerman & Brummel, and signed by the Santa Rosa-Vallejo Tanning Company, per E. W. Hurgren, president. By the terms of the contract the tanning company agreed to sell, and Ackerman & Brummel agreed to buy, 1,000 sole leather backs, with an option of 2,000 additional at $41.50 per 100 pounds "less 2 per cent. f. o. b. Vallejo—30 days date of arrival Boston." On August 12, 1916, through correspondence the terms of the contract were changed so as to read "2 per cent.—30 days f. o. b. tannery." On March 3, 1916, the tanning company invoiced and shipped to Ackerman & Brummel 1,000 sides of leather. On August 23d, an invoice of 255 sides was issued by the tanning company and contained the words: "Terms: 2%—30 days f. o. b. Vallejo." No other shipments were made. In a letter dated September 12th, addressed by the Tanning Company to N. W. & A. L. Friedman, who were the representatives of Ackerman & Brummel at San Francisco, the

tanning company advised Friedman that another shipment of leather was ready for delivery, and requested Friedman to be in Vallejo to receive the leather on the date of the shipment. Friedman went to Vallejo, and on his return to San Francisco on September 15, 1916, wrote to the tanning company that the leather inspected did not meet the specifications provided for under the contract, and that it was necessary to reject the same. A few days later, September 18th, Friedman again wrote the tanning company, offering to find a market for the rejected leather at 43 cents a pound; but the tanning company refused the offer, and on September 19th telegraphed to Ackerman & Brummel at Boston as follows: "Had shipment leather ready last Friday. As matter of courtesy asked Mr. Friedman to inspect same before shipment. He examined part of lot and said it was not satisfactory. We insist it is up to requirements in all respects. To avoid delay and future difficulties please name another representative here to inspect the shipment. Advise by wire your wishes."

Ackerman & Brummel, under date of September 20th, wrote the tanning company, acknowledging receipt of the telegram, and saying the matter must be left in the hands of Friedman to pass upon the shipment. Five days afterwards, September 25th, Ackerman & Brummel, by letter to the tanning company, acknowledged receipt of the leather invoiced on August 23d and said: "We have had such an exceptional amount of trouble in securing this leather from you that we propose to hold back payment on this bill until you make another shipment, and as soon as we receive the other shipment we will pay you this bill immediately, and will continue to follow this mode of payment until your order is completed." The August shipment was invoiced on the 23d of that month, and the leather was shipped on the 22d. On September 25th, Friedman wrote the tanning company to the effect that he had received a communication from Ackerman & Brummel, inclosing a copy of their letter to the tanning company, and expressing regret that he (Friedman) was unable to accept the last shipment of leather. The next day the tanning company wrote to Friedman, acknowledging receipt of a letter of September 20th from Ackerman & Brummel, in which they had referred to the acceptance and rejection of the leather by Friedman. In this letter the tanning company asked a re-examination and acceptance of the leather, and stated that it fully met all requirements of the agreement.

On September 27th Friedman again wrote to the tanning company, stating that the leather was not of the proper quality and color, and on the following day the tanning company replied, insisting that it was in accordance with the terms of the agreement. On October 9th the tanning company wrote Ackerman & Brummel, acknowledging receipt of their letter of September 25th, already quoted from, in which Ackerman & Brummel notified the tanning company that they intended to hold back the payment on that and other bills. In the letter of October 9th was a statement that, if the money due for the August shipment was not paid without further delay, suit and attachment for the full amount due and damages would be brought. The letter continued as follows: "The 'other shipment' which you mention was, as you know, repeatedly tendered by us in accordance with our contract and was by you rejected. We feel that your course in this matter is prompted by a disposition to take an advantage. You have rejected leather which is fully up to the contract, and you now, without any excuse therefor, arbitrarily refuse to pay us for the consignment which you received and which you concede is of the quality called for. We cannot tolerate such defiance of the terms of your contract, and we propose to insist upon prompt payment in accordance with the terms of your agreement." On October 11th Friedman wrote to the tanning company as follows: "* * * As long as the leather for Ackerman & Brummel is ready for shipment, go right ahead and tie it up and ship it at the earliest possible date." The last correspondence had between the parties was dated October 13th, a letter by the tanning company to Friedman, wherein the tanning company accuses Ackerman & Brummel of having refused to accept leather complying with the terms of the contract, and of having refused to pay for each consignment within 30 days after shipment from Vallejo.

Wise & O'Connor, Otto Irving Wise, Richard S. Goldman, and John C. Altman, all of San Francisco, Cal., for plaintiffs in error.

John L. McNab and Byron Coleman, both of San Francisco, Cal., for defendant in Error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The theory of the plaintiffs in error is that the tanning company refused to comply with the directions of Friedman, made after the second inspection, to ship the leather at once, and that by refusal to carry out such request, or to deliver any other backs until the shipment of 255 backs had been paid for, it followed that the tanning company broke the contract and became liable for damages for a breach. The argument is that a failure to pay an installment due under the terms of a contract does not avoid the entire contract, or constitute a breach, unless by express terms such failure to pay is made a ground for the termination of the contract, and Cox v. McLaughlin, 54 Cal. 605, is the main decision relied upon. There a contractor brought action for damages for breach of contract for erecting a building, and alleged failure to pay certain installments due under the contract at the time provided for. The court held that such failure did not give plaintiff right to terminate the contract and sue for damages for its entire breach. Upon a later appeal of the same case (Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164) it was held that the contractor could amend and recover upon a quantum meruit for labor and material furnished, but could not maintain action for damages for breach of the entire contract. Under the later cases in California the earlier decision in Cox v. McLaughlin, supra, is regarded as holding that a mere refusal to pay an installment upon the contract price of an article as it becomes due does not authorize the plaintiff to abandon the work and recover the profits he would have made if the work had been completed under the contract. Woodruff Co. v. Exchange Realty Co., 21 Cal. App. 607, 132 Pac. 598; Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 Pac. 146.

In the recent case of Jensen v. Goss (Cal. App.) 179 Pac. 225, the parties made a contract for purchase and sale of hay, payments to be made on the 13th of each month following delivery. The buyer failed to make the payments as agreed, and the seller refused to deliver. The court held that the seller of the hay was justified in rescinding the contract, when it was shown that there was a clear intention to violate its provisions and to withhold payments due until the delivery of more hay. Minaker v. California Canneries Co., 138 Cal. 239, 71 Pac. 110, was cited to support the rule that plaintiff could not offset any damages for alleged breach by refusal to pay on the ground of a failure to deliver the quality of hay required by the contract without showing performance on his own part of his own agreement. The court said:

"It was just as important that payments should be made as agreed upon as it was that deliveries should be made according to the contract, and when

one of the parties flatly declared that it would not pay as agreed, the other party had the right to refuse to further deliver."

[1, 2] By the application of these rules, Ackerman & Brummel first defaulted, for on August 22d the tanning company shipped 255 backs of leather in accordance with the terms of the contract, and invoices were mailed on August 23d, and receipt of the consignment was acknowledged on September 25th. The modified contract, as to terms of payment, was made before the leather was shipped; hence payment was due September 22d, or 30 days after shipment from the tannery. It was on September 25th, however, that Ackerman & Brummel wrote the letter quoted, refusing to carry out the terms of the contract, and announcing their intention to continue to hold back payment until the order was completed. The situation gave to the tanning company the right to stand upon the terms of the contract and to refuse performance until the terms thereof were lived up to. The delayed acceptance by the buyers of the leather that had been once rejected was a waiver of defects in the leather, and of contract requirements as to the quality of the merchandise, and Ackerman & Brummel, having failed to comply with the terms of payment, are not in a position to insist that the tanning company should have proceeded and completed the contract in the manner specified. San Francisco Bridge Co. v. Dumbarton Land, etc., Co., 119 Cal. 272, 51 Pac. 335.

[3, 4] In what we have said we construe the mode of payment stated in the contract, "2%—30 days f. o. b. tannery," to require payment within 30 days of the date of shipment from the tannery, and if paid sooner than the expiration of the 30 days a deduction of 2 per cent. was to be made. Such a construction usually obtains in respect to mercantile agreements where, as a rule, the parties are held to have intended to make time the essence of the contract. Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; Jensen v. Goss, supra.

We think the District Court was right in its findings, and that its legal conclusion should be sustained.

Affirmed.

UNITED STATES v. WARD et al. (two cases). SAME v. BRAINERD et al. SAME v. MATTHEWS et al.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1919.)

Nos. 5223–5226.

1. BANKRUPTCY ⟸230—REFEREES—LIABILITY ON OFFICIAL BOND.

Where a referee has collected from parties or estates in bankruptcy proceedings moneys as compensation to which he is not legally entitled, and these fees have been collected or withheld from parties who are numerous, and the individual amounts small, the United States may maintain a single action on his bond, on behalf of all parties injured, to recover back such illegal fees.

2. BANKRUPTCY ⟸230—ACTION ON REFEREE'S BOND—COMPLAINT—NAMING OF USE PLAINTIFFS.

In an action by the United States on the official bond of a referee in bankruptcy, on behalf of numerous parties from whom he has collected

illegal fees, it is not necessary that all such parties should be named in the complaint.

3. BANKRUPTCY ⊂⊃223—REFEREES—COMPENSATION.
Where a duty is imposed upon a referee by the bankruptcy law, and compensation is also fixed for its performance, the bankruptcy court has no power or authority to allow any further compensation.

4. BANKRUPTCY ⊂⊃223—REFEREES—COMPENSATION.
Where a duty is clearly imposed by the bankruptcy law upon a referee, and no specific compensation is fixed for its performance, the compensation expressly authorized by the law as a whole is the only compensation which he can receive, or that the court has power to allow.

5. BANKRUPTCY ⊂⊃230—REFEREES—ACTION TO RECOVER FEES ILLEGALLY COLLECTED—EFFECT OF ALLOWANCE BY COURT.
A court of bankruptcy being without jurisdiction to allow a referee under any form or guise any other or further compensation than expressly authorized and prescribed by the bankruptcy law, such allowance, if made, does not bar an action for its recovery.

6. BANKRUPTCY ⊂⊃223—ALLOWANCE OF EXPENSES TO OFFICERS—REVIEW.
An allowance by a court of bankruptcy of necessary expenses incurred by officers in administration of estates, which under Bankruptcy Act July 1, 1898, § 62 (Comp. St. § 9646), is within the power of the court, is not subject to collateral attack, but can only be reviewed by direct proceedings.

7. BANKRUPTCY ⊂⊃223, 224—POWERS OF BANKRUPTCY COURT—APPOINTMENT OF SPECIAL MASTERS.
A court of bankruptcy may, in the exercise of a sound discretion, refer issues to special masters, and may name a referee as such special master, and his fees and expenses as such are within the control of the court, and its judgment in such matters is not subject to collateral attack.

8. BANKRUPTCY ⊂⊃223—POWERS OF BANKRUPTCY COURT—EXPENSE ALLOWANCE TO REFEREES.
A court of bankruptcy may authorize a referee to employ a clerk and allow an expense for stationery, office rent, light, heat, and phone, and such authorizations may be made by standing rule or order, or by special order in any particular case.

9. BANKRUPTCY ⊂⊃230—REFEREES—ACTION TO RECOVER FEES ILLEGALLY COLLECTED—"JUDICIAL ACT."
The taking of fees by a referee in excess of those prescribed by the statute is not a "judicial act," and as such protected from an action for an accounting.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Act.]

10. BANKRUPTCY ⊂⊃230—REFEREES—LIABILITY OF SURETIES.
Sureties on the bond of a referee conditioned for the faithful performance of his official duties are liable for fees illegally collected or retained by him.

11. JUDGES ⊂⊃24—"JUDICIAL ACT."
A "judicial act" is an act of a court or magistrate in deciding a question of right litigated before him or referred by law to his judgment.

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

Actions by the United States against W. T. Ward and others (two cases), against Ezra Brainerd, Jr., and others, and against R. H. Matthews and others. Judgments for defendants, and the United States brings error. Reversed.

For opinion below, see 250 Fed. 1011.

Alvin F. Molony, Sp. Asst. U. S. Atty., of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

J. L. Hull, of Muskogee, Okl., and H. C. Thurman, of Oklahoma City, Okl. (N. A. Gibson and T. L. Gibson, both of Muskogee, Okl., and J. H. Gordon and E. E. McInnis, both of McAlester, Okl., and J. S. Ross, of Oklahoma City, Okl., on the brief), for defendants in error.

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

CARLAND, Circuit Judge. These are suits on bonds of referees in bankruptcy to recover fees, costs, commissions, and compensation alleged to have been illegally collected and received by them in excess of the amount allowed by law. They were brought by the United States on its own behalf and on behalf of various suitors and parties interested in the administration of bankrupt estates. The defendants in each case are the referees and the sureties on their official bonds. The items for which a recovery is sought are stated in detail in exhibits attached to the complaints. These items may be grouped under three heads: (1) Services for which the bankruptcy law fixes the compensation. (2) Services for which the compensation is fixed by the United States District Court. (3) Costs and expenses allowed by said court.

[1] The defendants filed general demurrers, which were sustained. The United States electing to stand on its complaints, judgments dismissing the same followed. The condition of each bond sued upon was for the faithful performance of the official duties of the respective referees. The United States was the obligee, and the law provides that the bond may be sued upon, in the name of the United States for the use of any person injured by a breach of its condition. In our opinion, Congress intended that the bond should protect private individuals as well as the United States. The requirement that referees in bankruptcy should execute a bond for the faithful performance of their duties was an assurance to persons interested that, within the penalty of any bond taken from them by the United States their rights would be protected against any act or omission on the part of referees resulting to their injury. Howard v. United States, 184 U. S. 676, 692, 22 Sup. Ct. 543, 46 L. Ed. 754.

The case cited was an action by the United States, for the use of one David D. Stewart, against the sureties on the official bond of one Watson, formerly clerk of the United States Circuit Court for the Western District of Missouri. Stewart had brought a suit against Henry county, Mo., to recover the amount of three bonds issued by it. The county, when it answered, paid to Watson $2,525 as a tender to the plaintiff, and thought it was depositing the money in court; but Watson did not think so, and converted the same to his own use. The condition of Watson's bond was that he would faithfully discharge the duties of his office and seasonably record the decrees and determinations of the court of which he was clerk. Not-

withstanding Watson's bond was silent as to his accounting for money coming into his hands as clerk, and notwithstanding there was nothing in the bond or in the law that provided for any one bringing a suit on the bond other than the obligee, the United States Supreme Court allowed a recovery against the surety. Howard. We therefore think that upon principle and authority, where a referee has collected, from parties or estates in bankruptcy proceedings, moneys as compensation that under no theory of the law was he entitled to, and these fees have been collected or withheld from parties who are numerous and the individual amounts small, the United States has the legal and moral right to bring one suit in behalf of all parties injured, to recover back compensation illegally exacted by him. Any other view would render a referee's bond largely valueless in respect to such matters.

[2] The names of the individuals for whom the United States sues are not given in the complaint, but this is not always necessary. It is a matter upon which no issue can be made. American Bonding Co. v. Allison, 182 Fed. 810, 105 C. C. A. 242; Schott v. Youree, 142 Ill. 233, 31 N. E. 591; Clarkson's v. Doddridge, 14 Grat. (Va.) 42; Boston El. Ry. v. Grace & Hyde Co. et al., 112 Fed. 279, 50 C. C. A. 239; United States v. Abeel, 174 Fed. 12, 98 C. C. A. 50.

[3, 4] Counsel seem to treat the items sued for as belonging all to one class, and the trial court so treated them; but manifestly they cannot be so treated. Coming to the merits, we think it must be conceded that where a duty is imposed upon a referee by the bankruptcy law, and compensation is also fixed by that law for the performance of that duty, no power or authority exists in the United States District Court sitting as a court of bankruptcy to allow him any other or further compensation for the performance of the duty than that fixed by the bankruptcy law, and it must be further conceded that where the duty to be performed is a duty clearly imposed by the bankruptcy law upon the referee as such, and no specific compensation is fixed for the performance of said duty, the compensation fixed by the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. §§ 9585–9656]) as a whole is the only compensation which the referee can receive or that the court has power to allow. Section 72 of the Bankruptcy Act as amended (section 9656) reads:

"Neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act."

General Order 35 (89 Fed. xiii, 32 C. C. A. xiii) provides:

"The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders." In re Halbert, 134 Fed. 236, 67 C. C. A. 18; In re Langford (D. C.) 225 Fed. 311, 314, 315; Dressel et al. v. North State Lumber Co. (D. C.) 119 Fed. 531.

The administration of the bankruptcy law existing prior to the enactment of the present one had been attended by grave abuses and scandals, resulting from the absorption of bankrupt estates in fees and costs of the officers connected with its administration. Congress therefore by the above legislation intended to cure the evil so

far as possible, and the courts should construe the law with reference to the object that Congress had in mind.

[5] The language of the complaint, in referring to the items which it is sought to recover, speaks of them as having been allowed to the referees. The trial court assumed, and it may have been justified in so doing, that it had the right to consider the excess fees, costs, and compensation as having been allowed by the United States District Court. The case being thus viewed, it sustained the demurrer by invoking the general principle that, where a court has once acquired jurisdiction, it has the right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed. The general principle as stated is correct, but, like all general principles, is subject to many qualifications in its application. The District Courts have a general jurisdiction in bankruptcy, but they have no power, when exercising that jurisdiction, to allow a referee, under any form or guise, any other or further compensation for his services as referee than that expressly authorized and prescribed by the bankruptcy law. It cannot transcend the power conferred by law. If a court has jurisdiction of an action on a money demand, it cannot in that action imprison the defendant. If it has jurisdiction of an action for libel, specific performance of a contract cannot be decreed in that action. If it has jurisdiction of an action for the possession of real property, the court cannot in that action probate a will. Such judgment, if rendered, would not be merely erroneous, but absolutely void. Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914; United States v. Walker, 109 U. S. 258, 3 Sup. Ct. 277, 27 L. Ed. 927; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

The principle invoked is better stated by Justice Swayne in Cornett v. Williams, 20 Wall. 250, 22 L. Ed. 254, as follows:

"That jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud."

In United States v. Walker, supra, Justice Woods said:

"Although a court may have jurisdiction over the parties and the subject-matter, yet, if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void."

When a court has power to fine only, and it also imprisons, the imprisonment is void. Ex parte Lange, supra.

[6] We are therefore of the opinion that the allowance of compensation by the District Court, other or different, or in addition to, that provided by the bankruptcy law for services clearly imposed upon a referee by said law, is beyond its jurisdiction and void, and its judgments may be attacked collaterally. The statute prohibits the court from exercising any judgment in the matter. There are many items sued for in these actions where this rule does not apply. Section 62 of the Bankruptcy Act (Comp. St. § 9646) provides:

"The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved

by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred."

And General Order 26 (89 Fed. xi, 32 C. C. A. xi) provides:

"Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month."

We are of the opinion that, within the limitations of these provisions, the allowance of necessary expenses in bankruptcy proceedings is within the power and control of the United States District Court, both as to the occasion therefor and the amount thereof, and if parties are aggrieved by the action of the court in this behalf, they must, by petition for review or appeal, bring the matter directly before an appellate tribunal, and that, if this is not done, the judgment becomes final and is not subject to collateral attack.

[7] We are also of the opinion that General Order No. 12 (89 Fed., vii, 32 C. C. A. vii) does not limit the United States District Court in appointing special masters to the case of an application for a discharge, the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state. We think the United States District Court sitting in bankruptcy cases may, in the exercise of a sound discretion, refer issues to special masters and name a referee as such special master; that the fees and expenses of such special masters are matters within the control of the United States District Court (Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607; In re Lacov, 134 Fed. 237, 67 C. C. A. 19; In re Tracy, 179 Fed. 366, 102 C. C. A. 644; In re King, 179 Fed. 694, 103 C. C. A. 240; In re Langford [D. C.] 225 Fed. 311; In re Harrison Bros. [D. C.] 197 Fed. 321; Collier on Bankruptcy [11th Ed.] 1184); that its judgments with reference to these matters, unless presented to an appellate tribunal by petition to revise or appeal, become final and are not subject to collateral attack.

[8] We are also of the opinion that the United States District Court may authorize the referee to employ a clerk, and allow an expense for stationery, office rent, light, heat, and phone, and that these authorizations may be made by standing rule or order as well as by special order in any particular case. In re McCubbin Co., 33 Am. Bankr. Rep. 280; In re Pierce (D. C.) 111 Fed. 516; In re McNeil Corporation (D. C.) 249 Fed. 765.

[9, 11] In view of the arguments made by counsel for defendants, and by reason of language used in the opinion of the court below, it is well to state that these suits are not brought to recover damages from referees for their judicial acts, and therefore a discussion as to the responsibility of judicial officers for their acts is not relevant. It would seem to be argued by counsel that the taking of a fee conceded to be unlawful by a referee is a judicial act, and that he cannot be made to account therefor. Can it be said that if there is $500 disbursed to creditors by a trustee, and the referee takes 2 per cent. thereof as a commission, when the law allows only 1 per cent., that this is a judi-

cial act? A judicial act is an act of a court or magistrate in deciding a question of right litigated before him or referred by law to his judgment.

In the case above supposed, there would be no litigation, and the law referred nothing to the judgment of the referee. The proceeding was simply one to find 2 per cent. of $500, a mere mathematical calculation, ministerial in its quality beyond question; moreover, there could be no judicial act by a judge acting in his own case. It is again claimed that the United States cannot recover in this action, because the beneficiaries could not recover. The reason alleged for this position is that the beneficiaries would be bound by the judgment from which they did not appeal. We have already indicated when this rule would apply and when it would not.

[10] In behalf of the sureties it is urged that the condition of the bond would not cover moneys collected in the form of illegal fees; that to take illegal fees may be entirely consistent with a faithful performance of the duties of the office of referee. We do not think so. There is a duty imposed by law on referees to receive none but legal fees. If they do otherwise, they are not faithfully performing their duty. In the case of Howard v. United States, supra, the clerk was held for the misappropriation of funds paid to him as clerk, and the condition of his bond, so far as the present case is concerned, was the same as the condition of the bonds now in suit.

The judgment below in each of the above cases is reversed, and the causes remanded, with instructions to overrule the demurrers and allow the defendants to answer, if they are so advised, and to otherwise proceed in said cases in conformity to the views herein stated.

BRYANT et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1919.)

No. 3250.

1. INDICTMENT AND INFORMATION ⟸87(7)—TIME OF OFFENSE—CERTAINTY.
   Indictment for seditious conspiracy, alleging commission of offense "on or about April 5, 1917," is sufficiently definite in respect of time.
2. CRIMINAL LAW ⟸1186(4)—APPEAL—HARMLESS ERROR—INDEFINITENESS OF INDICTMENT.
   Any imperfection in indictment as to definiteness of averment of time of commission of offense is cured by Rev. St. § 1025 (Comp. St. § 1691).
3. INDICTMENT AND INFORMATION ⟸125(5½)—DUPLICITY—CONSPIRACY.
   Indictment charging conspiracy to overthrow and destroy government and to levy war against it is not duplicitous; conspiracy being the gist of the offense, and but one being charged.
4. CRIMINAL LAW ⟸369(2)—EVIDENCE—SHOWING OTHER CRIME.
   Facts material to show the offense in issue are not incompetent, because tending to prove an independent crime.
5. CRIMINAL LAW ⟸824(8)—LIMITING EFFECT OF EVIDENCE—NECESSITY OF REQUEST.
   To put the court in error in not limiting effect of evidence admissible against one of the defendants, request by the others that this be done is necessary.

6. CRIMINAL LAW ⊂⊃1169(7)—HARMLESS ERROR—ADMISSION OF EVIDENCE.
Admission of declaration of one of defendants tried for conspiracy could not have injured the others, the jury being charged to consider declarations of a defendant only against himself or codefendants who were present and heard them, unless a conspiracy between him and the others was found; and he being acquitted necessarily involving a finding that he did not conspire with the others.

7. CRIMINAL LAW ⊂⊃393(1)—PRIVILEGE OF ACCUSED—SECONDARY EVIDENCE.
The constitutional guaranty against compelling defendants to be witnesses against themselves does not go to the extent of preventing the government from proving by secondary evidence the contents of a document it cannot produce, because in a defendant's possession.

8. CRIMINAL LAW ⊂⊃402(2)—SECONDARY EVIDENCE—LETTERS IN DEFENDANT'S POSSESSION—DEMAND.
Tracing letters into defendant's possession authorizes the government to introduce secondary evidence of their contents, without a demand for their production, especially where defendants testify to their destruction.

9. WITNESSES ⊂⊃360—IMPEACHMENT—REBUTTAL.
In rebuttal of evidence of conviction of government witness, shown by defendants for purpose of impeachment, his pardon is competent.

10. CRIMINAL LAW ⊂⊃1169(6)—HARMLESS ERROR—ADMISSION OF EVIDENCE.
No harm was done by admission of government evidence; all the defendants affected thereby having been acquitted.

11. CRIMINAL LAW ⊂⊃877—INCONSISTENT ACQUITTALS AND CONVICTIONS.
It is no ground for setting aside a conviction of certain defendants of conspiracy that the evidence may be equally strong against others who were acquitted.

12. CONSPIRACY ⊂⊃43(12)—VARIANCE—NUMBER OF CONSPIRATORS.
It is only necessary to show conspiracy between two or more of all those charged with conspiracy to warrant conviction of those shown to have conspired.

13. CONSPIRACY ⊂⊃28—ILLEGALITY—INCEPTION BEFORE STATUTE.
A conspiracy against enforcement of the Draft Law, entered into before its passage, continuing up to and after the time it became effective, then became illegal, even if it was not before.

14. CONSPIRACY ⊂⊃28—TO OVERTHROW GOVERNMENT.
Though the specific object of the conspirators was to prevent enforcement of the Draft Law, if to attain that object an attempt was to be made, if necessary, to supplant the administration with a provisional government, the conspiracy was to destroy or overthrow the government, in violation of Penal Code, § 6 (Comp. St. § 10170).

15. CONSPIRACY ⊂⊃28—TO LEVY WAR.
It is a conspiracy to commit treason by levying war against the United States, to conspire to prevent altogether the enforcement of a statute thereof.

16. CONSPIRACY ⊂⊃27—AGAINST GOVERNMENT—OVERT ACT.
An overt act is not necessary for conviction, under Penal Code, § 6 (Comp. St. § 10170), of conspiracy to destroy or overthrow the government, or to wage war against the United States.

17. CONSPIRACY ⊂⊃47—TO RESIST LAW—GENERALITY—EVIDENCE.
Relative to necessity of resistance of a law being general, that a conspiracy to resist it shall constitute one to destroy or overthrow the government, or to wage war against the United States, evidence *held* sufficient to show conspiracy of defendants to prevent enforcement of conscription under the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k) all over the United States, not alone in their individual cases.

18. CONSPIRACY ⟸48—AGAINST GOVERNMENT—QUESTION FOR JURY.
Evidence *held* sufficient to make it a jury question whether defendants conspired to overthrow and destroy the government and to levy war against the United States.

19. CONSPIRACY ⟸43(12)—VARIANCE—OBJECTS OF CONSPIRACY.
Though indictment under Penal Code, § 6 (Comp. St. § 10170), charges conspiracy to overthrow and destroy the government and to wage war against the United States, it is enough to establish either.

20. CRIMINAL LAW ⟸377—EVIDENCE—DEFENDANT'S GOOD CHARACTER—LIMIT OF TIME.
Proof of good character of defendants as to being law-abiding citizens may be limited to the date of the alleged commission of the offense.

21. COURTS ⟸337—FEDERAL COURTS—FOLLOWING STATE PRACTICE—IN CRIMINAL MATTERS.
Federal courts do not follow practice of the courts of the states in which they sit, in criminal matters, and need not permit argument to follow charge in conformity to state practice.

In Error to the District Court of the United States for the Northern District of Texas; George W. Jack, Judge.

G. T. Bryant, Z. L. Risley, and S. J. Powell were convicted of violation of Penal Code, § 6, and they bring error. Affirmed.

See, also, 245 Fed. 682.

William H. Atwell, of Dallas, Tex. (C. Nugent, of Hamlin, Tex., on the brief), for plaintiffs in error.

W. M. Odell, U. S. Atty., of Ft. Worth, Tex. (William E. Allen, Asst. U. S. Atty., of Dallas, Tex., on the brief), for the United States.

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

GRUBB, District Judge. The plaintiffs in error were indicted, tried, and convicted in the District Court of the United States for the Northern District of Texas for an alleged conspiracy to overthrow, put down, and destroy by force the government of the United States and to levy war against them. The indictment included originally 55 defendants and 8 counts. A verdict of guilty was returned against the 3 plaintiffs in error only of all those originally indicted, and fixed their guilt under the first count of the indictment alone. This count charged the plaintiffs in error with a violation of section 6 of the Penal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1089 [Comp. St. § 10170]), by conspiring to overthrow, put down, and destroy by force the government of the United States and to levy war against them. That section provides, among other things, that if two or more persons in any state or territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or destroy by force the government of the United States, or to levy war against them, they shall each be fined not more than $5,000, or imprisoned not more than 6 years, or both. No overt act is required to complete the offense created by this section.

The plaintiffs in error were officials of a secret organization called the Farmers' and Laborers' Protective Association, which was or-

ganized in Texas in the year 1914 or 1915, and it was in connection with their activities as officials of this organization that the charges were preferred. The contention of the government is that the plaintiffs in error, together with the defendants jointly indicted, who were acquitted, and others not indicted, formed a conspiracy to prevent the enforcement of any conscription law that might be passed by Congress, and to overthrow the government of the United States, in the event such a law was enacted and sought by the government to be enforced.

The government contends that, to accomplish the result of the conspiracy, the conspirators created or used the machinery of the organization named and its membership, and that, whatever might be said of the guilt of the members of the association other than the three plaintiffs in error, the evidence, as to them, satisfied the jury, and was sufficient for that purpose, that they did conspire to overthrow the government and levy war against it, if conscription was attempted by it to be enforced; that the plaintiffs in error introduced and urged in the conventions of the association the adoption of resolutions looking to that end; urged the procuring by the members of high-power rifles, in anticipation of forcible resistance to conscription, if it became necessary, and the sending of delegates to the adjoining state of Oklahoma to secure the co-operation of such organizations as the Working Class Union and the Industrial Workers of the World in this intended purpose; that they urged upon the local lodges of their own organization and their members resistance to conscription by force and arms, and the procuring of arms to that end; and that, in obedience to such urging, members of the organization did actually procure rifles, and some few, after so arming themselves, took a position in a canyon, prepared there to offer resistance to the officers of the government, if any attempt to conscript them was made.

The government contends that, but for the timely interruption of the conspiracy by the apprehension of its leaders, actual resistance would have come about. The greater part of the evidence relied upon by the government to establish the conspiracy related to facts which occurred before the passage of the Selective Draft Act.

The defendants, in the District Court, admitting the organization of the Farmers' & Laborers' Protective Association and their membership therein, denied that it or its members entertained any treasonable designs against the United States government, and asserted that its object was to benefit the working and farming classes by the use of co-operative stores and other lawful methods. The trial consumed many weeks, and the evidence is so voluminous as to make a narrative of it, in even a condensed form, impracticable in an opinion. It suffices to say that, at least as to the plaintiffs in error and some of the other defendants, there was substantial evidence that they designed something more than an innocent association of workingmen and farmers to profit by co-operation in lawful ways, and that they combined with the purpose to produce among the members an uprising against any enforcement of any conscription or draft law

that might be enacted, and to prevent such enforcement, by violence, if necessary.

[1-3] The plaintiffs in error question the sufficiency of the indictment, under which they were convicted, upon two grounds. The first count of the indictment, on which alone a conviction was had, is only to be considered. It is contended that the averment of the date of the commission of the offense is not alleged with sufficient certainty in this count. The averment is that it was committed "on or about the 5th day of April 1917." The indictment was sufficiently definite in respect of time, and any imperfection in this respect is cured by section 1025, Revised Statutes (Comp. St. § 1691). United States v. McKinley (C. C.) 127 Fed. 168; United States v. Lair, 195 Fed. 47, 115 C. C. A. 49; United States v. Aviles (D. C.) 222 Fed. 474.

The plaintiffs in error further criticize the first count of the indictment upon the ground that it is duplicitous, in charging separate offenses in the same count. The count charges but one conspiracy, though its purposes were more than one. Conceding that to overthrow and destroy the government is a separate offense from levying war against it, it does not follow that a conspiracy to do both constitutes more than one offense. The conspiracy is the gist of the offense, and but one is charged. The offense itself is therefore single. John Gund Brewing Co. v. United States, 206 Fed. 386, 124 C. C. A. 268, and cases cited; United States v. Aczél (D. C.) 219 Fed. 917.

[4] The plaintiffs in error complain of the admission, over their objection, of evidence tending to show facts which would constitute crimes against the state, or the United Sates, different from the accusation for which they were being tried. It is true that the law does not permit one crime to be proved in order to raise the probability that another has been committed. If, however, the facts which tend to show the independent crime are also material to show the offense being tried, they do not become incompetent because they tend to prove the commission of an independent crime. The evidence objected to was pertinent to establish the existence of the conspiracy relied upon by the government, and was properly admitted. The court instructed the jury as to the only legitimate effect of the evidence. Jones v. United States, 179 Fed. 584, 103 C. C. A. 142.

[5, 6] The plaintiffs in error complain of the admission in evidence of an alleged statement testified to by the government witness Williams to have been made by their codefendant, Bergfeldt, who was acquitted, that he had papers in his possession that might put him in the penitentiary if it were known. The admissibility of this statement, as against the defendant who made it, is clear. If admissible as to Bergfeldt, the other defendants should have requested that its effect be limited to Bergfeldt, in order to put the court in error for not so limiting it. However, Bergfeldt was acquitted, and, in order to reach that result, the jury must have found that he did not conspire with any of the plaintiffs in error, for the indictment charged no other offense against him. The court did charge the jury that they should consider declarations of defendants only against themselves, or those of their codefendants who were shown to have been present and to

have heard them, unless they first found a conspiracy to have existed between the defendant making the declaration and those against whom it was asked to be considered. The jury, therefore, as they were instructed, must have considered the statement objected to against Bergfeldt only, since they found the plaintiffs in error had not conspired with him, by their verdict of acquittal. Its admission, therefore, worked no injury to the plaintiffs in error.

[7, 8] The plaintiffs in error complain that they were compelled to be witnesses against themselves, in violation of their constitutional right. The contention is based upon the action of the District Judge in permitting the government to trace certain letters and documents to the possession of certain of the defendants on trial, and then permitting secondary and oral evidence of their contents to be introduced. The constitutional guaranty does not go to the extent of preventing the government from proving by secondary evidence the contents of a document it cannot produce because it is in the possession of a defendant. That fact authorizes the introduction of secondary evidence, and, to lay a predicate for its introduction, the government must necessarily establish to the court's satisfaction the possession of the defendant. No demand for the production of any document was made upon any defendant in the presence of the jury. McKnight v. United States, 122 Fed. 926, 61 C. C. A. 112; Heinze v. United States, 181 Fed. 322, 104 C. C. A. 510; Trent v. United States, 228 Fed. 648, 143 C. C. A. 170; Watlington v. United States, 233 Fed. 247, 147 C. C. A. 253. The record also shows that the defendants concerned, testifying in their own behalf, proved the destruction of all the documents, except a letter, which their attorney stated was in his files, and which he stated he would produce, but was unable thereafter to locate. The District Judge also instructed the jury to disregard the evidence tracing the documents to the possession of defendants. The plaintiffs in error's rights were fully protected.

[9, 10] The plaintiffs in error also complain of the admission of the evidence of a pardon granted to the government witness Garner by the Governor of Texas. The defendants sought to impeach the evidence of Garner by showing his conviction and sentence to the state penitentiary on a charge of robbery. In explanation the witness Garner testified, without objection, to the facts attending the securing of his pardon. The objection was made to the pardon itself. We think it was competent in rebuttal of the evidence of conviction. As the defendants who were alone affected by Garner's evidence were all acquitted, no harm was done by its admission, in any event.

The plaintiffs in error demurred to the government's evidence, and also requested an instruction directing their acquittal, upon the close of all the evidence. The evidence is too extensive to abstract or analyze. There was evidence sufficient to justify the jury in determining that the plaintiffs in error, together with other of the defendants, not convicted, but apparently no less guilty, were active in their opposition to the conscription of citizens of the United States to take part in foreign wars. This opposition began in the organization of which plaintiffs in error were officers prior to the date of what is

called the first Cisco convention in February, 1917. At that convention a resolution, called the Haskell county resolution, was passed. In its original shape it contained these words:

"And we oppose the United States government in the prosecution of a foreign war."

Upon the suggestion that this might be treasonable, it was amended, after adoption, by substituting for the words "United States government" the words "capitalistic classes." This resolution had been previously adopted in its original form by local and county lodges in Haskell county. In May, 1917, a second state convention of the order was called and assembled at Cisco. One of the purposes for which this convention was called was to discuss the question of conscription. At this convention a committee on resolutions was selected by the plaintiff in error Risley, who was president of the order. It was open to inference that a majority of this committee were known to Risley to be men of radical views. The evidence tended to show that Risley suggested to the committee that the radical report be made the majority report, and it was so presented to the convention. It is true that Risley testifies his purpose in making the suggestion was to procure the defeat of the majority report on the floor of the convention. His good faith in this respect was for the jury, and it probably decided that question adversely to him. The minority report was the one adopted by the convention. It is a matter of fair inference, however, that the conservative action of the convention was distasteful to the leaders of the order, and that they did not acquiesce in it, but immediately took steps to continue the agitation for radical and violent measures against conscription. The first was the selection of the radical majority of the resolutions committee as delegates to go to Oklahoma to seek the co-operation of the radical organizations there operating.

The failure of the radical majority resolution of adoption by the convention would indicate that the order was not willing to adopt violent measures, and if the conspiracy charged had been coextensive with the membership of the order, or a majority thereof, it might have been fatal to the government's contention. The conspiracy charged was not necessarily so broad. It might include any part of the membership, though less than a controlling majority. The jury acquitted all but the three plaintiffs in error, and, by so doing, found against the conspiracy, so far as its scope included the order as an organization, only implicating its officers. The fair inference to be drawn from the verdict is that the jury believed that the plaintiffs in error had formed an inner conspiracy, the purpose of which was to use the machinery of the order to resist any draft law that might be enacted, even to the extent of overthrowing the government, if necessary, and to accomplish this by overcoming the conservatism of the majority and committing them to their own views. A tendency of the evidence, if believed, would authorize a finding that certain of the members of the organization, including plaintiffs in error, were not dissuaded from such action by the adverse vote on the majority resolution, but agreed

to continue agitation to accomplish, through the organization, violent opposition to the government, in the event it should attempt to enforce conscription. The evidence tends to show that these members considered that such action was to be deferred only until co-operation with other kindred orders could be obtained, and their power so strengthened. The report of the delegates, on their return from Oklahoma, of the impracticability of such co-operation, was not accepted as final, since, after their return and report, the letter to the local lodges signed by the plaintiff in error Powell clearly indicates the continuance of the opposition to conscription, even up to the day of the enactment of the Selective Draft Law.

The evidence also tends to show that, after the adjournment of the Cisco convention in May, forcible opposition to conscription continued to be advocated in the locals; that high-power guns were procured by members in response to urging by leaders, to be used in resisting conscription; and that certain members, armed to resist, left their homes and took position in a canyon, to resist the conscription officers. The record tends to show that the conspiracy continued to progress until it was interrupted by the indictment and arrest of certain of the defendants, on and after May 18, 1917, the date of the enactment of the selective draft act (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2044a–2044k]). There is evidence, aside from the official connection of the three plaintiffs in error, tending to connect them with such an inner conspiracy. Powell's letter to the locals, dated May 16 or 18, attached to which was a petition in opposition to conscription, to be signed by the members, is some evidence of his connection, and that it continued up to the date of the enactment of the law. Risley's conduct, as presiding officer, at the second Cisco convention, was, of itself, evidence tending to show his connection, if the jury believed from it that he then advocated the adoption of the majority resolution, and it was open to them to so find. Bryant's utterances in the locals in the course of his position as organizer was evidence of his connection, the sufficiency of which was for the jury to determine. The record contains other evidence to the same effect.

[11, 12] The fact, if it be a fact, that codefendants of the plaintiffs in error, against whom the evidence was equally persuasive, were acquitted by the jury, is no reason for setting aside the judgment of conviction against plaintiffs in error. It was necessary for the government to go no further than to establish a conspiracy as against any two or more of the defendants on trial. The organization was not on trial, but certain of its members, and a conspiracy of the kind charged, proven between any two of its members, as individuals, answered the requisition of the indictment.

The plaintiffs in error contend that a conspiracy to resist the enforcement of anticipated conscription was not forbidden by law: (1) Because the law was not in effect when the conspiracy was formed; (2) because it was not shown by the evidence to be a conspiracy to levy war against or overthrow the government of the United States, as charged in the first count of the indictment; and (3) because the

evidence showed merely individual resistance, and not a general plan to prevent the enforcement of the draft law.

[13] 1. We are not prepared to say that a conspiracy to prevent the general enforcement of a law, formed in advance of its enactment, cannot become illegal unless and until it is enacted. The threat implied in the conspiracy may operate to prevent the enactment of the law, and so interfere with an operation of the government as much as would an attempt to prevent its enforcement when enacted. The purposes of this case do not require a decision of that question. The Selective Draft Law was enacted. A conspiracy aimed at its enforcement, though entered into before its passage, would become illegal, upon its passage, if it was not before so. Otherwise the government would have no redress against preparation by force and arms to resist the enforcement of a proposed law until after its passage, when it might well be too late. Unless such a conspiracy is shown to have been abandoned before the law against which it is aimed takes effect, it would be none the less punishable because entered into in advance of the passage of the law. In this case the jury might well have inferred from the evidence that the conspiracy, though formed before May 18, 1917, the date of the enactment of the Selective Service Law, continued up to and after that date, and was only interrupted then by the interposition of the government and the arrest and indictment of the alleged conspirators.

[14-16] 2. The plaintiffs in error contend that, if a conspiracy is proven by the evidence in the record, it is not a conspiracy to levy war, or to destroy or overthrow the government, and so not the conspiracy charged in the first count of the indictment, on which alone conviction was had. The motive of the conspirators does not necessarily determine the character of the conspiracy. Their object may have been to prevent the enforcement of a specific law. If, to attain that object, they conspire to overthrow or destroy the government, as a means to that end. the conspiracy is one to destroy or overthrow the government. There is evidence in the record tending to show that, to defeat conscription, if necessary, an attempt was to be made to supplant the administration by a provisional government. If the jury so found, a conspiracy to destroy or overthrow the government would be proven. The evidence also tended to show that there was a conspiracy to prevent the enforcement of conscription and the act of Congress providing for the selective draft. A conspiracy to prevent altogether the enforcement of a statute of the United States has been held to be a conspiracy to commit treason by levying war against the United States. In the case of United States v. Fries, Fed. Cas. No. 5,127, Circuit Judge Chase, speaking for the Circuit Court, said, in charging the jury:

"The court are of opinion that, if a body of people conspire and meditate an insurrection, to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor, but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war; and the quantum of the force employed neither lessens nor increases the crime—whether by 100 or by 1,000 persons is wholly immaterial."

This extract was quoted with apparent approval by Chief Justice Marshall in the opinion of the Supreme Court in the case of Ex parte Bollman, 4 Cranch, 75, 127, 2 L. Ed. 554. In the case of United States v. Mitchell, 2 Dall. 348, 355, 1 L. Ed. 410, Justice Paterson, in charging the jury, said:

"The first question to be considered is: What was the general object of the insurrection? If its object was to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation, the offense, in legal estimation, is high treason; it is an usurpation of the authority of government; it is high treason, by levying of war."

In charging the grand jury in the Fries Case, Circuit Judge Iredell defined treason by levying war as follows:

"But I think I am warranted in saying, that if, in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms the execution of any act of the Congress of the United States altogether (as, for instance, the land tax act, the object of their opposition), any forcible opposition calculated to carry that intention into effect was a levying of war against the United States, and of course an act of treason."

The opinions of Judges Paterson and Iredell are referred to approvingly by Chief Justice Marshall in the case of Ex parte Bollman. It is true that, in order to constitute treason, as distinguished from a treasonable conspiracy, an actual assemblage of men in force is necessary, as was held in Ex parte Bollman, supra, and in United States v. Burr, 25 Fed. Cas. 162. The plaintiffs in error were, however, indicted and convicted for a conspiracy under a statute not even requiring proof of an overt act in order to convict.

[17-19] 3. It is also true that the cases cited hold that the resistance or the conspiracy to resist the enforcement of the law must be general, and not limited to a particular instance, or against a particular officer, or from a private or personal motive. There is evidence, however, in the record, which, if believed by the jury, was sufficient to show a conspiracy on the part of the plaintiffs in error to prevent the enforcement of conscription under the Selective Service Act all over the United States, not alone in their individual cases.

We think the record contains evidence, the sufficiency of which was for the jury to determine, that the plaintiffs in error conspired to overthrow and destroy the government of the United States and to levy war against it, as charged in the first count of the indictment. The government was not required to establish both, though both were averred. It established the conspiracy, as alleged, by proof of either.

[20] The plaintiffs in error complain because evidence as to the good character of some of them was limited to the finding of the indictment. Proof of good character as to being law-abiding citizens might properly have been limited to the date of the commission of the offense. 16 Corpus Juris, 581. No restriction, as to date, was placed upon evidence of reputation for truth and veracity of those defendants who testified in their own behalf.

The District Judge fully and fairly charged as to the effect of evidence of good character, and was justified in refusing the requested instructions on this subject-matter for that reason.

[21] The federal courts do not follow the practice of the state courts of the states in which they sit, in criminal matters, and there was no obligation to permit argument to follow the court's charge in conformity with the Texas practice.

The special instructions requested by the defendants have been examined. They were either covered by the court's general charge, or properly refused, because not asserting correct propositions of law, or were not applicable to the facts of the case. The questions presented by the motion in arrest of judgment have been heretofore considered.

We conclude that there is no reversible error in the record, and the judgment of the District Court is affirmed.

AUGUST v. UNITED STATES.

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

No. 5216.

1. CRIMINAL LAW ⊜450—OPINION EVIDENCE—MATTER IN ISSUE.
   On trial of an indictment charging an offer to bribe members of a draft board to exempt a person from service, the understanding of such members as to whether the words used by defendant constituted an offer *held* properly excluded as incompetent; this being the very matter in issue.
2. CRIMINAL LAW ⊜1055—APPEAL—DISREGARD OF TECHNICAL DEFECTS—EXCEPTIONS TO ARGUMENT.
   Under Judicial Code, § 269, as amended by Act Feb. 26, 1919, that "on the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties," it is the duty of the Circuit Court of Appeals to consider prejudicial remarks of counsel, although no exception was taken.
3. CRIMINAL LAW ⊜723(1)—IMPROPER ARGUMENT OF COUNSEL.
   Argument of counsel for the government in a prosecution for offering to bribe member of draft board, referring to the war with Germany, etc., *held* to contain such an appeal to prejudices of the jurors as was likely to prevent a fair consideration of the issues.

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 Albert J. August. Judgment of conviction, and defendant brings error. Reversed.

John G. Parkinson, of St. Joseph, Mo. (Benjamin Phillip and James W. Mytton, both of St. Joseph, Mo., on the brief), for plaintiff in error.

E. B. Silvers, Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., of Kansas City, Mo., on the brief), for the United States.

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

CARLAND, Circuit Judge. The plaintiff in error, hereinafter called defendant, was jointly indicted with one Kalis for violating section 39 of the federal Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10203]). The indictment was in two counts. The first count charged, among other things, that the defendant did unlawfully, willfully, knowingly, corruptly, and feloniously offer the sum and amount of $500, the exact description of which was unknown to the grand jury, to one Walter P. Fulkerson, a member and chairman of the local board known and designated as the "Local Board for Division No. 3, City of St. Joseph, State of Missouri," with the corrupt intent and purpose to influence the decision and action of Fulkerson as chairman and member of said board in relation to the making of a physical examination of said Kalis and in passing upon and determining his physical qualifications for the military service of the United States. The second count was in the same language, except the person to whom the $500 was alleged to have been offered was one Walter L. Mack, a member and clerk of the above board. A trial on this indictment resulted in the acquittal of Kalis and the conviction of the defendant. From a judgment imposing a fine and imprisonment in the penitentiary, the case is here for review.

[1] To sustain the case of the prosecution, two separate conversations had by the defendant with Fulkerson and Mack were given in evidence. The conversation with the former, as testified to by him, was as follows:

"Well, Mr. August came up about—I think about 6 o'clock in the evening, and I had just gotten home from the Exemption Board, and he drove up and got out of his car and came up the steps. I turned around. I saw him getting out of his car, and I turned around to meet him; so I walked down the steps and he came up the steps. I live on a terrace probably 10 or 12 steps high; and we met and probably shook hands. I don't remember whether we did that or not; but Mr. August just said—he says, 'W. P.,' he says, 'How can we get this boy off?' And I had in mind his son. I said, 'What boy do you refer to? or 'What boy are you talking about?' something like that, and he said, 'Why, Ike Kalis.' He says, 'You know Ike.' And about that time Ike hollered at me. Ike was either in the car, or getting out of the car, just down below. Ike hollered at me, and then I recognized him, and A. J. told me it was Joe's brother, and I said, 'Well, I remember him now.' And I told him I didn't know of any way to get Ike off. I said I didn't know of any way to get Ike off, if he is eligible to go; and he said, 'Well, he saw'—he says, 'I just can't afford to have this boy go, it'll ruin his business.' I thing he mentioned, 'It will kill his old father—going to ruin his business,' and he says, 'I can't—just can't afford to have this boy go; I must get this boy off some way'—something like that."

Counsel for the United States then asked the following questions and the witness replied as here stated:

"Q. Yes; well, for the purpose of refreshing your recollection, I will get you to state on that occasion if Mr. August didn't say to you, 'I would rather give $500 out of my own pocket right this minute than to lose this boy.' A. Well, substantially that.

"Q. Yes; you know whether or not he did say that, Mr. Fulkerson—'I would rather give $500 out of my pocket right this minute than to lose that boy?' A. I think he said, 'I would rather lose $500,' or 'I would rather give $500, than to see this boy go. I would rather go myself' Of course, it has been a good while ago for me to say he said, 'Right this minute;' I don't know that he said that. The idea was that he didn't want this boy to go.

"Q. Your recollection would be probably better in September, when the grand jury met, than after the passage of this much time? A. Yes.

"Q. Now, Mr. Fulkerson, I desire to put this question before you again—if he didn't say to you in that conversation, 'I would rather give $500 out of my pocket right this minute than to lose that boy'—if he didn't say that to you as near as you can recollect? A. Well, he said something like that; yes. He said he would rather go himself. Well, I made fun of him, and he said, 'Well, I would rather go myself—I would rather than $500 not to see this boy have to go.' 'I would rather than anything,' he says, 'I can't afford to have this boy go;' and I just turned it off in a joke with him, and I said, 'Why, A. J., you know you're getting too old to go, and no use talking that way,' and we discussed it in this way."

On cross-examination the witness testified:

"Oh, he just said, 'I can't have this boy go.' He says, 'I would rather go myself—I would rather give $500 out of my pocket than to see this boy go.' I said, as I have stated, 'It is out of the question about you going to war; you can't go to war.'"

Counsel for defendant then asked the following questions on cross-examination and they were ruled upon by the trial court as follows:

"Mr. Parkinson: You never heard Mr. August at any time say anything out at your home that indicated that he intended to corrupt you, or anything of that kind; you never heard him say anything that indicated that?

"Senator Wilson: We object to that, for that is the question to be determined by this jury. That is what this lawsuit is about; what he meant by it.

"The Court: Sustained.

"Mr. Parkinson: Well, we except to the ruling of the court.

"The Court: He may state what was said, but he can't give his opinion about it.

"Q. Well, Mr. Fulkerson, did you hear Mr. August say anything the night he was out at your home that would indicate to you that he wanted to give you $500 to do anything for or against—for or against this man's being taken into the army or being left out?

"Senator Wilson: We object to that.

"The Court: Objection sustained.

"Mr. Parkinson: We again except. We offer to prove by this witness that nothing was said there that indicated to him that Mr. August intended to brike him, or offered to bribe him, or offered him in any sense $500, or anything of that kind, in the sense of offering it to him, in the sense of its being offered to him to influence his action, or anything of that kind.

"The Court: The offer is rejected, upon the ground that the witness has stated what was said, and it is for the jury to determine what the purpose was, and the witness is not entitled to state his conception of it.

"Mr. Parkinson: Q. Mr. Fulkerson, did Mr. August offer you $500—where is that indictment—did Mr. August offer you $500, or any other sum at your home that night—offer to you—

"Senator Wilson: That is the same question asked over again.

"The Court: Well, the court will permit whatever is proper about that. If you mean the tender, the physical tender, of money, if you mean by that an interpretation of what those words meant, the court has ruled on that. If you mean to ask him whether he had $500 there which he offered him physically, of course, you may answer that. He has already answered that, and said he did not.

"Mr. Parkinson: Well, this man has been charged on a certain date with—Mr. August has been charged with offering him $500, and now I want to ask him whether in the language of the indictment this is the man—whether on that night, or at any other time, he offered him $500, or any other sum.

"The Court: If you want to put that on that ground, the ground of physical offer of money; that is, that the money was there which he offered—

"Mr. Parkinson (interrupting): No.
"The Court: If that is not what you mean, then the objection is sustained.
"Mr. Parkinson: We except."

The conversation had with Mack as related by him was as follows:

"So we took a drink of root beer, I believe, if I remember correctly, and turned around and came outside of the store, and Mr. August says, 'Mack, I want you to do something for me;' and I said, 'What is it, A. J.?' 'This man Ike Kalis comes up before your board for examination; I don't want him to go to war.' I said, 'Mr. August, if he passes the physical examination, he will have to go to war, so far as my—so far as I am concerned. I couldn't do any different if he was a brother of mine.' He said, 'I can't afford to lose that man; he's a mighty valuable man. I wouldn't have him go to war for $500 out of my own pocket.' I said, 'If he passes the examination, Mr. August, he will have to go the same as any other boy.' He says, 'How about your doctor?' I says, 'I don't believe you could touch him with a million. You would insult him if you would say anything to him.' He says, 'How about Dr. Weary?' And I repeated what I have said. He said, 'How about Dr. Ladd?' I said, 'If he passes the examination before Dr. Weary, he will never get to Dr. Ladd. If he fails to pass Dr. Weary, he will be re-examined in the afternoon before Dr. Ladd and Mr. Fulkerson.'"

Counsel for defendant on cross-examination made the following offer, which was denied, and counsel, out of deference to the ruling of the court when Fulkerson was on the stand, pursued the matter no further:

"I offer to prove by this witness that he did not understand by anything that Mr. August said that he intended to corruptly influence him to do anything improper to either admit or reject Mr. Kalis into the army."

These rulings of the trial court are assigned as error. There was no error in the above rulings of the court. How Fulkerson and Mack understood the language used by the defendant, or whether they understood it at all, was immaterial. What the language meant was a question for the jury, and the opinions of Fulkerson and Mack as to what it meant were inadmissible. Cases cited by counsel for defendant on this point are not applicable. The inadmissibility of the evidence ruled out is made to appear at once, if we suppose counsel for the United States endeavoring to prove his case in the same way from a willing witness. If this was attempted, counsel for defendant would vigorously protest, and he would be right in so doing. There was evidence to take the case to the jury. The indictment was good against a motion in arrest. Such motions are not favored. They only reach a pleading that is wholly bad. Baker v. Warner, 231 U. S. 588–592, 34 Sup. Ct. 175, 58 L. Ed. 384.

[2] We see no reversible error in the charge of the court. We are of the opinion, however, that the judgment below must be reversed for error committed by the Assistant United States Attorney in his argument to the jury. There were no exceptions taken at the trial to the remarks of counsel, and it has been the uniform ruling of this court that such exceptions are necessary in order for this court to review the error if any. Cudahy Packing Co. v. Skoumal, 60 C. C. A. 306–313, 125 Fed. 470, 477; Union Pacific R. Co. v. Field, 69 C. C. A. 536–538, 137 Fed. 14, 16; Chambers v. United States, 237 Fed. 520, 150 C. C. A. 395.

We think, whatever may be our power otherwise, or our inclination to exercise it, the late amendment to section 269, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163, as amended by Act Feb. 26, 1919, c. 48), fully authorizes and commands us to look to the entire record before the court, and render judgment without regard to the technical error of the want of exceptions to the remarks of counsel. The amendment reads as follows:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Public—No. 281—65th Congress.

[3] There were two issues submitted to the jury by the trial court: (1) Did the conversations in evidence constitute an offer of money to Fulkerson and Mack? (2) If they did, were such offers made with the intent to influence their decision in relation to the matter charged? The issues being as stated, the Assistant United States Attorney, in making the opening argument for the prosecution, spoke as follows:

"Of course, the gravity of this event is not to be measured, and the influence of what you do here to-day is not to be calculated. It will be unnecessary, probably would be unfitting, for me to remark at any length as to the momentousness of the events that are transpiring in the world to-day; but I feel it is impossible for me to refrain from some reference to those things, and the relevancy of those events to the trial that here is proceeding will justify my remarks along that line.

"You know different people view different things in different ways. That which deeply impresses one man may be considered by another with no great concern; but as for me, gentlemen, in thinking of the causes which precipitated the entrance of America into the great struggle which now embraces practically all mankind, I can consider the evil imaginations of the emissaries of the German government in this country while we were yet at peace and neutral, with some calmness; I can even think of the illegal establishment of a blockade, and the futile manner in which it was sought to be enforced, without any great heat. But when I come to think of the outrages that have been committed against helpless, defenseless, and unsuspecting peoples—when I think of the atrocities committed against the women and the helpless children of France, and of Belgium, and of Serbia, and of Armenia, and of Poland, when I think of the outrages committed against womanhood throughout Europe, without justification, without provocation, without cause, and without reason, save to gratify the ambition of a war lord, and to satisfy the lust of his followers, my blood boils, and I know, gentlemen, that our cause is a just cause, and a righteous cause, and the entrance of America into this war is a just entrance, and a righteous act, and when I think of those things I turn to Him whose omnipotence has always upheld the arm of the righteous and confounded the wicked, who has always lent succor to the helpless and consolation to those who are sad of heart, and I turn to Him with an unswerving faith that despite the numbers of the enemy, despite their preparation, despite schemes and their ingenuity, and despite even the villainous and traitorous conduct of some even among us who would thwart and impede the work of our Lord in this great struggle, in spite of all these things, I cannot help but feel that somehow in His omnipotence eventually He will see our boys come home crowned with the laurels of victory.

"I say, gentlemen, that the gravity of the things that we do here to-day is not to be measured, and, as I said a while ago, I have a feeling of sincerest pride to be engaged in this prosecution. On the other hand, I have some sense of chagrin; not that my task is obnoxious, or that my duty is onerous; not that. But, gentlemen, I was born and raised in the state of Missouri, and

it is not without some sense of shame that I stand here in this public court to prosecute one whom I am convinced while living within the borders of that lovely state, whose name and emblem I revere as second only to that of the nation, of which she forms a part, I say that I feel a sense of shame that there is within her borders one so low and so vile that he would employ his efforts, his influence, and his filthy gold to thwart and impede the efforts of his nation, which has blessed him so abundantly with security and with happiness and with prosperity and the things of this world.

"You know, I came from the southwestern part of this state, and we folks down there have always looked upon northwest Missouri as a great territory peopled by noble people. This is my first experience in this division of this court, and yesterday morning, when I looked at this panel as they came into court, and the first I looked over the faces of the spectators who had assembled here, I said to myself that my estimation of the character and quality of the people of northwest Missouri had never been too high, and I trust and believe that the outcome of this prosecution will not necessitate that I shall in any wise revise the high opinion that I have always entertained of northwest Missouri and her people.

"I said awhile ago that the gravity of this occasion is not to be measured, and it is not. It is not as though, gentlemen, we were prosecuting some one on a charge of having stolen a horse or a cow, for then only a few people would be directly interested. It is not, gentlemen, as though we were prosecuting some one on a charge of murder, for in that case only a comparatively small community would be directly interested. You know we are prone to think of the crime of an attempt to corrupt the courts as being very heinous and striking at the very foundations of our institutions. Gentlemen, this occasion and this prosecution is more grave than were it a prosecution against some one for having attempted to corrupt his honor on the bench, though in such a case only the immediate litigants involved would be directly interested or affected. *But to-day, gentlemen, the world is engaged in a war, the whole world is engaged in a war for humanity; a war which holds in its balance the very future of the race; a war for the rights, the sacred rights, of man, and the honor of womanhood, and the security and sanctity of little children; and we are here engaged in the prosecution of one who, as I am convinced, was willing to place his influence and his efforts and his filthy gold in the scales against those things which all men hold most dear.*

"This prosecution, gentlemen, will not affect only St. Joseph. It will not only affect Buchanan county. It will not only affect northwest Missouri, and reflect either dishonor or credit upon her; but the result of you gentlemen's deliberations will be heralded to every nook and every corner of this land; yea, and in some way I doubt not it shall waft its way to the agents of hell opposed to us across the mighty waters, and there, gentlemen, the verdict of this jury will be read and heard by the war lords of Germany as a beat from the pulse of the American people. So I say that the gravity of this occasion cannot be measured, and I trust gentlemen, that you will consider this case carefully—that you will consider very, very deliberately."

The case was tried on March 5, 6, 7, and 8, 1918. On these dates it was not necessary to inflame the passions of jurors by talking about the enemies of our country, rather was it a time to caution jurors against allowing their prejudices and patriotism from swaying their judgment. But the Assistant United States Attorney so far transcended his duty as a prosecuting officer that we are clearly of the opinion that the conviction of the defendant ought not to stand. The language used speaks for itself. It must have produced a situation in the minds of the jurors that destroyed a calm consideration of the rights of the defendant. The United States cannot afford to convict her citizens in this manner. There was no case against Kalis. The court directed a verdict in his favor on one count, and there was no evidence to

convict him on the other. His acquittal, therefore, cannot be urged in support of the proposition that the jury acted without prejudice.

The judgment below is reversed, and a new trial ordered.

O. & W. THUM CO. v. A. K. ACKERMAN CO.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3161.

TRADE-MARKS AND TRADE-NAMES ⟸100—UNFAIR COMPETITION—SUFFICIENCY OF DECREE.

In suit to restrain unfair competition in the sale of sticky fly paper or fly coils, so as to infringe plaintiff's rights, decree approving the trade-name, the name of his commodity, and the designs submitted by defendant under which to continue business, and fixing the amount of bond required as a condition to permit the sale of stock previously manufactured by defendant, *held* sufficient as effectively protecting plaintiff's rights.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; Clarence W. Sessions, Judge.

Suit in equity by the O. & W. Thum Company against the A. K. Ackerman Company. From the decree, plaintiff appeals. Affirmed.

See, also, 254 Fed. 219.

This is an appeal from the decree entered in the court below upon mandate issued pursuant to opinion rendered, August 1, 1917, in the two cases of the present appellant against Dickinson and the Ackerman Company, respectively, which were commenced in separate jurisdictions and subsequently heard together in this court, as explained in 245 Fed. at page 610, 158 C. C. A. 37. The facts then pertinent to the cases and the reasons for the conclusions reached appear in that opinion, and a petition for writ of certiorari was denied in each case. 246 U. S. 664, 38 Sup. Ct. 334, 62 L. Ed. 928. The defendants in those cases, on November 26, 1917, presented to the court below a joint petition, bearing the titles of both the original cases, specifying the courts in which the cases had been brought, one in Michigan and the other in Ohio, and addressed to the "District Courts of the United States"; but it does not appear whether a similar petition was filed in the District Court for the Western District of Michigan. This joint petition, after setting out steps previously taken in this court, in substance states that the season of manufacture of sticky fly paper for the year 1918 was then at hand, and that it was necessary for the petitioner Dickinson to proceed with such manufacture at once; that Dickinson had caused to be prepared certain photographs, submitted with the petition, showing the name under which he proposed to continue his business and the name of the commodity manufactured by him, as well as the design which he proposed to use—presumably in the introduction and sale of his product. The petition further states that the business name so proposed would serve "effectually to qualify and explain" the trade-name Dickinson had previously used and "to distinguish" it from the name of the present appellant, and that the name so to be given to his commodity would serve "unmistakably to differentiate his product from plaintiff's," the appellant's, and prays (a) approval of the trade-name, the name of his commodity, and the design so submitted, and (b) an order fixing amount of bond required as a condition to permitting the sale of finished stock theretofore manufactured by Dickinson and bearing the names and marks in issue in appellant's former appeals.

In our former opinion certain questions concerning the further use of Dickinson's trade-name and of the term he applied to his product were referred to the trial judge for determination (245 Fed. at page 627, 628, 158 C. C. A. 37); and the method adopted by the joint petitioners to present the issues involved in these questions was fairly within the practice sanctioned by this court in Kalamazoo Loose-Leaf Binder Co. v. Proudfit Loose-Leaf Co. (243 Fed. 895, 156 C. C. A. 407). It does not appear that appellant responded to the petition by motion, answer, or other pleading. It is, however, to be gathered from the contentions of counsel that the matters so referred to the trial judge were presented by both sides and heard in open court. In the assignments of error appellant sets up a number of objections to the decree, though in all material respects they are based on the conditions under which Dickinson is permitted by the decree to continue the use of his former trade name and of the term ("Sticky") he had applied to his commodity.

Fred L. Chappell, of Kalamazoo, Mich., for appellant.
Willard F. Keeney, of Grand Rapids, Mich., for appellee.

Before WARRINGTON, Circuit Judge, and COCHRAN and HOLLISTER, District Judges.

PER CURIAM. We are constrained to believe the decree is right:

1. The decree adjudges that "it is and will be an effective qualification and explanation" of the name under which "Dickinson conducts his business if, in association with and immediately following" his trade-name, viz. " 'Grand Rapids Sticky Fly Paper Company,' * * * there be used" the name and word "Albert G. Dickinson, Proprietor," provided such name and word "be printed in type as large as that in which the words" of such trade-name "are printed." The change thus exacted is manifestly designed to break up the practice of concealing the real origin of the Dickinson product.

2. The decree also adjudges that "it is an effective qualification and explanation of the word 'Sticky' if the same be used in connection with the fly paper or fly coils manufactured" by Dickinson "as descriptive thereof, and not as heretofore as the name of a brand called 'Sticky,' " provided the word as thereafter used by Dickinson "upon his fly sheets, cartons, cases, and crates, vended by defendant (Ackerman Company) shall not be printed in larger type than the words 'fly paper' or 'fly coils' in connection with which it is used." The effect of this is to forbid further use of the word "Sticky" as a separate and distinct descriptive term; indeed, petitioners propose and one effect of the decree is to approve the use of "American Fli-Catch," instead of "Sticky," as a single descriptive term.

3. The decree recites the submission to the court by Dickinson of certain photographs, one showing what is to be displayed on the top and edges of the carton, another the design which is to be imprinted upon the fly sheets, including directions for the use of the paper and coils, and still another the design and also at each end a representation of the fly coil. They also show the name under which the business is to be continued and the name selected for the product, and the photographs are attached as exhibits in the order thus stated; and the decree adjudges that, if the business name and that of the product are used in the manner shown in these exhibits, they will sufficiently differentiate

Dickinson's business and product from appellant's, and that the design so shown "does not infringe the design of the plaintiff," the appellant.

It is not necessary to state further details of the changes so wrought. It is sufficient to say that other changes are made respecting the dress in which the Dickinson products are to be displayed in putting them on the market. Furthermore, the results of these changes are placed in definite and permanent form by the exhibits attached to the decree, and, in view of the part Dickinson has taken as a joint petitioner in this case, the decree would seem to be as effective in binding him as it is the Ackerman Company. This of itself is a distinct advantage to appellant, unless it is correct in its contention that Dickinson has no right at all to use the name under which he is permitted to continue his business or to use the word "sticky," even as such use is explained and restricted by the decree.

The truth is appellant seeks to reopen both of the original cases on these points. This is to overlook the contentions made on both sides and the decision rendered on both questions when the original cases were here. The officers controlling appellant will not see, much less do they appreciate, the significance of the geographic and descriptive character of the name, Grand Rapids Sticky Fly Paper Company, or of the years of acquiescence in Dickinson's use of the words as a trade-name. It hardly is necessary to try to add to what is said and, in the way of judicial decisions, cited in our original opinion on these subjects (245 Fed. at pages 625 to 627, 158 C. C. A. 37). Appellant's reiteration of its claim to an exclusive right in the name is not persuasive. The most that it ever obtained in an exclusive sense was through purchase of the stock in a corporation created under that name—true, a franchise to be and to act under such name—but this was lost through ouster (People v. Grand Rapids Sticky Fly Paper Co., 144 Mich. 221, 231, 107 N. W. 1119); and hence we still think the appellant's insistence is not aided by the purchase of the stock mentioned or the decision cited. It is to be added that appellant never used the name in the precise form to which it persists in claiming the exclusive right; certainly this course was not calculated to secure such a right. Plainly, then, it will not do to ignore the vital characteristics, the geographic and descriptive nature, of the name, nor the effect of appellant's acquiescence in Dickinson's use of it.

What appellant and its predecessors have done concerning the use of the name "Grand Rapids" and the words "sticky fly paper," and what rights they so acquired, were considered in our first opinion. The relief granted to appellant was bottomed on the fact, deducible from the record, that Dickinson adopted the trade-name in question, without disclosing his own name, for the purpose of getting some of appellant's business. 245 Fed. at page 625, 158 C. C. A. 37. Dickinson's initial intent was made plain by his subsequent progressive methods of imitating appellant's trade-mark, trade packages, and trade dress. Besides, we think the trade-name itself was calculated to enable him unduly to secure advantages from appellant's established business. The name told the story of years of effort on the part of the Thum Bros. to perfect the manufacture of sticky fly paper at Grand Rapids and to

build up a trade in their output, until Grand Rapids became known as "the home of sticky fly paper." The situation was peculiar and exceptional; it clearly called for disclosure of Dickinson's name as the producer of the sticky fly paper he was selling under the name "Grand Rapids Sticky Fly Paper Company"; he did not accompany his use of the trade-name with an explanation "so as to give the antidote with the bane."

Here we have an instance of defendants' refusal to see or to appreciate the effect of Dickinson's intent, like the refusal of appellant with respect to the characteristics of the name and the acquiescence in its use; this attitude of the parties, of course, results in dissatisfacion to each and involves considerations which must be balanced and met. It may be added that what has been said in respect of the trade-name sufficiently discloses our view of the restriction imposed by the decree upon the further use of the word "sticky." The question is not what relief appellant might have been entitled to in the beginning; it is what relief it is entitled to now. Appellant presents no suggestion in this behalf, except such as would require Dickinson to advertise his competitor's business; the decisions relied on are not applicable. We still think, as expressed in our first opinion, that the place to solve the problem was in the court below and upon full hearing.

Judge Sessions has after painstaking effort adopted a plan which in its entirety we believe will effectively protect appellant's rights; and accordingly the decree will be affirmed.

UNITED STATES v. ROGERS et al.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1919.)

No. 5166.

1. EMINENT DOMAIN ⇐148—JUST COMPENSATION—INTEREST AS ELEMENT OF COMPENSATION.

An award for land taken under Reclamation Act June 17, 1902 (Comp. St. §§ 4700–4708), three years before condemnation proceedings were instituted under section 7 of the act (section 4706), *held* to properly include an amount equal to interest at the legal rate of the state until time of payment of the value of the land fixed by commissioners as of the date of the taking, not for interest as such, but as an element of the just compensation to which the owner is entitled under the Constitution.

2. UNITED STATES ⇐110—LIABILITY FOR "INTEREST."

In the rule of immunity of the government from liability for interest, the word "interest" is generally used as meaning compensation for the use or forbearance of money, or damages for its detention.

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

3. EMINENT DOMAIN ⇐122—"JUST COMPENSATION."

"Just compensation" rests on equitable principles, and it means substantially that the owner should be put in as good position pecuniarily as he would have had, if his property had not been taken.

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

In Error to the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Condemnation proceeding by the United States against William E. Rogers and others. From the award of compensation, the United States brings error. Affirmed.

P. W. Dent, Dist. Counsel U. S. Reclamation Service, of El Paso, Tex. (S. Burkhart, U. S. Atty., of Albuquerque, N. M., and J. O. Seth, Asst. U. S. Atty., of Santa Fé, N. M., on the brief), for the United States.

J. M. Hervey, of Roswell, N. M. (W. C. Reid and George S. Downer, both of Albuquerque, N. M., on the brief), for defendants in error.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

HOOK, Circuit Judge. [1] This is a writ of error by the government to review awards in condemnation proceedings instituted by it in the court below. Act Aug. 1, 1888, c. 728, 25 Stat. 357 (Comp. St. §§ 6909, 6910); Reclamation Act June 17, 1902, c. 1093, 32 Stat. 388 (Comp. St. §§ 4700–4708). The only questions involved are whether the landowners are entitled to interest as part of the awards, and, if so, from what time and at what rate?

Lands of the defendants in error in New Mexico were appropriated by the government for public use in a reclamation project. They were actually taken by flooding on April 19, 1912, and private use and enjoyment thereafter were destroyed. Formal proceedings in condemnation were not begun until January 18, 1915, when the government filed its petition in the court below for that purpose. The petition expressly averred that the lands "were flooded and thereby appropriated by the government of the United States" on April 19, 1912, but that no compensation had yet been paid. The prayer of the petition asked, among other things, that the lands be decreed to be the property of the government "from the date of the said taking or the appropriation thereof." Commissioners were appointed to assess the damages. Their report, February 23, 1917, was confirmed by the court, and on July 27, 1917, the government was directed to pay the awards to the clerk for the benefit of the defendants in error. The commissioners followed the customary practice of valuing the property as of the time of appropriation, and they therefore stated in their report that the amounts awarded were as of April 19, 1912; also that they had included therein no interest to the time the government's petition was filed or to the date of their report. Upon motion of the defendants in error the court, by supplemental order on October 1, 1917, required the government to deposit with the clerk, in addition to the amount of the awards, a sum equal to interest thereon at 6 per cent. per annum from April 19, 1912, to the time the deposit was made. The addition required was not interest as such, but a sum equal to interest.

It is urged that no interest can be allowed against the United States in a condemnation case for any period prior to final judgment, or for

any period prior to an order of the court placing the United States in possession of the lands condemned; also that, irrespective of the time for computation, there is no authority of law for a rate of 6 per cent. Among the many authorities relied on is United States v. Bayard, 127 U. S. 251, 260, 8 Sup. Ct. 1156, 1161 (32 L. Ed. 159), where the court said:

"It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are where the government stipulates to pay interest, and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages."

Section 177 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1141 [Comp. St. § 1168]; Rev. Stats. § 1091) provides:

"No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

Without further reference to the many authorities cited, it may be said that the position of the government is fully illustrated by the above excerpt and statute. We think that the question is settled in this court by United States v. Sargent, 89 C. C. A. 81, 162 Fed. 81, in which interest at 6 per cent. was allowed in a similar case as a part of the "just compensation" required by the Fifth Amendment to the Constitution. In the matter of the time and the rate of interest, the court followed the rule in Minnesota, where the property was located and the condemnation proceedings were had. The case was taken to the Supreme Court, but was afterwards dismissed on the motion of the Solicitor General. In New Mexico, where the case at bar arose, the legal rate is 6 per cent. In Atchison, T. & S. F. R. Co. v. Richter, 20 N. M. 278, 148 Pac. 478, L. R. A. 1916F, 969, it was held that the owner should have interest "from the time his possession is invaded * * * either with or without an order of court."

[2] In the rule of immunity of the government from liability for interest, the term "interest" is generally used as meaning compensation for the use or forbearance of money, or damages for its detention. But the position of the government in the case at bar is not like that which it occupies when a claim or demand on contract is asserted against it. True, it is said that, when the government takes possession of private property for public use in advance of formal proceedings in eminent domain, the right of the acquiescing owner arises ex contractu (United States v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846); but that is by way of implication that compensation is intended by the government, instead of a trespass for which the landowner has no enforceable remedy. The duty and obligation to make just compensation in such a case is fundamental, and whatever is an essential element in that compensation cannot be excluded, even by legislative enactment. The question of compensation is a judicial one. Monongahela Navigation Co. v. United States, 148 U. S. 312, 327, 13 Sup. Ct. 622, 37 L. Ed. 463.

[3] Just compensation rests on equitable principles, and it means substantially that the owner should be put in as good position pecuniarily as he would have had if his property had not been taken. United States v. Nahant, 82 C. C. A. 470, 153 Fed. 520. When in the exercise of its sovereign power the government actually appropriates and takes possession of private property in advance of proceedings in condemnation, interest from the time of taking is in a sense a convenient commutation of the value of the use of the property or the direct loss the owner sustains until the value of the property itself is paid by deposit in court or otherwise. Something of substance is lacking in an award that omits all consideration of the time of the prior actual taking. That would be obvious in the case of a completed office building, and the difference here is but in degree, not in principle. An instance in which interest was regarded as an integral part of the principal sum in issue, and not within the statutes and decisions exempting the government, may be found in United States v. New York, 160 U. S. 598, 619, 16 Sup. Ct. 402, 40 L. Ed. 551. That was not a case of appropriation of private property, but there is a relevant analogy. In United States v. Cress, 243 U. S. 316, 319, 37 Sup. Ct. 380, 61 L. Ed. 746, the judgment of the District Court, which was affirmed, embraced interest, but the period for which it was allowed does not definitely appear. United States v. First Nat. Bank (D. C.) 250 Fed. 299, Ann. Cas. 1918E, 36, is in point. There the government took possession of property some months before commencing condemnation proceedings in the District Court. In instructing the commissioners respecting their duties the court said:

"The sole question for you to determine, in each one of the cases, is the value of the lands and the property at the time of the actual taking and occupation by the United States, together with interest at the rate of 8 per cent. per annum, the legal rate in Alabama, on said sums so ascertained by you, from the date of such actual taking and occupation."

The proceedings in that case were under Act July 2, 1917, c. 35, 40 Stat. 241 (Comp. St. 1918, § 6911a), which provided that they should "be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted." But, as regards the essential elements of the just compensation to be paid, the requirement is not different from the conformity provisions of section 2 of the act of August 1, 1888, supra, applicable to the case at bar.

The order is affirmed.

UNITED STATES v. HIGHSMITH.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1919.)

No. 5263.

EMINENT DOMAIN ⊜148—JUST COMPENSATION—INTEREST AS ELEMENT OF COMPENSATION.

That a landowner did not institute proceedings to recover compensation for land appropriated by the United States for public use does not debar him of the right to interest from the date of taking, as part of the compensation, since the permanency of the occupation is not always disclosed, or not even finally determined.

In Error to the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Condemnation proceeding by the United States against Margie L. Highsmith and others. From the award of compensation, the United States brings error. Affirmed.

P. W. Dent, Dist. Counsel U. S. Reclamation Service, of El Paso, Tex. (S. Burkhart, U. S. Atty., of Albuquerque, N. M., and J. O. Seth, Asst. U. S. Atty., of Santa Fé, N. M., on the brief), for the United States.

J. M. Hervey, of Roswell, N. M. (W. C. Reid and George S. Downer, both of Albuquerque, N. M., on the brief), for defendant in error.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

HOOK, Circuit Judge. This case is like United States v. Rogers (No. 5166) 257 Fed. 397, —— C. C. A. ——, just decided, except in the following particulars: Both the United States and the landowner, Margie L. Highsmith, appealed from the award of the condemnation commissioners to the District Court, where the case was tried to a jury. The parties having agreed that the question of interest on the amount awarded was one of law for the court, it instructed the jury that interest should be allowed, and a verdict was so returned. It was also agreed that the court should make a separate order requiring the deposit of interest, so that the government might prosecute a writ of error to review that matter only. That was accordingly done. Finally it was stipulated:

"That although the lands were appropriated on April 19, 1912, and used thereafter by the United States, no order was entered by the court formally placing the United States in possession of the same, except that contained in the final judgment entered on January 30, 1918."

We do not regard these differences as material, or calling for a conclusion different from that announced in the other case. The government took title and possession, and the landowner was deprived of both on April 19, 1912. The final judgment of the court did not change that situation. True, a landowner might himself commence suit and thereby hasten the day of payment, but one objection to making that a

requisite is that the purpose of the government, whether a permanent appropriation or a temporary occupancy, is at times not disclosed, or even not finally determined.

The order is affirmed.

PAGE et al. v. OLD DOMINION TRUST CO.

In re PIZZINI.

(Circuit Court of Appeals, Fourth Circuit. February 8, 1919.)

No. 1663.

BANKRUPTCY ⟸188(3)—EQUITABLE LIEN.

Where bankrupt, after recording a trust deed securing his notes, which latter he delivered to payee, retained the deed and executed other notes purporting to be those secured by it, upon which he borrowed money from a bank, not only was the lien of the first payee on the mortgaged property a prior one, but the bank acquired no equitable lien on the property superior to the claims of unsecured creditors as represented by bankrupt's trustee, especially since Code Va. 1904, § 2463, makes parol liens void as against creditors.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond, in bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of William B. Pizzini, bankrupt; the Old Dominion Trust Company, trustee. L. R. Page and the Old Dominion Trust Company, trustees for C. D. Langhorne, appeal from an order denying them a lien. Affirmed.

Robert E. Scott, of Richmond, Va. (Page & Leary and Scott & Buchanan, all of Richmond, Va., on the brief), for appellants.

Norvel L. Henley, of Williamsburg, Va. (Brockenbrough Lamb, of Richmond, Va., and Henley, Hall, Hall & Peachy, of Williamsburg, Va., on the brief), for appellee.

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

WOODS, Circuit Judge. In this appeal is to be determined the proper application of the proceeds of the sale of a lot of land in the city of Richmond sold by order of the court in the administration of the estate of William B. Pizzini, bankrupt. The facts are not in dispute. On June 15, 1914, Pizzini conveyed the lot to H. K. Franklin, trustee, to secure seven notes, one for the principal sum of $15,000, payable three years after date, and six notes, for $450 each, for the semiannual interest, all payable to bearer at the National State & City Bank, Richmond, Va. On the notes was an indorsement to the effect that they were secured by the deed of trust. On July 1, 1914, William B. Pizzini, as payment of past indebtedness and for cash paid at the time, delivered the notes and the deed of trust to his uncle, Louis W. Pizzini. Louis W. Pizzini returned the deed of trust to William B. Pizzini, to be

by him delivered to the clerk of the chancery court for record. On July 3, 1914, William B. Pizzini gave to Louis W. Pizzini the clerk's certificate of record, but retained the deed of trust.

In January, 1915, William B. Pizzini applied to the Old Dominion Trust Company for a loan of from $12,500 to $15,000, to be secured by a first mortgage or trust deed on the same property. Upon examination of the title, the trust company found that it was incumbered only by the trust deed to Franklin. Falsely representing that the notes and trust deed securing them were held by his bank as security for a small loan, and pretending to wish to avoid the expense of new papers, Pizzini proposed to pay the small debt to the bank, give to the trust company his note for $12,500, and deposit as collateral the trust deed to Franklin, the notes it secured, and the policy of insurance on the property. Upon acceptance of this proposition, Pizzini gave to the trust company his note for $12,500, dated February 18, 1915, payable two years after date, and four notes representing the semiannual interest thereon. At the same time he turned over as collateral to the trust company the trust deed made to Franklin, and notes signed by himself exactly answering to the description of those secured by the trust deed, representing that they were the genuine notes. Upon this apparent security and no other the trust company lent $12,500 money of C. D. Langhorne, which it held in trust for investment.

After the adjudication in bankruptcy, it was discovered that Louis W. Pizzini held the genuine notes secured by the trust deed. At the sale made by order of the court, the property brought $24,700. In the contest over the proceeds it was at first contended by the Old Dominion Trust Company that it was entitled to be paid in preference to Louis W. Pizzini; but that issue was decided against the trust company, and there is now no dispute that Louis W. Pizzini is entitled to be first paid out of the proceeds. The present claim of the Old Dominion Trust Company is to the surplus proceeds of sale as against the trustee in bankruptcy, representing the unsecured creditors. The referee reported against the claim of the trust company, and this report was confirmed by the District Court.

The position taken by the appellant is that the transaction between Pizzini and the trust company shows an intention of Pizzini to give, and of the trust company to take, a lien on the lot to secure the loan of $12,500, and that the court should effectuate that intention by holding the transaction to be an equitable lien or mortgage entirely outside of and beyond the trust deed, superior to the claims of the trustee standing in the position of a judgment creditor. It is not pretended that there was any written agreement to give any lien to the trust company, except that which was represented by the deed of trust to Franklin, and therefore, if any lien was intended, it must have been a lien created by parol. It is impossible to support such a claim either on principle or authority.

Prior to the enactment of section 2463 of the Code of Virginia, a lien might be created by a parol agreement even as against subsequent judgment creditors without notice. Floyd v. Harding, 69 Va. (28 Grat.) 401. This anomalous condition of the law, by which a parol agreement

for a lien took precedence of subsequent judgment liens, while a written unrecorded mortgage did not, was remedied by that section of the Code which provides:

"Every contract, not in writing, made, in respect to real estate or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, shall be void, both at law and in equity, as to purchasers for valuable consideration without notice and creditors." Norfolk & Portsmouth T. Co. v. White, 113 Va. 102, 73 S. E. 467, Ann. Cas. 1913E, 655.

Straley v. Esser, 117 Va. 135, 83 S. E. 1075, and Young v. Holland, 117 Va. 433, 84 S. E. 637, earnestly relied on by appellant, have no application. These cases only decide that the recording statutes and section 2463 do not protect judgment creditors against a resulting trust or an express trust created by a grantee at the time of the conveyance by his contract, expressed or implied, to the effect that he would hold the land for another who had paid the purchase money. There was no semblance of an agreement in this case that Pizzini would hold the lot in trust for the Trust Company. Nor does Charlottesville Hardware Co. v. Perkins, 118 Va. 34, 86 S. E. 869, affect the question, for it merely reaffirms the Virginia doctrine that the lien of a judgment attaches only to whatever interest the debtor has, and that where a conveyance and mortgage for the purchase money are interdependent parts of the same transaction the interest of the grantee vests subject to the mortgage, which, although unrecorded, cannot be displaced by judgments against the grantee.

But, laying aside section 2463, it is perfectly clear that there never was any intention by Pizzini to give, or by the trust company to take, a parol agreement for a lien as security. Nor was there any promise on the one side, or expectation on the other, that another mortgage or deed of trust should be executed, or that another lien should be given in any form; and this obviously distinguishes the case from Dulaney v. Willis, 95 Va. 608, 29 S. E. 324, 64 Am. St. Rep. 815. To warrant a court in holding that an equitable lien was created, "equity requires a clear mutual understanding and a positive assent on the part of each party. An offer must be accepted in the terms and form submitted, or there is no valid assent such as will create a contract which may be specifically enforced." Creecy v. Grief, 108 Va. 320, 61 S. E. 769, and Shield v. Adkins, 117 Va. 619, 85 S. E. 492. The transaction shows on its face that the sole intention of Pizzini, which he carried out, was to obtain the money of the trust company without any security, on the deception that he controlled and could confer upon the trust company the security of the trust deed executed to Franklin. That this was his intention, and that the trust company relied alone on the security of the trust deed already given to Franklin, is made the more evident by the fact that the original plan of executing another security was abandoned and reliance on the trust deed already executed substituted. The obtaining of money by Pizzini, by representing that he owned or controlled a certain piece of property, namely, the trust deed, was nothing more than the ordinary case of obtaining money under false pretenses.

The court is not asked to carry out the real agreement that the trust company should have the security of the trust deed executed to Franklin, for that is impossible. The position submitted is that the court has the power which equity requires it to exercise against lien creditors of creating another lien, not thought of by the parties, because that upon which the trust company relied turned out to belong to some one else. Judicial power does not extend to that point.

Equities against Pizzini to require him to make good his representation to the trust company that he was giving a good title to the Franklin trust deed cannot operate to estop the trustee in bankruptcy representing the interest of creditors for whose protection the recording acts, and section 2463 of Virginia Code were intended. Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642-648, 36 Sup. Ct. 466, 60 L. Ed. 841.

Affirmed.

THE NEW YORK CENTRAL NO. 18.

THE AMANDA MOORE.

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

No. 152.

1. COLLISION ⟸9, 73—SUIT FOR DAMAGES—VIOLATION OF HARBOR RULE—VESSEL LYING AT END OF PIER.

   New York City Charter, § 879, providing that no vessels shall lie at the end of piers, "except at their own risk of injury from vessels entering or leaving any adjacent dock," while not binding on courts of admiralty to the extent of absolutely preventing recovery, is recognized by them as establishing a valid harbor rule, a violation of which is evidence of negligence, and casts on the violator the burden of showing affirmatively that the violation did not contribute to its injury.

2. COLLISION ⟸9—DEFENSES TO SUIT—VESSEL LYING AT END OF PIER.

   A violation by a vessel of the New York harbor rule against lying at the end of a pier can be invoked only by vessels entering or leaving an adjacent slip, the risk of injury from which under the statute such vessel assumes, and they are not exempted from the duty to exercise proper care.

3. TOWAGE ⟸11(6)—INJURY TO TOW IN COLLISION—LIABILITY OF TUG.

   A tug cannot be held liable for injury to her tow by collision, because she tied the tow at the end of a pier, where it was done with the express consent of the owner.

4. COLLISION ⟸72(2)—TUG MOVING OUT OF SLIP AND SCOW LYING AT END OF PIER—FAULT.

   A collision between a tug moving out of a slip and a scow held by her towing tug at the end of an adjacent pier *held* due to faults of all three vessels.

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

Suit in admiralty for collision by Fred E. Jones, owner of Scow No. 33, against the steam tug New York Central No. 18, with the steam tug Amanda Moore impleaded. Decree for half damages against the Moore, and libelant appeals. Reversed, with directions to distribute damages between libelant and both tugs.

Libelant owns the scow No. 33. On a fair summer day, the tide being strong flood, she was in tow of the tug Amanda Moore. It was intended to take the scow into the slip between Piers 32 and 33, East River. The slip, however, was already occupied—at least by the tug New York Central No. 18, engaged in pulling out the lighter Black Rock. To give No. 18 time to execute her maneuver before towing No. 33 into the slip, the Amanda Moore landed libelant's scow on the end of Pier 33, making her fast in such manner that her end nearest the slip was about 15 feet from the lower outer corner of Pier 33.

This procedure was in violation of section 879 of the Charter of New York City (Laws 1901, c. 466), quoted in The Allemania, 231 Fed. 942, 146 C. C. A. 138, which declares that no vessels shall lie in the position that No. 33 occupied, "except at their own risk of injury from vessels entering or leaving any adjacent dock or pier." Tug No. 18 put a line from her own bow upon the Black Rock and backed out of the slip, blowing a slip whistle as she went. As the tug passed out of the slip, the full force of the tide struck her broadside, and threw the tug against the end of No. 33, causing the damages sought to be recovered in this action. The libelant testified that he knew his scow was going to the slip in question, and that he had, if not instructed, at least authorized, those in charge of the Amanda Moore to tie up his scows (and among others the 33) at the ends of piers. He was specifically asked whether in these instructions he included the end of the "pier as well as the inside of the slip," and he answered in the affirmative. It did not appear that the navigator of the Amanda Moore was aware of this order or willingness of the libelant; the same having been communicated by libelant to the owner of that tug.

It is inferable from the record that libelant's scow had no crew; she was wholly in charge of the Amanda Moore, and the line to the pier end was thrown out and made fast by a tug deckhand. The court below dismissed the libel as to New York Central No. 18, and gave half damages to libelant against the Amanda Moore. From this decree libelant alone appealed.

Henry E. Mattison and Park & Mattison, all of New York City, for appellant.

George E. Hargrave, T. Catesby Jones, and Harrington, Bigham & Englar, all of New York City, for the New York Central No. 18.

George Whitefield Betts, Jr., Robert McLeod Jackson, and Hunt, Hill & Betts, all of New York City, for the Amanda Moore.

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

HOUGH, Circuit Judge (after stating the facts as above). [1] Section 879 of the charter is to be construed and applied as required by our previous decisions. (The Allemania, supra, The Dean Richmond, 107 Fed. 1001, 47 C. C. A. 138, and The Chauncey M. Depew, 139 Fed. 236, 71 C. C. A. 362). It does not absolutely prevent a vessel lying at the pier end from recovering against manifest tort-feasors. But a violation of the statute is sufficient evidence and sufficient reason for imputing fault to the violator. The consequence of such violation is, by the statute, that the violator cannot recover for injuries inflicted by a vessel "entering or leaving any adjacent pier"—i. e., slip. Our decisions quoted above hold that this absolute prohibition of recovery does not bind the courts of the United States, at least sitting in admiralty; but we have fully recognized the statute as establishing a valid rule for the management of the harbor. A departure therefrom, like a departure from any other legal rule, is evidence of negligence, and casts on the violator the burden of showing affirmatively that the violation did not contribute to the injury giving rise to suit.

[2] Undoubtedly such violation of rule can be invoked only by vessels of the class enumerated by the statute, viz. those "entering or leaving" a slip adjacent to the pier end at which the offender lies; and even a violation of rule does not give any one the right to dispense with care, and treat a vessel wrongfully at the pier end as an outlaw. The Cincinnati (D. C.) 95 Fed. 304.

The statement made in Wright, etc., Co. v. New England, etc., Co. (D. C.) 189 Fed. 813, that the statute does not make lying at a pier end illegal, is true, in the sense that no crime is thereby committed; but, if construed to mean that no valid rule is established by the enactment, it is erroneous. That case was affirmed in 204 Fed. 762, 125 C. C. A. 129, and the point of statutory violation was disposed of by referring to The Rhein, 204 Fed. 252, 122 C. C. A. 520, in which case it was held that the statute was not applicable; nor was it in the Wright Case, though for a different reason.

But out of the language, not the facts, of the last two cases cited, there seems to have developed an impression that lying at a pier end is, even as to vessels entering and leaving the adjacent slips, not a fault, unless there be some other and special circumstances making the prohibited position dangerous to others. This is incorrect, and anything to that effect in The Stella (D. C.) 243 Fed. 220, and The Daniel McAllister (D. C.) 245 Fed. 188, must be regarded as erroneous.

[3] The ground upon which half damages against the Amanda Moore were allowed below was that that tug violated the statute with libelant's consent. This is true; but we are unable to perceive that libelant has any cause of action against the Amanda Moore for doing exactly what he distinctly told the tugboat owners they might do when he employed them. It was therefore no fault (in respect of this libelant) for the Amanda Moore to fasten the scow at the pier end.

[4] But the duty of the tug was not confined to merely pausing at the slip entrance until No. 18 could get out. She was obliged to take such steps as good navigation required while she was there. Therefore the question of fact is whether there was any error of navigation on the part of either No. 18 or the Amanda Moore while the former was pulling out the Black Rock—an operation admitted on all sides as not easy, owing to the narrowness of the waters and congestion in the slip.

The tide was running about five knots. It was sure to hit heavily on the broadside of any vessel emerging from the slip. The Moore had fastened her scow and herself with only a single line, and it was quite possible to slack off the line in an instant and let both scow and tug drift away with the tide.

The master of No. 18 saw what was at the end of the pier, blew his whistle, and says that he did not think he would strike the scow, because "I thought he would slack up with the line"; but he held no conversation with the master of the Moore, whom he saw, never asked him to do what he says he expected would be done, and (in short) went ahead on the chance that all would be well.

The master of the Moore saw the No. 18 coming, and says that he did not cast off his line and drop back with the tide, "because I thought

she had room enough to go up clear," which was exactly what the No. 18's master knew did not exist.

The No. 18 put on full speed and attempted to execute a maneuver which could not succeed unless the master of the Moore co-operated with him; but no means of co-operation were suggested. It was left to divination.

In our opinion the No. 18 was at fault for close shaving, and not attempting to get the Moore to remove herself and scow, and the Moore for not executing an obvious maneuver, which would certainly have mitigated and might have avoided collision.

Therefore all parties to this action were at fault, and it is ordered that the decree appealed from be reversed, with one bill of costs in this court against the two tugs jointly, and the cause be remanded with directions to distribute the damages between the libelant and both tugs, upon the principles enunciated in The Harold (D. C.) 84 Fed. 704, and The Lyndhurst (D. C.) 92 Fed. 682.

SUMPTER LUMBER CO. v. SOUND TIMBER CO.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1919.)

No. 3283.

1. APPEAL AND ERROR ⟸330(2)—CIRCUIT COURTS OF APPEALS—SUBSTITUTION OF PARTIES.
   A Circuit Court of Appeals has jurisdiction to entertain an original application for substitution of parties in a suit which has been brought into that court by appeal, regardless of the action of the District Court in denying a similar application.

2. APPEAL AND ERROR ⟸95—APPEALABLE ORDERS.
   An order of a District Court denying an application by a stranger to be substituted as complainant in a suit is not appealable.

3. APPEAL AND ERROR ⟸330(2)—SUBSTITUTION OF PARTIES IN APPELLATE COURT.
   Where the interests of a party to an appeal devolve upon another, either by operation of law or act of the parties, the person acquiring such interests will usually be allowed to be substituted, and to prosecute or defend the appeal in place of the original party.

4. APPEAL AND ERROR ⟸373(1), 397—DISMISSAL OF APPEAL—GROUNDS.
   An appeal will not be dismissed, on the ground that no citation was served and no bond filed in the court below, when the appeal was taken in open court and bond has been filed in the appellate court.

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

Suit in equity by the Sumpter Lumber Company against the Sound Timber Company. Decree for defendant, and complainant appeals. On motion for substitution of parties, and motion to dismiss appeal. Motion for substitution granted, and motion to dismiss denied.

W. F. Hays, of Seattle, Wash., for appellant.

Peters & Powell and John H. Powell, all of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. W. F. Hays, who was the attorney for the appellant in the court below, moves this court for an order that he be substituted as the party appellant in the above-entitled suit. The cause was tried on its merits in the court below, and on April 19, 1918, decision was announced, and the appellant in open court gave notice of its appeal. The form of decree was taken under advisement, and the decree was entered on April 29th, and the appellant was required to file a supersedeas bond on the appeal in the sum of $10,000. On November 19, 1918, an order was made that the appellant's appeal be allowed, and that, instead of giving a supersedeas bond, it might give its bond for costs in the sum of $500, and thereafter, upon extensions of time, the transcript was filed in this court on January 14, 1919. In the meantime, and before the filing of a bond on appeal, Hays moved the court below for an order that he be substituted as the party plaintiff and appellant in said cause, which motion was denied on January 6, 1919.

The appellant makes no objection to the motion now made in this court, but the appellee opposes the same on the ground that a similar motion made in the court below was denied, and that Hays' only remedy is by appeal from that order. The ground of the motion for substitution, as shown by affidavits, is that Hays is the real party in interest in the said suit; that he obtained a judgment on June 13, 1908, and in pursuance of such judgment, he purchased on execution the defendant's interests in certain real estate, and received from the sheriff certificates of sale; that on November 19, 1908, he conveyed all rights under said certificates to Henry Hewitt, under a contract with Hewitt whereby, upon the quieting of the title to said lands, Hewitt was to pay to him $42,500 and reconvey to him an undivided one-half interest in the lands; that Hewitt was the president of the appellant herein, and that he conveyed said lands to the appellant, the stock of which he was the sole owner, and that the present suit to quiet title to said lands was accordingly commenced in the name of the appellant; that Henry Hewitt died on May 2, 1918, and his successors in interest thereafter, and after the appeal had been taken in open court, refused to prosecute the appeal, and that Hays was not aware of their purpose to abandon the appeal until about the time of his application to the court below for an order of substitution; and that the said corporation now has no intention to prosecute the appeal, and has abandoned and disclaimed any interest in the subject-matter of the litigation.

The appellee points to the fact that Hays was aware, soon after the entry of the decree in the court below, that the appellant would take no further steps toward the prosecution of the appeal. To this it is to be said that the appellant has not at any time instructed its

counsel to abandon the appeal or to dismiss the same. Hays, as its counsel, undoubtedly had the right to take the appeal. It is not disputed that he had an understanding with the president of the appellant that an appeal should be taken in case of an adverse decision. The appeal has now been perfected, and a bond for costs has been filed in this court, and the appellant is still properly a party to the appeal.

[1] The principal question here is whether Hays' right of substitution is foreclosed by the order denying him substitution in the court below. We are not advised of the ground on which the order was denied. It may have been denied on the ground that the jurisdiction of this court had attached upon the allowance of the appeal, notwithstanding that a bond had not been given. Evans v. State Bank, 134 U. S. 330, 10 Sup. Ct. 493, 33 L. Ed. 917; Southern Pine Co. v. Ward, 208 U. S. 126, 28 Sup. Ct. 239, 52 L. Ed. 420. But, however that may be, this court has jurisdiction to entertain original applications for substitution (Howard v. United States, 102 Fed. 79, 42 C. C. A. 169; Chicago G. W. Ry. v. First Methodist Episcopal Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488; Southern Pine Co. v. Ward, supra), and the action of the court below cannot affect that jurisdiction.

[2, 3] We find no merit in the contention that the right now to move for substitution was lost by the failure to appeal from the order of the court below denying substitution. Hays had no capacity to appeal from that order, and such an order is not appealable. 3 C. J. 477; Ex parte Cutting, 94 U. S. 14, 24 L. Ed. 49; Ex parte Cockcroft, 104 U. S. 578, 26 L. Ed. 856; Guion v. Insurance Co., 109 U. S. 173, 3 Sup. Ct. 108, 27 L. Ed. 895; Sliscovich v. Scandinavian-American Bank, 78 Wash. 660, 139 Pac. 606. The proposed substitution makes no change in the cause of suit. It can cause no prejudice to the rights of the appellee, and we see no reason why it should not be allowed.

"Where the interests of a party to an appeal or writ of error devolve upon another, either by operation of law or by act of the parties, a person acquiring such interests will usually be allowed to be substituted, and to prosecute or defend the appeal or writ in place of the original party, if the proper steps are taken in accordance with the practice in the particular jurisdiction." 3 C. J. 1031; Bowden v. Johnson, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386.

[4] The motion for substitution will be allowed, and the appellee's motion to dismiss the appeal, on the ground that no citation was served and no bond filed in the court below, will be denied, since the appeal was taken in open court, and a bond has been filed in this court.

INTERNATIONAL HARVESTER CO. OF AMERICA v. PATTERSON et al.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1919. Rehearing Denied June 2, 1919.)

No. 5209.

1. GUARANTY ⟸25(3)—CONSIDERATION—EVIDENCE.
The words "for value received," in an indorsement of guaranty, affirmatively express a consideration, which casts upon the guarantor the burden of proving that there was none, and a mere denial that anything was paid him does not discharge it.

2. CORPORATIONS ⟸218—STOCKHOLDERS—GUARANTY OF CORPORATION'S NOTE —CONSIDERATION.
A guaranty of renewal notes of a corporation, of which the guarantor was a stockholder and also a creditor in a substantial amount, by which an extension of the debt was secured, *held* supported by a valuable consideration.

3. MORTGAGES ⟸25(3)—VALIDITY—CONSIDERATION.
The release of a guarantor from a valid contract of guaranty and the surrender to him of guaranteed notes to the amount of the mortgage *held* to constitute a valid consideration for his personal notes for a portion of the debt and a mortgage securing the same.

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suit in equity by the International Harvester Company of America against Henry Patterson and others. Decree for defendants, and complainant appeals. Reversed.

Thomas J. Doyle, of Lincoln, Neb. (H. P. Atwater, of Sturgis, S. D., on the brief), for appellant.

John L. Cleary, of Grand Island, Neb. (Clarence L. Lewis, of Rapid City, S. D., on the brief), for appellees.

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

HOOK, Circuit Judge. This is an appeal by the International Harvester Company from a decree denying it relief in a foreclosure suit upon notes and a mortgage given by defendant Patterson. The interest of defendant Miner is unimportant, and further reference to her may be omitted. The defenses appear from the findings of the trial court, which may be briefly summarized as follows: (1) That defendant Patterson was incapable of exercising a deliberate judgment, because of mental and physical weakness, though not lacking contractual capacity; (2) that he was imposed upon in the sense that he was overpersuaded against his own interest; (3) that his guaranty of certain prior notes, in part renewal of which the notes and mortgage in suit were given, was without consideration, therefore the latter were likewise without consideration; and (4) the notes and mortgage sued on were obtained by a false and fraudulent representation.

Defendant was a rancher, and had been fairly well to do before becoming involved in a mercantile venture by a corporation named Con-

sumers' Supply Company, which he and others organized, and which finally became insolvent. He was the president of the company and owned $1,000 of its capital stock, of a total issue of $7,000. The conduct of its business was intrusted to one Tivis as manager, who held $5,000 of stock and was largely responsible for its lack of success. On May 21, 1913, defendant's company owed the plaintiff $17,600 on notes executed prior to that time, and new notes were then taken for the amount, with the indorsement of Tivis and defendant as guarantors. This appears to have been the inception of defendant's individual liability to the plaintiff, and the first and second findings of the court above enumerated were addressed to that transaction. When defendant guaranteed the renewal notes of May 21, 1913, he was about 62 years of age and was suffering from neuralgia; but the evidence clearly shows that he was mentally and physically competent to contract, and knew what he was doing at the time. His guaranty of the notes of his company may not have been wise from a personal standpoint, but no imposition in a legal sense, such as is required to avoid a contract, was practiced upon him. He was evidently influenced in large measure by Tivis, his associate in business, upon whose advice and solicitation he had been accustomed to act; and there was no improper collusion between Tivis and the representative of the plaintiff, who was present and participated in the transaction. If men are competent to contract, and do contract, a court cannot relieve them from their obligations because in its view they acted unwisely.

[1, 2] Was defendant's guaranty of the notes of his company without consideration? The words in the indorsements of guaranty, "for value received," affirmatively express a consideration. The burden of proving there was none was on defendant, and a mere denial that anything was paid him does not discharge it. There are other kinds of consideration. The notes guaranteed were renewals of prior notes, and the reasonable inference is that the plaintiff granted and the debtor company secured an extension of time. Forbearance, renewal, or extension of an old debt, or a suspension of a right, is universally recognized as a legal consideration for new contractual conditions. Nor is it necessary that the benefit of the consideration should accrue to the promisor. Violett v. Patton, 5 Cranch, 142, 3 L. Ed. 61. This is especially so in cases of sureties and guarantors. It would be sufficient if the entire benefit accrued to the debtor company; but defendant had a personal interest in the transaction. He was not only a stockholder of his company, but also a creditor in a substantial amount (about $10,000), and consequently was individually interested in what concerned it, though indirectly and to a less degree. A valuable consideration, however small or nominal, given or stipulated for in good faith and in the absence of fraud, will support a contract of guaranty. Lawrence v. McCalmont, 2 How. 426, 452 (11 L. Ed. 326); Davis v. Wells, 104 U. S. 159, 167, 26 L. Ed. 686. The above are old rules, and according to them it cannot be said defendant's guaranty was without consideration.

[3] *The Notes and Mortgage in Suit.*—On May 21, 1914, when the $17,600 of guaranteed notes had matured, an adjustment was made by

which defendant executed to plaintiff his individual notes, aggregating $5,355.50, and a mortgage to secure them, an equal amount of the preceding notes were surrendered to him, and he was released from his guaranty of the others. The plaintiff and Tivis, acting for his company, settled the balance of the guaranteed notes by the former taking implements, etc., at an agreed discount from sale price and a new note of the company for the balance. The notes for $5,355.50, and the mortgage, given by defendant, are the instruments in suit. As already observed, the trial court held they were without consideration, because there was no consideration for defendant's guaranty of their predecessors. What we have said disposes of that defense. But further, in Lawrence v. McCalmont, supra, the Supreme Court says:

"In Brooks v. Haigh, 10 Ad. & E. 309, 323, the court held that a surrender by the guarantee of a former guaranty, even if it was not of itself binding upon the guarantor, was a sufficient consideration to take the case out of the statute of frauds and to sustain a promise made on the footing thereof."

The individual notes in suit are upon the footing of the prior guaranty which was surrendered by the plaintiff.

Finally, it is urged that an agent of plaintiff induced defendant to execute the notes and mortgage by falsely representing that his (defendant's) attorney said it was the best thing he could do. We think this defense is an afterthought. The preponderance of the testimony of witnesses is against it, and is confirmed by defendant's conduct before and after the transaction.

The decree is reversed, and the cause is remanded, for a decree in favor of the plaintiff.

NOKIS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1919.)

No. 5257.

1. PROSTITUTION ⊂⊃5—VIOLATION OF WHITE SLAVE TRAFFIC ACT—QUESTION FOR JURY.
   Evidence in a prosecution for violation of the White Slave Traffic Act (Comp. St. § 8812) *held* sufficient to warrant submission of the case to the jury.

2. CRIMINAL LAW ⊂⊃338(3)—TRIAL—EVIDENCE.
   That a defendant could not read or write English did not render letters purporting to have been written by him inadmissible, under instruction that they should be considered only if the jury found that they were written at the direction of and for defendant.

3. CRIMINAL LAW ⊂⊃823(2)—TRIAL—INSTRUCTIONS—CURE OF ERROR.
   A recital by the judge to the jury of the evidence, although not in all respects correct, was not reversible error, where the jury were told that it was only his recollection, and not binding on them.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Criminal prosecution by the United States against Chris Nokis. Judgment of conviction, and defendant brings error. Affirmed.

C. R. Jones and George G. Yeaman, both of Sioux City, Iowa, for plaintiff in error.

F. A. O'Connor, U. S. Atty., of Dubuque, Iowa, and Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. Chris Nokis was convicted and sentenced for violating the White Slave Traffic Act of June 25, 1910 (36 Stat. 825, c. 395 [Comp. St. § 8812]). He complains of instructions of the trial court and the admission of certain evidence, and also says that the evidence which was competent was not sufficient to warrant the verdict. The arguments in the brief upon the several questions are so intermingled that for the better understanding of them the facts which we think were fully and competently proved will be set forth. No testimony was given, except by witnesses produced by the government.

[1] The accused first met the young woman in the case at Aberdeen, S. D. She had recently separated from her husband and was a waitress in a restaurant which the accused patronized. Shortly afterwards she went to Cleveland, Ohio, and he went to Sioux City, Iowa. Just before her departure, he entertained her at dinner at a hotel in Aberdeen. She was in Cleveland about two months, and while there received several letters purporting to have been written and signed by him, to all of which she responded. The letters were offered in evidence, but, upon objection by his counsel, the court excluded them, because it appeared that the accused could not read or write the English language. Nevertheless, while on the witness stand, she testified from time to time, and without objection, to what was necessarily the purport of their correspondence in part. While at Cleveland she received $15 from the accused, also a telegram. The fact that she received a telegram was shown, but the contents were excluded by the court. Being advised that a railroad ticket to Sioux City awaited her at the station in Cleveland, she went there and got it. Her information was that the ticket came from the accused. Shortly before this two men appeared at the window of the railroad ticket office in Sioux City, one of whom, not the accused, acted as spokesman for the other, and arranged and paid for the delivery of the ticket to her at Cleveland. He represented that she was the sister of the other man. The latter was seen indistinctly, and was not identified as the accused. The young woman left for Sioux City, using the ticket. She had never been in that city before, and had no relatives, friends, or acquaintances there, except the accused. The day before her arrival the accused told the proprietress of the lodging house where he roomed with another man that he expected his wife, and he arranged with her for a separate room. He met the young woman at the station when she arrived. They went to his lodging house. He introduced her to the proprietress as his wife. In his presence she registered the accused and herself as husband and wife. They repaired to the room previously assigned him, he took his belongings there, and they occupied it together for at least two nights. The furnishing of the room implied the most intimate relations. He

paid for her occupancy of the room, and also for her board at a restaurant. Later he attempted to kill her, because she desired to leave him and return to Cleveland. The disclosure of their relations resulted from the disturbance and the calling in of a police officer. To say that the above was insufficient to warrant the jury in finding that the accused caused the young woman to be transported on the interstate journey from Cleveland, Ohio, to Sioux City, Iowa, for an immoral purpose, is to take a sophistical view that is out of touch with the actualities of life. It is true that the young woman testified on cross-examination that she went to Sioux City of her own accord, and that accused did not induce or entice her; also that she denied an inference from their occupancy of the same room. But under the circumstances the significance of their undisputed conduct was for the jury, and it is idle to say the conclusion was unwarranted.

[2] When on the witness stand the young woman was asked by counsel for the government whether prior to her arrival in Sioux City she had any arrangement or understanding with the accused with reference to her meeting him there. The record shows an affirmative answer by her, and then an objection by counsel to the question. The complaint that the court overruled the objection might be disposed of by observing that the objection came too late and that there was no motion to strike out the answer. But, aside from that, no prejudice resulted, even if the contents of the letters were thus indirectly brought into the case. That a meeting was arranged and understood between them appeared otherwise without reasonable doubt. Furthermore, there was enough in the evidence to have justified the court in admitting the letters themselves, with an instruction that the jury should consider them only if they found that they were written at the direction of and for the accused. Illiteracy does not exclude other proof of responsible authorship. The complaint of the admission of testimony of the young woman that the arrangement with the accused was made about two weeks before she left Cleveland is equally without merit.

[3]] It is urged that the court erred in reciting the undisputed facts in its charge to the jury. The recital was substantially correct except in one particular. The court said that the ticket agent at Sioux City heard his assistant in the office inquire of the man at the window as to who was buying the ticket, and that the latter named the accused. This does not appear in the bill of exceptions. It may be that the court got the fact from the railroad office record of the transaction, which was received in evidence, but is not set forth in the record before us. However this may be, the court carefully told the jury that what it said about the evidence was simply according to its recollection and that they were not bound by it. There was in this no reversible error.

The sentence is affirmed.

JUNG BACK SING et al. v. WHITE, Commissioner of Immigration.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919. Rehearing Denied June 6, 1919.)

No. 3258.

1. HABEAS CORPUS ⊂=25(1)—CHINESE PERSONS—DEPORTATION—FAIR HEARING.
A Chinese person ordered deported is not entitled to discharge on habeas corpus, because she was denied the right of counsel at her preliminary hearing, where after examination a second warrant was issued, and she was notified in the presence of her counsel of a right to counsel, and at that time, without objection by counsel then representing her, the former examination was introduced in evidence as a part of the record in the proceedings under the second warrant.

2. HABEAS CORPUS ⊂=25(1)—CHINESE PERSONS—DEPORTATION—EVIDENCE.
A Chinese person ordered deported by the immigration authorities was not denied a fair hearing, so as to be entitled to discharge on habeas corpus, because the immigration authorities admitted in evidence the testimony given by a witness in a case in the state court, without showing that the witness was not available in person, where counsel for such Chinese person merely requested that all of the evidence of the witness be introduced, and made no objection to the introduction of the whole record of the testimony in the case in the state court.

3. HABEAS CORPUS ⊂=25(1)—CHINESE PERSONS—DEPORTATION—EVIDENCE.
A Chinese woman ordered deported was not denied a fair hearing, so as to be entitled to habeas corpus, because the immigration authorities refused to allow her alleged husband to testify in person, where the inspector requested an affidavit of the husband and considered the same.

4. ALIENS ⊂=54—CHINESE PERSONS—DEPORTATION—EVIDENCE.
Evidence in deportation proceedings against a Chinese person *held* to warrant an order for her deportation, on the ground that she was found employed in or connected with a house of prostitution, or resort frequented by prostitutes, and that she had been sharing in or deriving benefits from the earnings of prostitutes.

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

Application by Jung Back Sing and Dear Shee for a writ of habeas corpus against Edward White, as Commissioner of Immigration, Port of San Francisco. From a judgment denying the writ, relators appeal. Affirmed.

James M. Hanley and Herbert Chamberlain, both of San Francisco, Cal., for appellants.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., and Ben F. Geis, Asst. U. S. Atty., of Willow, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. Dear Shee, a Chinese alien, was ordered deported upon a warrant which charged that she was found employed by, in, or in connection with a house of prostitution, or resort habitually frequented by prostitutes, or where prostitutes gathered, and that she had been found receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes. Jung Back Sing, claiming

to be her husband, but who was found by the immigration officials never to have been married to her, filed a petition in the court below for habeas corpus, alleging that the hearing on the proceedings for deportation was unfair. The record in those proceedings was submitted with the petition for the writ.

[1] It is contended that the proceedings were unfair in that, first, Dear Shee was denied the right of counsel at a preliminary examination on January 25 and 26, 1917, and was not instructed as to her right to be represented by counsel. It appears that after that examination of Dear Shee a second warrant was issued, and that she was notified in the presence of her counsel of her right to counsel, and that at that time, without objection from her counsel then representing her, the former examination was introduced in evidence as a part of the record in the proceedings under the second warrant. It is not ground for discharging an alien on habeas corpus that a preliminary examination was had without advising the alien of his right of representation by counsel (Mok Nuey Tau v. White, 244 Fed. 742, 137 C. C. A. 190), and, if there were error in the proceedings of January, it was cured by the admission of those proceedings in evidence without objection on April 18, 1917.

[2] It is said that Dear Shee was denied a fair hearing by the action of the immigration authorities on April 3, 1917, in admitting in evidence the testimony of Ay Ying given at a hearing in the case of Choy Sun in the superior court of San Francisco, without first showing that Ay Ying was not available in person, or without showing inability to procure her affidavit; also in introducing only a part of the record in the Choy Sun case, and without showing that a verdict was rendered therein finding Choy Sun not guilty. The answer to this is that the testimony of Ay Ying so taken in the superior court was introduced without objection from counsel for the appellants, and that he then asked that all the evidence of said Ay Ying be introduced and incorporated in the record.

But the appellants assert that, instead of introducing the testimony of Ay Ying alone, the whole record of the testimony in that case was taken and received in evidence. Again the answer is that counsel for the appellants made no objection to the reception of the record, and moreover it does not appear that any portion of the record other than Ay Ying's testimony was considered on the hearing or on the appeal. The Secretary of Labor, in affirming the order of deportation, said:

"In the transcript of proceedings in the superior court of San Francisco, pages 1 to 45, which were made a part of the hearing so far as the testimony of Ay Ying was concerned, Ay Ying testified," etc.

[3] It is said that the hearing was unfair, in that the alleged husband of Dear Shee was not allowed to testify. It appears that counsel for Dear Shee asked permission to have her husband testify in person, to which the inspector answered that he preferred an affidavit, and added, "If we want him, we will call for him." It does not appear that any substantial rights of the appellants were prejudiced by this action of the inspector. The alleged husband was allowed to, and did,

present in the form of affidavits the facts as to which he might have testified.

[4] It is urged that the record in the proceedings for deportation contains no evidence to sustain the particular charge under which Dear Shee was ordered deported, and that there is absolutely no evidence to show that she was employed or detained by any person in a house of prostitution, or resort frequented by prostitutes, or where prostitutes lived. The record contains ample evidence to sustain the charge that Dear Shee was a prostitute, and on that charge she might have been ordered deported. There is but little evidence to sustain the specific charge which was made against her. But we think there is sufficient in the affidavit of Donaldina Cameron, superintendent of the Presbyterian Chinese Mission, to sustain the specific charge which was made. That affidavit states:

> That the affiant had known Dear Shee "as a slave owner and prostitute for the past year"; that "on May 29, 1916, I raided the premises at 926 Stockton street under a juvenile court warrant, and took in custody Wong Hong Ho, and at that time Dear Shee, alias Kow Ling, was an inmate of those premises, and was left in charge of the house after the other women were taken to prison. On January 24, 1917, I raided the premises at 710 Sacramento street under juvenile court warrant, and took in custody Jung Ohy, and I again found Dear Shee, alias Kow Ling, in charge of the premises."

There was other evidence to corroborate that affidavit. If Dear Shee was a slave owner, and was in charge of a house of prostitution, we think it may properly be found that she was employed "in or in connection with a house of prostitution," and was "receiving, sharing in, or deriving benefit from the earnings of a prostitute" as charged in the warrant.

The judgment is affirmed.

PRUDENTIAL CASUALTY CO. v. MILLER.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3103.

1. REFORMATION OF INSTRUMENTS ⊂=30—BURGLARY POLICY—EQUITABLE CAUSE OF ACTION.

   If the agent of a burglary insurer and the insured storekeeper or his agent so misunderstood each other that their minds never met as regards the extent of the store's burglary alarm equipment, or if agent of insurer through mistake or designedly misinformed insurer as to extent of such equipment, or undertook without authority to waive failure of the storekeeper to connect his safe with a burglary alarm system, correction of the policy as issued cannot be obtained at law, but must be sought in equity, after which the actual contract as then determined can be enforced.

2. INSURANCE ⊂=143(3)—BURGLARY INSURANCE—ACTION IN DISREGARD OF PROVISION.

   The holder of burglary insurance cannot accept his policy without reading it, and in an action at law on the instrument, after a loss, ignore one of its provisions and have it enforced otherwise than according to its terms; his remedy, if any, being by reformation in equity.

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

3. ACTION ⇐=68—STAY OF ACTION AT LAW PENDING SUIT IN EQUITY.

When it is discovered, after an action at law is brought on a policy of insurance, that a reformation is necessary, for which a bill in equity must be filed, the action at law will be held in abeyance until the case in equity is concluded.

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

Action by Gilbert E. Miller against the Prudential Casualty Company. To review judgment for plaintiff, defendant brings error. Reversed.

Wilson W. Mills, of Detroit, Mich., for plaintiff in error.

James O. Murfin, of Detroit, Mich., for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SATER, District Judge.

SATER, District Judge. On October 2, 1915, Miller made a contract with a still alarm company for the equipment of the doors, windows, and transoms of (but not of the safe in) one of his Detroit jewelry stores with a burglar alarm system. He then held an unexpired policy issued by the insurance company, insuring him for $5,000 against loss by burglary. While the work of installation was in progress, Allen, who, notwithstanding his rather uncertain evidence as to his status with the insurance company, must be regarded as its accredited representative, met Guerin, who was Miller's financial man and business manager, at which time Guerin, so he states, exhibited to Allen the executed contract between Miller and the still alarm company. Allen claims he was shown merely an unsigned memorandum. The instrument produced was examined by Allen, and a discussion took place as to most of its details. Guerin took him over the premises, and explained to him quite fully of what the equipment would consist. The evidence is not entirely clear as to whether there was any mention of, or discussion between them relating to, the protection of the safe located in the rear of the store, but there is no pretense that Guerin represented that the still alarm system was to extend to the safe. Allen suggested, what was previously unknown to Miller and Guerin, that, on account of the improvement then being made, Miller would be entitled to a rebate on the premium previously paid for his insurance policy. He claims to have discussed the matter of the store's equipment several times from early September until some time in October, with both Miller and Guerin, and that on one occasion, when the latter was absent, he was informed by Miller that a complete system of protection including a wooden casing around the safe with connections with the outside central alarm system was intended. Miller did not testify, being "somewhere between Jacksonville and Washington" at the time of the trial.

The still alarm company completed its contract for work at the store about November 1, notice of which was given to Allen, who,

after that date on more occasions than one, visited the store, but at no time examined or noticed the safe. He had never seen a safe inclosed by a wooden casing. On December 27, Guerin received from the insurance company in Miller's mail a rider to be attached to the insurance policy, and also a check for the rebate (which had been figured by Allen) on the premium theretofore paid. The rebate was such as would be allowed for the protection of the safe, as well as the doors, windows, and transoms, and was greater than it would have been, had it been based on the installation actually made. The check was paid, and Miller received the money. Guerin, presumably without reading such rider, placed it in the file with the policy, and neither Miller nor any of his agents knew of any claim of failure in the installation of the still alarm system until after his safe was burglarized and more than $5,000 worth of property was abstracted therefrom on the night of February 5, 1916. The rider provides that, in consideration of the return of a portion of the premium, it is agreed that Miller had installed and that his safe was protected by a still alarm system, which was connected with a wooden casing surrounding the safe and connecting with the central alarm system; that he warrants the maintenance of such system from November 1, 1915; and that nothing contained in such rider, except as therein stated, should be held to vary or waive any of the terms of the policy. One of the terms of the policy is that no agent of the insurance company has authority to change it, or waive any of its provisions, nor shall any notice to or knowledge of any agent be held to effect a waiver or change in the insurance contract or any part of it. Proofs of loss were made by Miller on a blank form furnished by Allen, were verified before him, and were submitted to the insurance company, which refused payment and denied all liability because the safe was not protected by or connected with the still alarm system.

Miller sued on the policy as originally issued. The insurance company admits its execution and delivery, and defends, in so far as its defense is meritorious, on the ground of breach of warranty in failing to install and maintain a wooden casing about the safe, with still alarm connections. At the conclusion of all the testimony the defendant, alleging the evidence showed such breach of warranty, moved for a directed verdict. The motion was overruled, and an exception was reserved to the ruling. A verdict was returned for the full amount of Miller's claim, and, following an adverse ruling on the motion for a new trial, judgment was entered thereon. Under the court's very direct instructions as to what the jury must answer as to various points involved, should the verdict be for the plaintiff, the jury necessarily found that neither Miller nor any authorized agent of his knew that the rider provided for a wooden casing around the safe, or made any misrepresentations to or deceived the insurance company relative to the equipment to be supplied, or which had been supplied, for its protection, or in any manner concealed or failed to reveal the true situation regarding it, and that the insurance company had actual knowledge that a wooden casing around the safe had not been installed. The jury manifestly repudiated Allen's evidence, not only as to his con-

versation with Miller, but also in so far as it was contradictory of that given by Guerin.

[1-3] We need not determine whether the insurance company, prior to the issuance of the rider, was misinformed by Allen as to the extent of the alarm system installed, or as to whether he undertook to waive the nonconnection of the safe with such system, or as to whether the minds of the parties in interest ever met as to the purpose to protect and the actual protection of the safe. If Allen and Miller, or his agent, so misunderstood each other that their minds never met as regards the extent of the store's equipment, or if Allen through mistake or designedly misinformed the insurance company as to its extent, or if he undertook to waive the failure to connect the safe with a burglar alarm system, and thus exceeded his power, a situation was presented which a court of law could not correct. Correction, if desired, must be obtained in a court of equity, after which the actually existing contract between the parties as thus determined can be enforced. If the insured can prove that he made a different contract from that expressed in the writing, he can, on making sufficient proof, have it reformed in equity; but he cannot accept his policy without reading it, and in an action at law upon the instrument ignore one of its provisions and have it enforced otherwise than according to its terms. A jury may not thus reform a policy by striking out one of its clauses. Lumber Underwriters v. Rife, 237 U. S. 605, 35 Sup. Ct. 717, 59 L. Ed. 1140; New York Life Ins. Co. v. McMaster, 87 Fed. 63, 30 C. C. A. 532 (C. C. A. 8); Chicago & A. Ry. Co. v. Green (C. C.) 114 Fed. 676, 678. It follows that the trial court erred in not sustaining the motion for a directed verdict. Miller, however, is not remediless; for when it is discovered after an action at law is brought on a policy of insurance that a reformation is necessary for which a bill in equity must be filed, the action at law will be held in abeyance until the case in equity is concluded. Abraham v. North German Fire Ins. Co. (C. C.) 37 Fed. 731, 3 L. R. A. 188; Simkins, Fed. Eq. Suit, 509.

Other questions discussed need not be considered. The judgment of the trial court is reversed.

STARK BROS.' NURSERIES & ORCHARDS CO. v. LITTLE et al.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2607.

1. CORPORATIONS ⟸640—FOREIGN CORPORATIONS—FILING OF REPORTS—STATUTE—APPLICATION.

Rev. Codes Mont. § 3850, relating to the filing of reports and affidavits by corporations, was not intended to, and does not, apply to foreign corporations.

2. CORPORATIONS ⟸640—FILING OF REPORTS—FOREIGN CORPORATIONS—"DEBT OR JUDGMENT."

If Rev. Codes Mont. § 3850, making directors of corporations liable for debts if they do not file certain reports, applied to foreign corporations, the "debt or judgment" specified therein must be limited to a debt incur-

red in Montana or a judgment based thereon: a state being without power to make nonresident directors of a corporation of another state liable upon a debt incurred in still another state to another foreign corporation.

3. PLEADING ⟸34(3)—PRESUMPTIONS IN AID OF—FILING OF REPORTS—LIABILITY OF DIRECTORS OF CORPORATIONS.

Assuming that Rev. Codes Mont. § 3850, making directors of a corporation liable for debts of the corporation if they do not file certain reports, applies to foreign corporations, in a proceeding against directors of a foreign corporation for not filing such reports in Montana, it must be specifically alleged that the debt was incurred in Montana, inasmuch as a judgment rendered in Montana on a debt raises no presumption that the debt was there incurred.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the Stark Bros.' Nurseries & Orchards Company against Charles B. Little and W. D. Starnes. There was judgment for defendants, and plaintiff brings error. Affirmed.

Ben M. Smith, of Chicago, Ill., for plaintiff in error.

L. A. Stebbins, of Chicago, Ill., for defendants in error.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. Pursuant to the provisions of section 3850 of the Revised Code of Montana, the material portions of which are copied in the margin,[1] action was brought by plaintiff corporation against the directors of a South Dakota corporation doing business in Montana, to subject them to a Montana judgment recovered by plaintiff against the corporation. To the declaration, which alleged the failure of the corporation to file the required report within the statutory period and of defendants to file the required affidavit, a demurrer was sustained.

[1] 1. Under the decisions of Helena Power-Transmission Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567, 10 Ann. Cas. 1055, and Daily v. Marshall, 47 Mont. 377, 133 Pac. 681, and

[1] "Sec. 3850. Every corporation, having a capital stock, except banks, trust companies and building and loan associations, shall annually, within twenty days from and after the thirty-first day of December, file, in the office of the clerk of the county in which the principal place of business of such corporation is situated, a report which shall state the amount of the capital stock, the proportion thereof actually paid in and the amount thereof actually paid in cash and the amount issued, if any, in payment of property purchased and the amount of existing debts and also the names and addresses of the directors or trustees and of the president, vice-president, general manager and secretary of the corporation. Such report shall be signed by the president and a majority of directors. * * * If any such corporation shall fail to file such report, directors of the corporation shall be, jointly and severally, liable for all debts or judgments of the corporation then existing, or which may thereafter be in any wise incurred until such report shall be made and filed; provided, however, that if within ten days after such failure a director, or directors, shall make and file, as aforesaid, an affidavit or affidavits, stating that the failure was due to no fault or neglect of his or theirs, and stating, also, that, within the said twenty days he or they requested the president or sufficient number of the other directors, whose residence was known to the affiants, to join them in making report, such director, or directors, shall not be liable under this section. * * *"

notwithstanding Nelson v. Bank, 157 Fed. 161, 84 C. C. A. 609, 13 Ann. Cas. 811, we are satisfied that this statute was not intended to and does not apply to foreign corporations.

[2, 3] 2. At the oral argument, counsel properly conceded that, if the statute applied to foreign corporations, "the debt or judgment" specified in the statute must be limited to a debt incurred in Montana or a judgment based thereon; otherwise, the act would be clearly unconstitutional, as Montana is without power to make Illinois directors of a South Dakota corporation liable upon a debt incurred in Missouri to a Missouri corporation. That the judgment was rendered in Montana raises no presumption that the debt was there incurred. Proof of this fact would be essential; the fact itself must therefore be alleged in the declaration. Bartlett v. Crozier, 17 Johns. (N. Y.) 439, 8 Am. Dec. 428.

Judgment affirmed.

T. L. SMITH CO. et al. v. CEMENT TILE MACHINERY CO.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1919. Rehearing Denied June 2, 1919.)

No. 5153.

1. PATENTS ⟸327—VALIDITY AND SCOPE—EFFECT OF PRIOR DECISIONS.
The sustaining of a patent upon a differentiation from the prior art does not authorize the successful party to gather to himself a monopoly of what was old when he entered the field.

2. PATENTS ⟸328—INFRINGEMENT—MIXING MACHINE.
The Smith patent, No. 803,721, for improvements in concrete mixers, construed, and *held* not infringed.

Appeal from the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Suit in equity by the T. L. Smith Company and others against the Cement Tile Machinery Company. From the decree, complainants appeal. Affirmed.

For opinion below, see 249 Fed. 481.

George L. Wilkinson, of Chicago, Ill. (Alfred Longley, of Waterloo, Iowa, on the brief), for appellants.

John E. Stryker, of St. Paul, Minn., for appellee.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

HOOK, Circuit Judge. This is a suit by the T. L. Smith Company and others for infringement of certain claims of patent No. 803,721, issued to that company as assignee November 7, 1905, for an improvement in mixing machines especially adapted for mixing concrete, etc. A prior suit in the Seventh Circuit by the same plaintiffs against one Foster was defended by the present defendant, the Cement Tile Machinery Company, as the maker and vendor of the machine claimed to infringe. It was held in that case that the Smith patent was not anticipated by prior patents, among which were a British patent, No. 441, to

Day and Lampard, August 2, 1878, and patent No. 433,663 to Taylor, August 5, 1890; also that the Smith patent, which was for a combination of old elements, disclosed invention, and that the machine used by Foster infringed. The decree was affirmed by the Circuit Court of Appeals of that circuit. Foster v. T. L. Smith Co., 157 C. C. A. 296, 244 Fed. 946. The present defendant made a change in its machine, which it contends was not involved in or affected by the decision in the Foster Case, but followed the prior patent to Taylor in the particulars in question. This suit was then brought, first, to enforce against the defendant the decree against Foster; and, second, for a decree that the modified structure of defendant also infringed. The trial court gave the first relief and denied the second. 249 Fed. 481. The plaintiffs appealed from the latter.

[1] The decree in the first suit is conclusive against the defendant as to the validity of the Smith patent and infringement by the machine it made and sold to Foster. Defendant's modified structure, however, was not in issue in that case, and was not considered by the court, and the question here is whether, in the light of the former decision, it infringes also. If the change from the Foster machine is a substantial departure from a vital element or elements of the patent in suit, or a reversion to the prior art, it cannot be said that plaintiffs' rights are invaded. The sustaining of a patent upon a differentiation from the prior art does not authorize the successful party to gather to himself a monopoly of what was old when he entered the field. The prior Taylor patent has expired. Its disclosures are public property, and no range of equivalents can be accorded the Smith patent that would embrace them.

[2] Roughly speaking, a mixing machine comprises a bowl or receptacle for the materials to be mixed, attached to a tiltable frame, which in turn is supported by and moves within a fixed, stable frame or yoke. As its name implies, the interior frame may be tilted, and thereby the mouth or opening of the receptacle which it carries may be put in position on one side or the other of the fixed support for loading or discharging the materials. The receptacle itself may be continuously rotated or revolved for the mixing operation, regardless of the position of the tilting frame. It was stated in the Smith patent that the primary object of the invention was to provide means for tilting the mixing receptacle, and further to provide a simple form of gearing for rotating the receptacle itself. The claims involved in this suit and also in the prior suit are Nos. 16, 17, 18, 28, 30, 31, and 32. An element in each of the first three claims is stated as being means for tilting the frame to any position in the entire circle of its revolution. In the others it is expressed more restrictively as "means for tilting said frame either to the right or to the left of the loading point." In a sense, plaintiffs' structure may be said to be ambidextrous. When the materials have been loaded into the receptacle and mixed by its rotation, they may be discharged on either side of the machine, as may be convenient for the work in hand. The other important feature of the claims in suit is the gear on the receptacle and the means of applying power for rotation, whatever may be the position of the tilting

frame and the receptacle. The Court of Appeals of the Seventh Circuit very properly held that the means specified for tilting the tilting frame and for rotating the receptacle were essential elements of the Smith combination, that the prior Taylor structure was lacking in those respects, and therefore there was no anticipation from that direction.

The defendant's modified structure is equally deficient in the two features mentioned by which Smith's was distinguished from Taylor's. Its tilting frame carrying the receptacle cannot move in an entire circle of revolution, nor in an arc sufficient for the discharge of the materials from the receptacle on either side of the loading point. The discharge can be on but one side. This is not, as in the machine sold to Foster and involved in the former suit, due to a fashionable form of the receptacle, limiting its motion, and which could be abandoned at pleasure, but to the essential character of the mechanical means employed by defendant for its rotation. In plaintiffs' structure a toothed rack around the middle of the receptacle is engaged by a driving pinion on the end of a shaft passing through a hollow trunnion. This simple and direct means for rotating the receptacle does not restrain the revolution or movement of the tilting frame. But defendant employs a train of gears, which with the frames blocks and limits the movement that constitutes the distinguishing feature of plaintiffs' structure. All of the elements in plaintiffs' patent appeared in the patents to Day and Lampard and to Taylor, but the combination of them was held in the former case to be new, and to produce a new or better result. But defendant does not secure that result, nor does he employ the particular means specified by plaintiffs, or other means within the comparatively narrow range of equivalents to which plaintiffs are entitled.

The decree is affirmed.

KELLOGG SWITCHBOARD & SUPPLY CO. v. DEAN ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3011.

1. PATENTS ⟸328—HARMONIC CALLING MEANS IN TELEPHONE SYSTEMS—INFRINGEMENT.

The Dean patent, No. 779,533, for improvements in harmonic calling means for use in party line telephone systems, *held* not infringed.

2. PATENTS ⟸149—CLAIMS TOO BROAD—RELIEF ON FILING DISCLAIMER.

The owner of a patent, if it be held in his suit for infringement that the claims in suit are too broad, cannot be given relief on filing necessary disclaimer in the Patent Office, where, if limited to the application of the three first features in the patent relied upon by plaintiff, another feature not employed by defendant's device would still remain, while, if made to include a construction of the claims in accordance with plaintiff's interpretation of the distinguishing fourth feature, relief would be inequitable as converting into infringement acts otherwise innocent.

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

Suit in equity by the Kellogg Switchboard & Supply Company against the Dean Electric Company. From a decree for defendant (231 Fed. 197), plaintiff appeals. Affirmed.

W. Clyde Jones, of Chicago, Ill., for appellant.

F. O. Richey, of Elyria, Ohio, and Charles A. Brown, of Chicago, Ill., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Suit for infringement of patent No. 779,533, January 10, 1905, to Dean, for improvements in harmonic selective calling means for use in party line telephone systems.

[1] In the calling device of the patent there is located between extensions of the ends of an electro-magnet (whose rear end is adjacent to one end of a permanent magnet) an armatured bell reed, whose rear end is held adjacent to the other end of the permanent magnet, whereby the bell is "polarized," the reed being held at rest in neutral position until an alternating current, selected at the central station, and of a frequency harmonizing with the rate of vibration of the subscriber's bell-reed, is impressed on the electro-magnet, whereupon the reed is made to vibrate alternately in opposite directions between the pole pieces of the electro-magnet, causing the hammer on the outer end of the reed to strike the gong; the other bells on the party line [none of which are in harmony with the selected rate of current frequency] being unaffected. In practice, four different rates of current frequency are used, viz. 16⅔, 33⅓, 50 and 66⅔, per second.

Judge (now Mr. Justice) Clarke, who presided below, dismissed the bill for laches in prosecution and for lack of infringement. In reaching the conclusion of noninfringement, Judge Clarke found that there was nothing new in the idea of Dean's harmonic selective signaling system; that all the elements of the combinations of the various claims in suit had been before used in the same combination, to produce the same result (though perhaps not so successfully as the plaintiff accomplished it); that the patent, if valid, should not be given a scope beyond the letter of the claims in suit, which, as held by the court, do not call for any special construction of reed tongue or polarized bell, each, however, containing as a supposed element of novelty, a so-called "undertune" feature, whereby the reeds are so adjusted as to be operated by a current of alternating frequency, corresponding, not to the natural rate of vibration (or pitch) of the reed, but to its rate as accelerated by the reflex action of the gong when struck; and that defendant does not employ the "undertune" feature—the operative rate of actuation of its bell being the natural rate of vibration of the reed tongue, unmodified by the action of the gong. 231 Fed. 197.

The features of novelty and invention which plaintiff contends are found in the elements of the combinations of the various claims in suit (Nos. 1, 3, 5, 17, 18 and 19) are (1) a reed tongue vibrating as a whole and not in nodes; (2) a hammer resiliently mounted, capable of a certain limited freedom of movement with respect to the reed tongue; (3) the latter being positively actuated by the electro-magnet in both

directions, to secure vibrations in practical synchronism with the ringing current; and (4) the latter having a rate of frequency sufficiently close to the natural rate of vibration of the reed to start the bell ringing, and sufficiently close to the accelerated rate occasioned by the kick-back of the gong to keep the bell operating—this flexibility of the impressed current rate being styled the "operative range." Plaintiff specifically rejects the "undertune" theory.

Passing the question of laches in prosecution (especially in view of the stipulation of counsel dropping the case from the trial calendar subject to reinstatement), we agree entirely with Judge Clarke's conclusion of noninfringement. There was nothing new in the idea of a harmonic, selective, alternating calling system, nor in the use of the polarized bell in connection therewith, whereby the bell reed was positivey actuated by the electro-magnet in both directions, and for the purpose claimed by plaintiff for its reed. Although such bells of the prior art did not prove satisfactory, and were discontinued after several years commercial use, they do not impress us as merely abandoned experiments. In the case of one or more of them the rigidity of the reed tongue perhaps contributed largely to lack of success. But the court below rightly found that the claims in suit did not call for any special construction of reed tongue or of polarized bell; for, while the specification describes a construction of the reed apparently capable of producing, and intended to produce, the results plaintiff claims for it, the claims call for the reed tongue only as "tuned," which has no relation to form. That the claims were not intended to cover the form of the reeds is further shown by the inclusion in a patent to Dean, applied for contemporaneously with the application for the patent in suit (and issued later), of several claims upon the specific form of a reed, corresponding to that described in the patent before us, and intended to accomplish the results plaintiff claims for that reed. Not only do none of the claims in suit call for a "polarized bell," except in that language alone, but the specification describes the bells as "polarized by permanent magnets, as in an ordinary alternating current bell." There is thus no room for the application of the rule that reference may be made to the specification to ascertain the characterizing features of an element described in the claims only generally and indefinitely.

We also agree with Judge Clarke that a characteristic element of each of the claims in suit is the "undertune" feature. Their language is:

"Means at the central office for impressing upon the line ringing current of frequencies *corresponding* to such operative rates of the bells and *sufficiently close to* the natural rates of the tongues to start the same vibrating." Some of the claims add, "from a state of rest."

The specification, after stating that the ringing current rates applied have "frequencies corresponding to the operative rates of vibration of the reed tongues," describes those operative rates as "the resultant of the natural pitch of the reed, as modified by the weight of the hammer or ball, the armature, and the action of the bell gong when it is struck," and as higher than the natural rate. The fact that the cur-

rent frequencies need only be "sufficiently close" to the *operative* rate of reed vibration "to successfully operate the bells," and "sufficiently close to" their *natural* vibration "to start them vibrating when current is first impressed upon the line," does not overcome the otherwise plain requirement that the current frequency rate must be substantially higher than the natural pitch of the reed, and must correspond with its operative rate of vibration—making due allowance for "operative range."

All doubt on the subject is removed by the oral testimony of the expert who assisted Dean in working out the application for the patent in suit, to the effect that it was then recognized that the only novel element of the claims was the "undertune" feature, although this feature is said to have turned out not to be novel in fact. The device of the patent in suit is doubtless superior to any prior selective, harmonic system; but the patent is not of a primary character, nor is its permissible range of equivalents broad enough to include defendant's structure.

It is persuasively shown that defendant's system, which is operated under a later patent to Dean, does not use the "untertuned" reed of the patent in suit, in which the impressed current corresponds not to the natural pitch of the reed, but to its rate as increased by the action of the gong, but uses an "in-tuned" reed—that is to say, one designed to vibrate at its natural rate, and thus most efficiently, under a current frequency corresponding to that natural rate, such rate not being accelerated by striking the gong. That its bell, like plaintiff's will actually operate under a current ranging from a few cycles below to a few cycles above the selected and most efficient current rate does not make to the contrary.

We do not understand the proof to show that defendant has constructed or sold bells which depend for their successful operation upon the use of an "undertuned" reed. We are content to rest our affirmance of the decree upon the opinion of Judge Clarke, supplemented by what we have said.

[2] Plaintiff, however, asks here that, if it be held that the claims in suit are too broad, it be given relief on filing necessary disclaimer in the Patent Office. We cannot accede to this request. If limited in application to the first three features before enumerated as relied upon by plaintiff, the undertune feature would still remain. If made to include a construction of the claims in accordance with plaintiff's interpretation of the distinguishing fourth feature (the "operative range" theory), such relief would be inequitable, as converting into an infringement acts otherwise innocent, because based upon a natural and correct interpretation of the claims as written, especially in view of the proof that the patentee intended them to be so interpreted. This would be to broaden, not to narrow, the claim.

The decree of the District Court is affirmed.

WEBER ELECTRIC CO. v. CONNECTICUT ELECTRICAL MFG. CO.

(District Court, D. Connecticut. April 5, 1919.)

1. PATENTS ⟸303—INFRINGEMENT—PRELIMINARY INJUNCTION—DISCRETION OF COURT.
   The exercise of the discretion of the trial court in passing on motion for preliminary injunction in a suit for infringement of patent does not extend to a refusal to apply well-settled principles of law to a conceded or indisputable state of facts.
2. PATENTS ⟸297(2)—PRELIMINARY INJUNCTION—PRIOR ADJUDICATIONS.
   Where plaintiff's patents have been held not anticipated, valid, and infringed in numerous prior suits, such prior adjudications justify plaintiff in seeking the extraordinary remedy of preliminary injunction against defendant, charged with infringement, unless it may fairly be said that defendant's device does not infringe the claims in suit.
3. PATENTS ⟸328—INFRINGEMENT—ELECTRIC LIGHT SOCKETS.
   Weber patents, No. 743,206, claim 4, and No. 916,812 claim 1 for incandescent electric lamp sockets, *held* infringed by defendant, so far as shown by the evidence on plaintiff's motion for preliminary injunction.

In Equity. Suit for infringement of patents by the Weber Electric Company against the Connecticut Electrical Manufacturing Company. On motion for preliminary injunction. Injunction issued.

Frank C. Curtis, of Troy, N. Y., for plaintiff.

Philipp, Sawyer, Rice & Kennedy, for defendant.

THOMAS, District Judge. This is a motion for a preliminary injunction in a suit for infringement of two Weber patents, No. 743,206 and No. 916,812, for incandescent electric lamp sockets. Only claim 4 of the first patent and claim 1 of the second patent are in issue.

At oral argument on this motion the court suggested that its general policy was against granting a preliminary injunction in a patent case where the defendant is, as here, a responsible and substantial concern; but an examination of the cases bearing upon the rights of the plaintiff in the circumstances of this case, and the prior adjudications respecting the claims of the patents in suit certainly justify the conclusion that the injunction should issue, unless the defendant is able to show something radically different in the construction of its device, which avoids infringement or is able to make a showing of some defense which makes the plaintiff's right doubtful.

The general rule of law is discussed by Judge Dickinson in Æolian Co. v. Cunningham Piano Co. (D. C.) 244 Fed. 478, where will be found his conclusions after a consideration of the adjudicated cases, and on page 479 he says:

"The real conclusion reached in awarding an interlocutory injunction is that under all the facts and equities so far appearing in the cause the plaintiff should be left in the undisturbed assertion of his claimed right until it is determined that his claim is groundless, subject to his liability to make good any loss thereby sustained by others. A patentee the validity of whose patent has been determined by adjudication or its equivalent may invoke the benefit of this rule with peculiar force. On general considerations the writ now asked for should be granted. The only inquiry left is whether anything has been made to appear which takes this case out of the general rule."

In Underfeed Stoker Co. v. Riley (D. C.) 207 Fed. 963, on page 966, Judge Brown says:

"It should be borne in mind that when a patent has been sustained after a thorough defense by competent and diligent counsel, and when the defendant's structure is substantially like that involved in the former litigation in essential particulars, the complainant should be given the benefit of such adjudication on an application for preliminary injunction, and that the burden rests upon the defendant to distinguish the cases."

[1] The defendant urges that the discretion of the court should not be exercised to restrain it from manufacturing and vending its device, as it would work a great hardship; but the exercise of the discretion of the court in passing upon a preliminary injunction does not extend to a refusal to apply well-settled principles of law to a conceded or indisputable state of facts.

[2] What are the conceded or indisputable facts as disclosed by the record here respecting prior adjudications? These patents have been in successful litigation before different nisi prius and appellate courts for a period of years. The patents have invariably been held not anticipated, valid, and infringed.

In Weber Electric Co. v. National Gas & Electric Fixture Co. (D. C.) 204 Fed. 79, Judge Ray held both patents valid and infringed. This ruling was sustained by the Circuit Court of Appeals for the Second Circuit. 212 Fed. 948, 129 C. C. A. 468.

Other adjudications respecting either one or both of the patents and the claims in suit may be found in Weber Electric Co. v. Union Electric Co. (D. C.) 226 Fed. 482, and in Weber Electric Co. v. E. H. Freeman Electric Co. (D. C.) 253 Fed. 657, both adjudications in the District Court of New Jersey in the Third Circuit.

In Weber Electric Co. v. Wirt Mfg. Co. (D. C.) 226 Fed. 481, Judge Dodge, in the First Circuit, held patent No. 743,206 valid and claim 4 of the patent here in suit infringed.

Again the matter was before the Circuit Court of Appeals for the Second Circuit on an appeal from a decree of the District Court for the Southern District of New York in Weber Electric Co. v. Cutler-Hammer Mfg. Co., 256 Fed. 31, decided January 22, 1919, wherein an injunction was granted, which ruling the Circuit Court of Appeals sustained.

In Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 489, 20 Sup. Ct. 708, 710, 44 L. Ed. 856, Mr. Justice Brown, speaking for the court, said:

"The obligation to follow the decisions of other courts in patent cases of course increases in proportion to the number of courts which have passed upon the question, and the concordance of opinion may have been so general as to become a controlling authority."

The repeated successes in the adjudicated cases seem to clearly bring the plaintiff within the rule and to justify the granting of the motion. Indeed, it would be very difficult to conceive a case where a plaintiff could rely with greater force upon prior adjudications to assert his right to an injunction pendente lite.

In this connection Judge Hough, speaking for the Circuit Court of Appeals in the Cutler-Hammer Case, supra, says:

"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."

And while, as Judge Hough further says, "each succeeding defendant * * * is not estopped by previous litigations from advancing defenses often overruled," nevertheless this case inclines me to hold, as he has held that "there are some matters which even in patent suits must finally cease to merit discussion." Thus far there can be no possible escape from the conclusion that the prior adjudications justify the plaintiff in seeking this extraordinary remedy at this stage of the case.

[3] So it only remains for me to decide whether upon the evidence in this proceeding it may be fairly said that the defendant's structure does not infringe the claims here in suit. And upon this point the language of the Circuit Court of Appeals in the Cutler-Hammer Case is helpful. They say:

"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."

So, too, is the defendant's device a positive lock and not a friction device. Claim 4 of the earlier patent reads:

"In a device of the class described, and in combination a pair of members comprising a sheet-metal sleeve having a slotted end, and a sleeve-metal cap adapted to telescopically receive the slotted end of said sleeve, one of said members being provided with a recess, and the other having a correspondingly located transverse slit and the wall on one side thereof displaced to form a projection beveled or inclined toward said recessed member and terminating abruptly at said slit, whereby said members are adapted to automatically interlock with a snap action when telescopically applied to each other, and to be released by manual compression of said slotted sleeve, substantially as described."

It has been frequently held that claim 4 is entitled to a fair range of equivalents which includes the transfer of any structural feature with its function from one to another part of the device and every structural feature with its function is present in the defendant's device, as called for by this claim.

Claim 1 of the second patent is as follows:

"In a device of the class described and in combination, a pair of tubular, sheet-metal members, one adapted to telescopically receive the other, having mutually abutting cut-metal edges on the respective members to prevent relative rotative movement, and automatically interlocking means for preventing a telescopic movement of separation of one member from the other said means permitting, without manipulation thereof, the telescopic application of the members to each other."

I cannot find that the defendant avoids infringement of this claim, and in view of the prior adjudications discussion concerning it seems of no avail. The proposition is too clear to admit of argument.

The only real issue here relates to the bayonet movement, and Judge Davis, in the Freeman Case, has disposed of that contention in favor of this plaintiff, and I am in accord with his conclusions.

In view of the evidence there is nothing in the claim made by the defendant regarding laches on the part of this plaintiff. Laches cannot be fairly charged against it.

From a careful consideration of all the evidence and arguments of counsel based thereon, and without attempting to answer all the claims advanced, most all of which have been repeatedly decided by various judges adversely to the defendant's claims, I can see no escape from the conclusion that the plaintiff is justly entitled to the injunction prayed for, and it may therefore issue.

UNITED STATES v. ALPHA PORTLAND CEMENT CO.

(District Court, E. D. Pennsylvania. April 3, 1919.)

No. 4072.

1. JURY ⊜31(7)—JURY TRIAL—JUDGMENT NOTWITHSTANDING VERDICT.
   Under the seventh amendment to the federal Constitution, preserving the right to trial by jury, a federal District Court cannot enter judgment notwithstanding the verdict.
2. NEW TRIAL ⊜70—WHEN GRANTED.
   If defendant corporation's book entries, reciting a profit on property sold another corporation, sustain a verdict for the income tax on the profit, a new trial will not be granted because of the court's opinion that no income was actually received; the entries being merely a matter of bookkeeping incidental to a corporate reorganization.
3. NEW TRIAL ⊜159—DETERMINATION.
   Although the court entertains serious doubt whether evidence sustains verdict for government in action to collect income taxes, a new trial will be denied, and judgment pro forma entered on the verdict, in order to preserve the government's rights under the verdict pending appeal.

At Law. Action by the United States against the Alpha Portland Cement Company. Verdict for the United States, and defendant moves for a new trial. Rule discharged, and judgment entered on the verdict.

See, also, 242 Fed. 978.

Francis Fisher Kane, U. S. Atty., and Ernest Harvey, Asst. U. S. Atty., both of Philadelphia, Pa.

William S. Furst, of Philadelphia, Pa., and Louis H. Porter, of New York City, for defendant.

DICKINSON, District Judge. This case belongs to what, in the administration of the income tax laws, will doubtless prove to be a large class. The legal situation presented is, however, unique. The disposition which, under all its features, it has been decided to make of it, is an unusual one. Because of this an explanation is in order, in the hope that it may afford an excuse, if not a justification, for the

course taken. If our system of appellate practice provided an advisory branch, as well as a substantive law and procedure branch, the questions involved in this case could be referred to the appellate tribunal for decision, with all the acquired rights of both parties fully preserved. As it is, we know of no way of dealing with the case, in accordance with established practice, than to deal with it through the the power of the court to grant a new trial. A verdict had been rendered in favor of the plaintiff. This fact finding is vital to the plaintiff's case. It may be controlling of the judgment, or the point of law involved may control.

[1] The constitutional principle declared in Slocum v. New York, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029, denies to the court the power to enter judgment n. o. v. Counsel view this also as a denial of the power to enter judgment on a point of law reserved. Ordinarily, therefore, the duty of the trial court is either to enter judgment on the verdict, thus giving its sanction to the fact finding, or to grant a new trial, thereby depriving plaintiff of the benefit of the fact finding in its favor. When the action of the court is dictated by a consideration of the fact merits, no legal injustice is done. When, however, it is dictated wholly by the judgment of the court upon the law of the case, and a new trial is granted, if there is error, the harm done the party in whose favor the verdict was rendered may be irreparable. Exactly this situation is here presented.

[2] We think the plaintiff is entitled (for whatever value it may have) to a definite finding by this court, which is now made, that if an issue of fact fairly arises in this case, and is for the jury, the verdict should be allowed to stand undisturbed by the fact that the trial judge, if a member of the jury, would have favored a different verdict. This means that, if there was no error in the law rulings made, the verdict would be allowed to stand. We would not exercise the power to grant a new trial because, in the judgment of the trial judge, the verdict was against the weight of the evidence. The reason for this attitude of the trial judge toward the verdict will later appear. Its further meaning practically is that, unless the defendant is entitled to judgment as matter of law, the verdict should stand.

This really takes us back to the former stage of the case, when the rule for judgment was dismissed. The conditions, however, are not quite the same. Judgment in favor of the plaintiff was then refused. Judgment was, we think, properly refused; but, whatever opinion had been entertained of the legal merits of the controversy, judgment would have been refused out of deference to the policy of deciding all questions as trial questions when they can be so ruled, notwithstanding the fact that they might also be decided as questions arising out of the pleadings, unless the parties had agreed to the judgment entered being a final judgment. The ruling then made, therefore, means no more than that the questions raised were trial questions. Nearly all legal reasoning is part of an artificial system. The results of any artificial system of logic should always be check-

ed up by the test of a common-sense view of the results which have been reached, and then by the test of whether they are in accord with decided cases.

Let us attempt to apply these tests after first getting into our minds the case to which the test is to be applied. The more broadly the facts are stated, the clearer is our view of them. When we attempt to go into the details, the effect is apt to be confusing. It will also help if the statement of the facts is limited to a statement of the substantial facts, although strictly and technically some of them are not the facts.

These substantial facts are that a corporation existed, the capital of which it was desired to have increased without any fresh contribution of capital being made by any one. The company owned a property which it had bought at a price, and which was carried on its books as part of its assets at its cost. The property possessed what may be called the quality of elastic value. As such transactions are viewed, it could be considered as having a value of many times what had been paid for it. The plan devised was to organize another company with the desired capital, and have the first company sell to the second the property, at a valuation equal to the capital of the latter, which paid for the property by the issue of its stock. The two companies were then merged into the present company, which, under the agreement of merger, was given the nominal capital it was planned to have, and the new company assumed all the obligations of the old. What actually and in fact resulted is too obvious to require statement. The bookkeeping result was, however, very different. The facts thus manufactured and made to appear were that the second company, by the formal action of its board of directors and its executive officers, offered to buy of the first company the property mentioned, at a cash price, for real money. This offer the first company, after like formal corporate action, accepted. A conveyance was made on the basis of this consideration having been paid and received. The books of the second company stated that it had paid actual money for the property. The books of the first company showed a corresponding receipt of the same moneys, and, in addition, showed a clear statement of the large profit which had accrued to it. In point of fact, at no time was a dollar handled by any one, or in sight. The facts were all manufactured bookkeeping facts. The statement made is not technically and strictly accurate, but it presents the transaction as in substance it really was.

The argument of counsel for the United States, ably and successfully presented to the jury, was in effect that when a person says he has received moneys by way of profit or income, and states the amount which he has so received, and for what he received it, and the source from which it came, this is evidence against him, and justifies the finding that what he says is true is true, and that he did receive the profit which he says he received.

This argument, so far as it goes, is unanswerable, and it went far enough to secure this verdict, and would go far enough to sustain it, were it not for the fact that the mind staggers over giving sanction to a finding that something is true which we know is not true.

There can be no question that the self-disserving declarations of a party are evidence against himself. They are, however, only evidence, and, if self-serving, would not be evidence which he could offer. As evidence, it may have much or little weight. Generally speaking, no one would be satisfied to make the finding that a man had made a profit merely because he said he had made a profit, even if he had a strong and sincere belief that he had made a profit. When, however, a man for his own purposes and to accomplish a certain object, which it is to his advantage to have accomplished, secures that advantage from the fact that he had actually made the profit which he said he had made, he cannot complain if afterwards, when the fact of profit is to his disadvantage, he is not permitted to successfully deny the fact which he before asserted.

This suggests one reason for making the statement before made that, if there is a fair jury question in the case, a new trial, in the opinion of the trial judge, should not be granted. It also suggests the disturbing element which exists in the case. It is that the question is not wholly or quite whether there was a profit, and because of this income, but whether the profit or income was the kind of income which is made taxable by law. The system of income taxes or excise taxes, where the amount paid is measured by income received, whatever else may be said of it, possesses these claims to merit: It distributes the money burden of government equably in consonance with the money benefits which flow from it, and it exacts payment in a way which makes the burden the least felt. No one is called upon to pay unless he has the wherewith with which to pay. If the law is construed with these grounds, indicating its policy, in mind, we must construe the words "income received" as meaning actually received, and not to include something which exists merely as a figment of the imagination.

With this construction given to the act of Congress, the commonsense conclusion is that the exacted tax is not payable. Such was the instruction given to the jury, but, inasmuch as the moneys, the receipt of which was sought to be taxed, had not been received, binding instructions to so find would seem to have been called for. This direction would have been given, except for the circumstance that the receipt of moneys is a fact of which there was evidence in the declarations of the taxpayer, and this may be the fact. The final result of the taxpayer having no money is without importance. The real question is whether he received any as income. The distinction may be thus illustrated. A man may buy a property on speculation, as it is termed. He may sell it in form and fact at a profit, and the transaction be an actual money transaction, and in fact everything it is in form. The man has made a profit. Afterwards, within the tax year, he may regret his bargain, thinking he could make more through another sale, and the purchaser may resell to him at the former price. The final result is that the man has no money out of which to pay the tax. It may nevertheless be said with plausibility, if not with actual truth, that he did make a profit.

It was upon this distinction that the case was submitted to the jury. Were there in fact two sales? The distinction, however, would seem

to be too fanciful to stand the test of common sense. The vice in it is that there was no more justification for the one finding than the other, and the invitation held out to the jury to find for the plaintiff was based upon error.

The case of Southern Pacific v. Lowe, 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. 1142, supplies us with a sufficient test of the application of the adjudged cases to the instant case. Counsel for defendant view this as decisive of the present case. Counsel for the United States read it as a case ruled upon its peculiar facts. This it undoubtedly was because the opinion so states. What, however, were its facts? There was a directed verdict against the taxpayer. The judgment was reversed, so we know this direction was wrong. A procedendo, however, was awarded, and the case remitted. We are not, therefore, at liberty from the mere reversal to infer that binding instructions should have been given in favor of the taxpayer.

So far counsel for the United States is right in differentiating the Lowe Case from the present case. The opinion of Mr. Justice Pitney, however, states certain findings which the court had made. Some of these were made because the facts were admitted, but some were made upon the deductions of the court. The test fact in the Lowe Case was whether the accumulations sought to be taxed as dividend income had accrued during the tax year or during a prior period when it was not taxable. There, as here, there were two corporations. One was the Central Pacific; the other the Southern Pacific. There, as here, each had a nominal independent existence as separate and distinct legal entities. Their relations were such, however, that in fact the Southern Pacific was everything and controlled everything, allowing the Central Pacific merely sufficient funds to maintain its organization nominally as a corporation. The control was exercised through a lease and through a board of directors. A set of books was kept by each company, and transactions were entered as if each company was independent and separate, except for the contractual relations between them. These bookkeeping facts indicated that the Central Company had accumulated a surplus. During the tax year this surplus was distributed in the form of a dividend, which took the further form of a payment to the Southern Pacific. In other words, if the bookkeeping facts had been the real facts, the tax would have been payable. What had actually been done was merely to make the bookkeeping entry which credited the account kept against the Central Company investment with the like sum received as a dividend. Nothing in fact had been received at the time the dividend was declared and entered as received.

The court reached the conclusions set forth in the opinion.

(1) The accumulations out of which the dividend had been declared had accumulated before the tax year. This was admitted to be the fact, and is stated to be an admitted fact.

(2) The conclusion of the court was that the fund had come to the Southern Pacific before the tax year, and that the declaration of the dividend worked nothing beyond the formal change from surplus to dividend.

(3) The opinion carefully notes the distinction between the ruling made and the case of the rights of the ordinary stockholder in and to a surplus fund before and after a dividend has been declared and made payable thereout. The case of such a stockholder is dealt with in the subsequently reported case of Lynch v. Hornby, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. 1149.

(4) The general proposition is advanced that income which had in fact been received before the tax year did not become taxable because in mere form and appearance it was made to appear to have been received during the tax year.

(5) The decision made was based upon the facts that the two companies, although they had each a formal existence as separate entities were in actual fact one organization, and that the fund which in form and as a bookkeeping fact came to the Southern Pacific during the tax year had in actual fact been in its hands before the tax year, and although in form the fund belonged to it only as a dividend received during the year, the fact was the fund had belonged to it before the tax year.

(6) The bookkeeping facts are stated to be not controlling of the real facts.

(7) A surplus fund which is made up of accumulations is stated not to differ from accretions in value of assets.

It is doubtless true, as counsel for the United States contend, that the Lowe Case may be distinguished from the instant case. The distinction, however, is based upon differences which are more formal than substantial. If, in the present case, the jury had been directed to find the verdict which they did find, the Lowe Case would command us to grant a new trial. What the jury found was an ultimate fact in each case. In the Lowe Case, the evidentiary facts were admitted; here, although not formally admitted, they are not in controversy. The court there drew its own conclusion from the evidentiary facts. How can we refuse to draw a like conclusion? This would ordinarily impose the duty of making absolute the rule for a new trial. To make this disposition of the case would result in depriving the United States and its counsel of the fruits of a trial victory of which they should not lightly be deprived, and if the conclusion indicated is wrong would be an injustice to them.

[3] We have, therefore, after much hesitation, decided to pro forma refuse the motion for a new trial and enter judgment on the verdict. This will hold the fact situation as it is until the law of the case can be finally determined. This, it is true, is at the expense of referring the questions involved—the statement of which we leave to counsel—to the appellate tribunal, the decision of which, in the first instance, we would ordinarily not be justified in evading. The result of the trial, however, is such that whatever judgment is entered will to all practical intents and purposes be a final judgment.

The question of the allowance of interest, we understand, has been withdrawn, and has therefore not been discussed.

Rule for new trial discharged, and judgment is entered on the verdict in favor of the plaintiff.

THE JASON. THE HESPEROS. THE HAMILTON.

(District Court, E. D. Virginia. April 23, 1919.)

1. COLLISION ⟸71(3)—ANCHORED VESSELS—IMPROPER ANCHORAGE.
A collision between the steamships Jason and Hesperos, anchored in James river off Newport News, *held* due solely to the fault of the Hesperos, which, coming later, was bound to give the other ample searoom, and did so at first, but anchored so insecurely that she dragged her anchors in a storm, and, although she drifted within a ship's length of the Jason three hours before the collision, and could have moved to a safe distance, did not, and when the wind increased was driven against the other vessel.

2. SALVAGE ⟸34—BEACHING SINKING STEAMSHIP—AMOUNT OF AWARD.
A tug *held* entitled to a salvage award of $15,000 for safely beaching a steamship, which was in a sinking condition from collision in a harbor at night in a storm; the service requiring some seven hours, and the value of the tug being $75,000, and of the ship and cargo $3,600,000.

In Admiralty. Suit for collision by the Jason Navigation Steamship Company against the steamship Hesperos, and suit by the tug Hamilton against the steamship Jason for salvage. Decree for both libelants.

Hughes, Vandeventer & Eggleston, of Norfolk, Va., for the Jason.
Hughes, Little & Seawell, of Norfolk, Va., for the Hesperos.
Lewis, Adler & Laws, of Philadelphia, Pa., and John W. Oast, Jr., of Norfolk, Va., for cargo owners and insurers.
Edward R. Baird, Jr., of Norfolk, Va., for the Hamilton.

WADDILL, District Judge. This case involves a collision between the steamship Jason and the steamship Hesperos, that occurred about 9:30 on the evening of June 12, 1918, in the harbor of Newport News, slightly westerly of the Warwick Machine Company pier.

The original libel was filed by the Jason Navigation Steamship Company against the Hesperos, and was twice amended, and Alexander Sprunt & Son and the American Smelting & Refining Company, and the Underwriters, the owners and insurers of the cargo filed their petitions asserting large claims against the Hesperos for loss and damage to the cargo sustained in the collision. Subsequently the steam tug Hamilton libeled the Jason to recover for salvage services rendered in connection with salving her after the collision, and by consent the testimony was taken and the combined causes heard together.

[1] The Jason, a large American steamship, 324.2 feet long, 40 feet beam, 25 feet depth, gross tonnage 2,551, on Saturday, the 8th day of June, 1918, about 3:30 p. m., came to anchor in the harbor of Newport News, and on the following Tuesday, about 8:35 a. m., the Norwegian steamship Hesperos, 389.8 long, 54.1 beam, 24.6 depth, gross tonnage 4,141, also anchored above and to the westward of the Jason. Both ships were brought in by duly licensed Virginia pilots, and in locating the Hesperos, the ship coming last to anchor, and charged with the duty of affording proper berth room to the Jason, due allowance was made of some three ship's lengths, or 1,100 to 1,200 feet.

The collision between the ships occurred substantially under the following circumstances: On the evening of the 12th of June a storm of some proportions set in, commencing about 3 o'clock, and, as shown by the Weather Bureau report at Norfolk, the wind blew at different velocities, as follows: At 4 o'clock, 31 miles; at 5 o'clock, 27 miles; at 6 o'clock, 24 miles; at 7 o'clock, 18 miles; at 8 o'clock, 17 miles; and from 8:59 to 9:09, 18 miles; from 9:10 to 9:14, 20 miles; 9:15 to 9:27, 19 miles; 9:27 to 9:29, 44 miles; 9:29 to 9:30, 68 miles; 9:30 to 9:37, 60 miles; 9:37 to 9:38, 58 miles; 9:38 to 9:39, 48 miles; 9:39 to 9:41, 35 miles; and at 9:43, 26 miles. During the evening, between 3 and 6 o'clock, libelant charges that the Hesperos' anchor dragged from time to time, until the ships at 6:30 were within a ship's length of each other, and approximately at 9:30, on the height of the storm, they came into collision, causing serious damage and injury to the Jason and her cargo, from the effects of which she had to be promptly beached.

Many of the incidents usually in dispute in a collision of this sort, such as the location of the ships, the time of anchorage, the vessel charged with the burden of providing proper berth space, and the prevalence and intensity of the storm, are not seriously controverted here. The case turns almost entirely upon the correct determination of the fact of which of the two vessels, if either, actually dragged anchor, whether both vessels were properly anchored, and whether the accident was inevitable or not.

The Jason insists not only that the Hesperos dragged her anchor from time to time, between 3 and 6:30 o'clock on the evening in question, as well as at the time of the accident, but that she was in fault, in that she failed to have out her port as well as her starboard anchor in time to avert the collision, and especially that she was negligent in the manner of paying out her anchor chains during the evening preceding the collision; whereas, the Hesperos says that her anchor did not drag, that she had out ample chain, that the same was paid out in a seamanlike manner, that the anchor of the Jason, and not that of the Hesperos, dragged, and that the accident, so far as the Hesperos was concerned, was inevitable.

The correct solution of these issues will be conclusive of this case, assuming the accident not to have been inevitable, as claimed by the Hesperos.

I. Consideration will be first given to the anchorage and movements of the Hesperos before and at the time of the collision. On the evening of the occurrence, the master of the Hesperos and her first officer were both ashore, having been away since the preceding day. They returned to the ship about 6:30 that evening. On their return they admit seeing the Hesperos within a ship's length of the Jason, and, as they claim, in the same position in which she had been from the time of her original anchorage. They did not personally know of the dragging of the anchor, as it occurred, if at all, during their absence; but they stoutly maintain that there had been no change in the position of the ship since she first came to anchor. The Hesperos at 3 o'clock had her starboard anchor on 30 fathoms of chain, and

15 fathoms more was paid out about 4 o'clock, and a further 15 fathoms, making 60 fathoms, on the starboard anchor, and at 6:50 the port anchor was dropped on 13 fathoms of chain. On the coming of the squall, 25 fathoms additional was paid out on the starboard anchor, making a total of 85 fathoms, and 47 fathoms on the port chain, making 60 fathoms altogether.

The libelant insists that the Hesperos should have had out both anchors; that one anchor was not sufficient to protect a ship of her size, light, in the winds liable to occur at that season of the year in the harbor of Newport News, and moreover say that the paying out of the anchor chain, especially that of the port anchor, admittedly was done so unscientifically as to afford no additional and sufficient protection to hold the ship, and that before the anchor was dropped the ship should have been eased up, and the anchor chain let out gradually, instead of running the same out all at once, causing it to coil on the bottom; that the method pursued tended to break the hold of the original anchorage, and, instead of holding the ship, to bring her up with a jerk, and also to foul her port anchor.

The Hesperos, during the time she is alleged to have dragged her anchor, between 3 and 6:30 o'clock, was in charge of her second and third officers; the second officer being a young man, 26 years of age, without a mate's license.

The testimony strongly tends to support the view that the anchor chain of the Hesperos was improperly paid out. The libelant's testimony in this respect is controverted, but the weight of the evidence preponderates in favor of the libelant. It comes from navigators of large experience and of a high order of intelligence, including Capt. John G. Quimby, a prominent naval officer, who testified as follows:

"Q. Captain, assuming that the steamer Hesperos was lying in the James river, abreast of, and about off and about a quarter of a mile offshore from, the Warwick Machine Company pier, a little above the pier, on June 12, 1918, in about 20 feet of water; she was light, drawing 12.6 forward, 14 feet aft; at that time she was anchored in 20 feet of water; about 4 o'clock in the afternoon of that day those in charge of the Hesperos paid out 13 fathoms additional chain; the wind at the time was blowing somewhere between 31 and 32 miles an hour, and the tide ebbing; that chain was paid out in such a manner, she being anchored on the starboard anchor, that the vessel fell back, and came up with a jerk: Will you state whether or not in your opinion that was the proper and seamanlike manner to pay out chain. A. It was not; danger of parting the chain and breaking the anchor out of the mud; it is not the proper way to do it. * * *

"Q. Assuming that after that 13 fathoms had been dropped in the water on the port anchor, as I have described, later on during the squall, which occurred about 9:30 p. m., those in charge of the Hesperos paid out 40 additional fathoms on the starboard anchor, and simultaneously 47 additional fathoms on the port anchor, giving the starboard anchor a total of 85 fathoms, and the port anchor a total of 60 fathoms: Was there any time that port anchor had any holding power? A. There was not. Those anchors were dropped in a horizontal distance of 45 fathoms apart, and with 85 fathoms on the starboard chain, and 60 on the port chain, there was 20 fathoms somewhere of slack chain on the port chain.

"Q. So at no time, from the time the 13 fathoms was dropped in the water until the 65 was dropped on the port and 85 on the starboard, was the port chain taut; that is correct? A. Yes, sir; and 20 fathoms on the bottom coiled round the anchor."

Regardless, however, of the paying out of the anchor chain, the court is convinced that the evidence establishes the fact that between the hours of 3 and 6:30 p. m., the Hesperos did drag her anchor from her original anchorage to within a ship's length of the Jason, the vessel she was required to give proper berth room to. The officers and crew of the Jason testify to this fact, and the naval gun crew from the Hesperos, several in number, corroborate it, and it is not inconsistent with some of the testimony from the Hesperos. The master and chief officer of the latter ship say, upon returning at 6:30 p. m., that the two vessels were a ship's length apart. This strongly sustains the libelant's contention as to the ship having dragged, assuming them to have been originally anchored a distance of from 1,100 to 1,200 feet apart, as the court thinks the testimony indisputably establishes.

This presents the question of whether the burdened vessel provided and maintained a proper anchorage. If she did not, and that brought about the collision, she is liable for damages growing out of her neglect. Unquestionably, a ship's length between the two vessels was an unsafe distance originally to have allowed the vessels to be in after coming to anchor. The evidence conclusively establishes that the vessels were originally anchored at the proper distance, and on the evening of the collision that the Hesperos dragged, as claimed by the libelant, until she was within a ship's length of the Jason, and that for a period of 3 hours prior to the collision she was allowed to be and remain in this dangerous proximity to the vessel she was charged with the duty of keeping clear of, in the presence of an impending storm. During these 3 hours, ample time was afforded the Hesperos to have moved back to the place from which she had drifted, or other safe anchorage, and if her navigators chose not to do so, and to rely upon placing out the port anchor, which failed to hold the ship, upon the storm increasing in volume, as it did, 2½ hours later, she, and not the Jason, should bear the burden therefor. Had both her anchors, instead of one, been out, it is probable that the dragging between 3 and 6:30 o'clock would not have occurred, and, indeed, had one with sufficient chain been out, she would probably have ridden out the storm and the disaster been averted. The Hesperos cannot escape responsibility, having crowded the anchorage of the Jason, by merely attempting while in the position mentioned, to lengthen the anchor chain. The vessels were then in too close proximity for safety, and had been allowed so to remain for more than three hours, and hence she cannot escape liability for ineffectively attempting to strengthen the anchor chain. The burdened vessel ought to have moved away, or at least in some effective way to have guarded against disaster of the character in question, reasonably to have been anticipated.

II. The court does not concur with the view that the Jason dragged her anchor. On the contrary, the testimony is entirely clear that she did not, and that her berth was fouled by the Hesperos dragging into her.

III. The Hesperos interposed the defense of inevitable accident; that is to say, that the collision could not have been avoided by the exercise of proper prudence and care on her part, and that the same was unavoidable. This defense will not avail the Hesperos for two reasons: First, she is not in a position to interpose the same, as she was not only not free from fault, but responsible for bringing about the collision; second, the facts demonstrate that the collision could and would have been provided against by the exercise of prudence and care on the part of the navigators of the Hesperos. She was a large vessel, in an exposed, crowded harbor, light. She was warned of the danger of such a situation, and good seamanship required that she should have taken no risks in placing her anchors, or in the manner and method of paying out the same. The storm was violent, it is true, for a little while, but not seriously so for over 2 minutes. Admonition of approaching bad weather had been evident. The wind was at intervals increasing in velocity during the evening. Indications of a threatened thunder storm were apparent to experienced persons. The velocity of the wind was not especially strong for more than about 10 minutes, and very high for about a minute, and could have been reasonably anticipated, and its consequences safeguarded against by the proper handling of the vessel. The Severn (D. C.) 113 Fed. 578; The Terje Viken-Bavaria (D. C.) 212 Fed. 1020, The Bertha-Athanasios (D. C.) 244 Fed. 319.

It is true several other vessels dragged anchor about the same time; but the great body of shipping found no difficulty in procuring entire security, as would also the Hesperos, if she had been properly anchored, or exercised ordinary care and nautical skill, after her navigator's attention had been drawn to the weakness of its anchorage. Had both vessels remained in their original anchorage, there would have been no collision; and had the Hesperos placed out both anchors, on proper anchor chains, there would not have been, nor should there have been, danger, if she had discharged her duty by moving to a safe distance, after her dangerous proximity to the Jason was apparent, more than 3 hours before the disaster.

The conclusion of the court is that the Hesperos should be held solely responsible for the collision.

[2] This leaves for consideration only the question of salvage, presented by the suit filed for that purpose, and heard along with the main or collision case. The facts in connection with the claim are briefly these:

The Hamilton is a large and powerful harbor tug, 74 feet long, 17.2 feet beam, and of 200 horse power, with a crew of seven officers and men. In the early afternoon of the collision, she had been engaged in assisting coaling the Jason, and after the collision, about 10:45 p. m., in response to urgent calls for help from the Jason, which had been most seriously damaged, promptly went to her assistance. The Jason was badly broken and cut into on the port side about and below the water line, and when the Hamilton arrived she was in 52 feet of water, and taking in water rapidly, especially in her first and

second holds. She was listed slightly to starboard, and it was of the utmost importance to beach her, in order to save the ship and cargo, especially the latter, which consisted mainly of 8,750 bales of cotton, and a large quantity of saltpeter, and some steel. The Hamilton assisted in raising the anchor of the Jason, and then made fast to her starboard bow, first securing a portion of the deck cargo of cotton, so that it could not shift over and onto the tug. She then turned the bow of the ship inshore, and succeeded about 12:15 a. m. in beaching her in 14 feet of water at the Jason's bow. The ship was thus made safe, though considerable water damage had been and was sustained by the cargo. The Hamilton took two ladies, the wife and mother-in-law of the first officer, off the ship, and subsequently carried the latter ashore with a view of finding the ship's master, who wa not on board. The tug spent an hour in that effort, and then returned to the ship, stood by, and remained with her until 5:30 in the morning, when it was discharged from further service.

The tug was valued at $75,000, and was under charter hire at $3,900 per month. The Jason and her cargo were very valuable; the ship worth considerably more than $1,000,000, and the cargo at least $2,600,000.

That the Hamilton is entitled to a salvage award cannot be seriously questioned. It is true the service was rendered in the harbor, and the claim to salvage may not be of the highest order; but libelant's rights as a salvor should be respected, and a reasonable sum allowed. The danger to the tug and its crew was probably not very great, though there was some in attempting to handle this large ship in the then weather conditions. A violent storm had shortly preceded the service, and during its rendition the wind was quite high, blowing some 24 miles an hour. There was necessarily risk in such a situation, taking into account the relative sizes of the two vessels, aside from the appreciable danger of the deck cargo breaking loose and falling upon the tug, if the ship listed further to starboard.

The value of the tug was considerable, and that of the salved property very large. The service was skillfully and successfully rendered when time was exceedingly urgent, and when no other help responded to the Jason's call, assuming it was possible to secure the same in the then disturbed condition of shipping in the harbor. The court feels, having due regard to the elements properly entering into an allowance of this character, that the sum of $15,000 would be a proper award to make, and a decree for that amount will accordingly be entered.

UNITED STATES v. LOEWENTHAL.

(District Court, N. D. Ohio, E. D. April 24, 1919.)

No. 4283.

1. POISONS ⇐2—HARRISON NARCOTIC ACT.
Harrison Narcotic Act, §§ 1, 2 (Comp. St. §§ 6287g, 6287h), are constitutional.

2. INDICTMENT AND INFORMATION ⇐111(1)—NEGATIVING EXCEPTIONS—HARRISON NARCOTIC ACT.
Under Rev. St. § 1025 (Comp. St. § 1691), providing that defects of form, not prejudicing defendant, shall not invalidate indictments, and Harrison Narcotic Act, § 8 (Comp. St. § 6287n), relative to negativing exceptions in an indictment, an indictment under sections 1 and 2 of the Harrison Act (sections 6287g, 6287h) need not negative exceptions in those sections.

3. INDICTMENT AND INFORMATION ⇐71, 125(3)—HARRISON NARCOTIC ACT.
Indictment under Harrison Narcotic Act, §§ 1, 2 (Comp. St. §§ 6287g, 6287h), charging accused with dealing in forbidden drugs without having registered and paid the special tax, *held* not bad for duplicity, or because vague, indefinite, and uncertain.

Moritz Loewenthal was indicted under the Harrison Narcotic Act. On demurrer to indictment, and motion to quash certain counts. Overruled.

E. S. Wertz, U. S. Atty., of Cleveland, Ohio, Joseph C. Breitenstein, Asst. U. S. Dist. Atty., of Cleveland, Ohio, and Chas. H. Isbell, Asst. U. S. Dist. Atty, of Akron, Ohio.

W. H. Boyd and Cary R. Alburn, both of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. [1] Upon a demurrer the constitutionality of the Harrison Narcotic Act (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [Comp. St. §§ 6287g–6287q]) is raised. This proposition is ruled by United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. ——, and Webb et al. v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. ——, both decided by the United States Supreme Court March 3, 1919.

[2] Upon argument it is urged that the indictment is insufficient, in that all the exceptions contained in sections 1 and 2 of the act are not negatived. Section 1025, United States Revised Statutes (Comp. St. § 1691), provides that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only which will not tend to the prejudice of the defendant. It has frequently been held that an indictment is sufficient if it charges the substance of the offense. Section 8 of the Harrison Narcotic Drug Act provides that in any indictment under the act it shall not be necessary to negative the exceptions. This language is so phrased that the contention has been made that it is limited to the exceptions contained in section 8. So far as considered by the courts, a broader interpretation has been given thereto, and indictments in the form of this one have been frequently held to be good. Fyke v. United States (5 C. C. A.) 254 Fed. 225, ——

C. C. A. ——, syllabus 4; decision of Thomson, District Judge, in United States v. Brun, November 20, 1918, submitted in manuscript (jury trial, no opinion). I am of opinion that this objection is not sustained.

[3] The motion to quash counts 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 26, is based on the proposition that they are bad for duplicity, inasmuch as it is asserted that two offenses are charged in each count thereof, and that the counts are vague, indefinite, and uncertain.

Defendant is charged with dealing in the forbidden drugs without having registered and paid the special tax required by law. The substance of the offense consists in dealing in these drugs, and, in my opinion, two offenses are not alleged, and these counts are not vague, indefinite, and uncertain because of the allegation that defendant does not register and pay the special tax.

The demurrer and motion to quash will both be overruled. An exception will be noted on behalf of defendant.

In re CONNECTICUT BRASS & MFG. CORPORATION.

(District Court, D. Connecticut. April 3, 1919.)

No. 4666.

1. BANKRUPTCY ⊂⊃92—INVOLUNTARY PETITION—FAILURE TO PROSECUTE.
Involuntary bankruptcy petition might be dismissed for laches in prosecution, where creditors did nothing for six months, except obtain permission to amend petition.

2. BANKRUPTCY ⊂⊃11—COURTS—NATURE.
A court of bankruptcy is a court of equity.

3. EQUITY ⊂⊃363—DISMISSAL—TIME.
Motion to dismiss, made in good faith and raising substantial issues vitally affecting the merits, may be entertained by court of equity at any time within a reasonable period.

4. BANKRUPTCY ⊂⊃92—INVOLUNATRY—MOTION TO DISMISS.
Under Bankruptcy Act July 1, 1898, § 18b (Comp. St. § 9602), authorizing creditors to plead to petition within five days after return day, and section 59f (section 9643) providing that creditors other than original petitioners may file answer at any time, a motion to dismiss involuntary petition is not too late, because made more than five days after return day.

5. BANKRUPTCY ⊂⊃92—MOTION TO DISMISS—VERIFICATION.
Bankruptcy Act July 1, 1898, § 18c (Comp. St. § 9602), requiring verification of pleadings setting up matters of fact, is inapplicable to motion to dismiss an involuntary petition made under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), requiring defenses on matters of law previously made by demurrer to be raised by motion.

6. BANKRUPTCY ⊂⊃61—ACT OF BANKRUPTCY—EQUITABLE RECEIVERSHIP.
A debtor, by admitting allegations of bill requesting an equitable receivership and alleging debtor's insolvency, does not thereby commit an act of bankruptcy.

7. BANKRUPTCY ⊂⊃81(3)—PLEADING—INSOLVENCY.
Involuntary bankruptcy petition, alleging that debtor was insolvent, is insufficient, because pleading a conclusion.

In Bankruptcy. In the matter of the Connecticut Brass & Manufacturing Corporation, alleged bankrupt. On motion to dismiss an involuntary petition. Motion granted.

Carmody, Monagan & Larkin, of Waterbury, Conn., for receiver.

Bronson, Lewis & Hart, of Waterbury, Conn., for petitioning creditors.

Allan K. Smith, of Hartford, Conn., for the United States.

Cummings & Lockwood, of Stamford, Conn., for noteholders' committee.

Rosenberg & Ball, of New York City, for certain creditors.

THOMAS, District Judge. In the suit of Equitable Trust Co. of New York v. Connecticut Brass & Manufacturing Corporation of Waterbury, Conn., now pending in this court, receivers were appointed for the defendant corporation on September 5, 1918. The suit in this court is ancillary to the suit in equity between the same parties pending in the federal court in Delaware, and by a decree in that court it appears that receivers were duly appointed and qualified. The bill, answer, and decree in the Delaware suit are part of the file in this suit.

In the suit pending here the bill alleges that practically all of the assets of the defendant corporation, worth at a fair valuation $1,700,000, are located in this district, and that nearly all of its business is carried on here. It is further alleged that the corporation has assets of about $1,700,000, and that its liabilities amount in all to $1,265,000, consisting of notes amounting to $565,000 and a general indebtedness of about $700,000, so that from the face of the bill it appears that the assets are $435,000 more than the liabilities and that the corporation is solvent. It is further alleged that certain of the defendant's creditors are pressing for immediate payment of their respective claims, and are likely to bring suit against the defendant, to attach its property and to cause its property to be sold in satisfaction of such judgments.

The defendant corporation filed its answer, admitted the allegations of the bill, and joined in the application for the appointment of the receivers, and pursuant thereto receivers in equity were appointed. The receivers were authorized to conduct the business, and have conducted it as a going concern in an endeavor to conserve the assets, preserve the estate, and eventually to turn it back to the stockholders, after satisfying its indebtedness.

On September 14, 1918, certain creditors filed an involuntary petition in bankruptcy against this respondent in which petition they represented as follows:

"That said the Connecticut Brass & Manufacturing Company is insolvent, and within four months next preceding the date of this petition said the Connecticut Brass & Manufacturing Company committed an act of bankruptcy, in that it did heretofore, to wit, on the 4th day of September, 1918, being insolvent, apply for a receiver of its property and because of insolvency a receiver was appointed by the United States District Court for the District of Connecticut, which said receiver, because of said insolvency, was put in charge of the property of the corporation in the state of Connecticut, in an action brought by the Equitable Trust Company of New York against said the Connecticut Brass & Manufacturing Corporation, in which action ancil-

lary proceedings are now pending in said United States District Court for the District of Connecticut. The defendant admitted the averments contained in said bill and complaint in said action, and joined in said application for the appointment of said receiver, and on said 4th day of September one William H. Coverdale, of the city and state of New York, who had been appointed receiver of the property, income, and assets of said the Connecticut Brass & Manufacturing Corporation by the District Court of the United States for the District of Delaware, was appointed ancillary receiver by the District Court of the United States for the District of Connecticut."

No proceedings were taken by the petitioning creditors after said petition was filed, but the alleged bankrupt on the 23d of September, 1918, filed its answer to said petition, in which it denied all the allegations contained in the petition. On March 11, 1919, counsel appeared before the court, and the hearing on the involuntary petition was assigned for April 1, 1919. On March 26, 1919, counsel representing noteholders' and creditors' protective committee and an individual creditor appeared, and on March 29, 1919, filed a motion to dismiss the involuntary petition in bankruptcy against the respondent, on the ground:

"That said petition on its face does not state any facts upon which an adjudication in bankruptcy could be granted herein. The ground upon which the involuntary petition is filed is the appointment of a receiver in a suit in equity in the above court. We refer to and make a part of this motion, the same as if here set forth, the bill of complaint in the said suit in which the Equitable Trust Company of New York is complainant and the Connecticut Brass & Manufacturing Company is defendant, said bill of complaint having been filed in this court on September 4, 1918, and being a part of the records of this court, and, as appears from the face of the said bill in equity in said suit just referred to, and by examination of said bill, it affirmatively appears that no act of bankruptcy has been committed, as we respectfully contend, by the alleged bankrupt."

On October 3, 1918, the petitioning creditors moved for permission to amend the bankruptcy petition which motion was, on said day, granted, but counsel for the petitioning creditors failed to avail themselves of the opportunity thus afforded them to file said amendment, so that the present motion to dismiss is addressed to the original petition quoted supra.

[1] The court might properly dismiss this petition on the ground of laches and failure to prosecute, but as substantial questions are here presented, which ought to be considered and decided, I have concluded not to pass on the question of laches further than to make the above suggestion.

[2-4] This motion is made pursuant to the provisions of equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), which, so far as is here pertinent, provides:

"Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss, or in the answer."

This rule is applicable here and is properly before the court, but objection is made by the petitioning creditors that under section 18b of the act (Act July 1, 1898, c. 541, 30 Stat. 551 [Comp. St. § 9602]), the creditors must appear and plead within five days after the return day, and that, having failed to do so, this motion cannot be entertained. The

answer to this objection is simple. A court of bankruptcy is a court of equity, and in the equity court a motion to dismiss, made in good faith and raising substantial questions vitally affecting the merits, may be entertained by the court at any time within a reasonable time, and may be made even on its own motion. And further, if section 59f (section 9643) is read in connection with section 18b, it is clear that there is no merit in the objection made by the petitioning creditors. Collier on Bankruptcy (10th Ed.) 424, 425, 433, 779, 780, 781, 782.

[5] Objection is further made that, as the motion sets forth facts, it should be verified under oath, as provided in section 18c. The answer to this claim is that the motion to dismiss under rule 29 is in lieu of a demurrer, and sets forth no facts, but raises only a question of law, as was formerly raised by a demurrer.

The preliminary objections having been answered adversely to the petitioning creditors, the only remaining question is as to the merits of the question of law presented by this motion.

[6] The argument of the petitioning creditors against the motion resolved itself into the proposition that, as the alleged bankrupt had joined in the application for the appointment of the receivers, and had admitted in its answer the allegations of the bill of complaint, such conduct is tantamount to applying for a receiver under the Bankruptcy Act, and numerous cases are cited to support this proposition.

A further reason advanced against the granting of the motion is based on the claim that the allegations set forth in the involuntary petition, and quoted supra, are sufficient to bring the petitioners within the meaning of the Bankruptcy Act. We will dispose of these contentions in their order.

In support of the first proposition counsel cite and rely upon the following cases: In re Spalding, 139 Fed. 244, 71 C. C. A. 370; In re Pickens Mfg. Co. (D. C.) 158 Fed. 894; In re Maplecroft Mills (D. C.) 218 Fed. 659; Exploration Mercantile Co. v. Pacific Hardware & Steel Co., 177 Fed. 825, 101 C. C. A. 39; Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co. (D. C.) 206 Fed. 813.

An examination of all of these cases shows that the decisions there reached were based upon an allegation of insolvency, or it appeared that the person or corporation was insolvent, and for that reason joined in the application for the appointment of a receiver. None of the cases cited are cases involving an equitable receivership, where it appears on the face of the bill that the assets are in excess of liabilities. The cases cited and relied upon in support of the petitioning creditors' argument are not opposite to the case at bar.

Here we have an equitable receivership, which is intended to avert insolvency. The allegations in the bill show, not insolvency, but solvency. It would be going too far to say that a solvent corporation, at least solvent so far as the record shows, committed an act of bankruptcy by applying for the appointment of a receiver, or joining in an application for the appointment of a receiver, simply because it had not the ready cash to meet all its obligations and immediate demands as they mature in the ordinary course of business, and because creditors were threatening attachments.

The authorities are too clear and conclusive to discuss the question further, as the differentiation between the two sets of facts—i. e., solvency and insolvency—is so emphasized as to make it clear to him who reads. In re Douglas Coal & Coke Co. (D. C.) 131 Fed. 769; In re Wm. S. Butler & Co., 207 Fed. 705, 125 C. C. A. 223.

The law governing this situation is settled. Nowhere is it more clearly stated than by Judge Hazel in Re Edward Ellsworth Co. (D. C.) 173 Fed. 699. On page 700 he said:

"The inquiry presented is whether the corporation proceeded against, by admitting the material allegations of the bill in the equity action and joining in the application for the appointment of receivers, can be held in a legal sense to have applied therefor pursuant to section 3a, subd. 4, of the Bankruptcy Act, * * * as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 [Comp. St. § 9587]. * * *

"If the company, while insolvent, had voluntarily brought an action to wind up its affairs for the benefit of its creditors, and had applied for the appointment of receivers to take charge of its property, the superior right of the bankruptcy court could not safely be questioned; but the interposition of an answer in an action brought by a contract creditor, admitting therein the truth of the allegations of the bill and joining in the prayer for relief, is not believed to be the equivalent of the term 'being insolvent, applied for a receiver or trustee for its property.' In the equity action the complainants applied for receivers on the ground that the Edward Ellsworth Company was unable to pay its debts as they matured, and that it would be to the advantage of creditors and stockholders to have its affairs wound up. Nowhere in the bill is it asserted that the corporation is insolvent, as that term is defined by section 1, subd. 15, of the Bankruptcy Act [section 9585]. In fact the bill contains an affirmative allegation that the defendant is solvent. Such averments, together with the admission by the corporation of their truth and its consent to the appointment of receivers of its property, undoubtedly vested the Circuit Court, in view of the diversity of citizenship of the parties, with power and authority to act in the premises. In re Metropolitan Railway Receivership, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403."

[7] The second question raises a question simply of pleading. To allege that a corporation is insolvent is to plead a conclusion. Facts must be pleaded, not conclusions.

In re Sig. H. Rosenblatt & Co., 193 Fed. 638, 113 C. C. A. 506, is a complete answer to the second point relied upon. There Judge Lacombe said, on pages 639 and 640 of 193 Fed., on pages 507, 508 of 113 C. C. A.:

"Neither of these petitions gives any details as to the date of the alleged preferences, the amount of the preferences, the persons preferred, the amount of the alleged fraudulent transfers, the dates of the transfers, the persons to whom, or the amount of the property. No word appears as to what property was concealed, with whom, at what time, nor whether the concealed property is still in the possession, or control of the alleged bankrupts.

"It is well settled that such general averments, without any specification sufficient to apprise the alleged bankrupt of the charge against him so as to enable him to answer it, are too vague and general. Many of the authorities supporting this proposition will be found in the single case which petitioner cites—In re Bellah (D. C.) 116 Fed. 69."

The motion to dismiss the involuntary petition is granted. The hearing on the receiver's reports may be set for Monday, April 14, 1919, at 10:30 a. m., at New Haven.

SOUTHERN PAC. CO. et al. v. CITY OF RENO.

(District Court, D. Nevada. April 4, 1919.)

No. A-52.

1. DEDICATION ⟸58—CHANGE OF USE.
A dedication of land to the public for one purpose does not necessarily justify its use for another purpose.

2. PUBLIC LANDS ⟸92—RAILROAD RIGHT OF WAY—EFFECT OF GRANT.
Land granted by Act July 1, 1862, for a railroad right of way, was dedicated by the government to a use deemed essential to national prosperity and safety, and could not thereafter be alienated or dedicated for any other kind of use, public or private, without the consent of Congress.

3. PUBLIC LANDS ⟸92—RAILROAD RIGHT OF WAY—PRIORITY OF GRANT.
The grant of lands for a railroad right of way by Act July 1, 1862, § 2, was a present grant, floating until the route was definitely fixed, but then sufficient to cut off all claims to lands thereby granted which were initiated subsequent to the date of the act.

4. PUBLIC LANDS ⟸92—GRANT OF RAILROAD RIGHT OF WAY—FAILURE TO FILE MAP.
The failure of the railroad company to file the map of its located route, as required by Act July 1, 1862, § 7, to supply information on which lands could be withdrawn upon entry, does not affect the title of the railroad to the right of way granted by section 2 of the act.

5. PUBLIC LANDS ⟸92—RAILROAD RIGHT OF WAY—AMENDATORY ACTS.
Act July 2, 1864, § 16, authorizing the Central Pacific Railway Company to extend its line 150 miles east of the California line, and Act July 3, 1866, § 2, authorizing extension of line with approval of the Secretary of the Interior until it met the Union Pacific, were amendatory of Act July 1, 1862, passed under the power reserved by section 18 of the latter act, and were not intended to forfeit the rights of way granted by section 2 of the act of 1862, and the right of the railroad to the right of way over lands within the limits of construction by the act of 1864 dates from 1862, and not from 1866.

6. PUBLIC LANDS ⟸92—RAILROAD RIGHT OF WAY—EXCEPTIONS.
The railroad right of way granted by Act July 1, 1862, § 2, over public lands, was not impliedly subject to the exception in the grant by section 3 of that act of alternate sections, exempting from the grant lands to which a pre-emption or homestead claim had attached at the time the road was definitely located.

7. PUBLIC LANDS ⟸92—RAILROAD RIGHT OF WAY—LANDS AFFECTED.
Within Act July 1, 1862, § 2, granting a railroad right of way over public lands, the term "public lands" means such lands belonging to the government as are subject to sale or other disposal under general laws.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Land.]

8. PUBLIC LANDS ⟸92—RAILROAD RIGHT OF WAY—PRE-EMPTION—ENTRY—RETROACTIVE EFFECT.
A pre-emption entry, made in the land office two years after the adoption of Act July 1, 1862, § 2, granting a railroad right of way over public lands, could not in itself have a retroactive effect sufficient to overcome the grant of the right of way.

9. PUBLIC LANDS ⟸114(3)—RAILROAD RIGHT OF WAY—EXCEPTION FROM PATENTS.
The failure of the land office to include, in a patent to land over which a right of way had been previously granted to a railroad, an express reservation of the easement, does not impair the easement.

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

10. PUBLIC LANDS ⟸41—PRE-EMPTION—PRIORITY—BURDEN OF PROOF.
Where a congressional grant of railroad right of way antedated a patent two years, the burden is on the patentee, claiming an equity prior to the easement, to establish the equity by competent evidence.

11. PUBLIC LANDS ⟸41—PRE-EMPTION—DECLARATORY STATEMENT—CONTRADICTION.
Recitals of fact in the declaratory statement of a pre-emption claimant, as against one claiming under a title adverse to the pre-emption, procured by another and a different course of procedure, are no more than ex parte statements by an interested party, which the other is not estopped from contradicting by competent evidence.

12. PUBLIC LANDS ⟸34—PRE-EMPTION—DECLARATORY STATEMENT—RIGHTS ACQUIRED.
Declaratory statement, filed under the pre-emption law (Rev. St. §§ 2264, 2265), sets apart the land to the pre-emptioner's option to purchase, and severs such land from the mass of public land until the entry is canceled or forfeited.

13. PUBLIC LANDS ⟸34—PRE-EMPTION—UNSURVEYED LAND—EXTENT OF CLAIM.
Under the pre-emption law (Rev. St. §§ 2264, 2265), a settlement on unsurveyed land does not entitled the pre-emptioner to a floating right to claim after survey any land within the three-quarter mile radius from the 40 on which his house is located, but is confined to the quarter section or sections on which the settlement is made.

14. PUBLIC LANDS ⟸92—PRE-EMPTION—NOTICE OF CLAIM—PRIORITY OF GRANT OF RIGHT OF WAY.
Where settlement was claimed on two contiguous quarter sections of unsurveyed land, on one of which the settler was residing and had placed all his improvements, his claim to a subdivision in the other quarter section, on which he had made no improvements, on which he had posted no notice that it was claimed by him, and as to which he had given no actual notice of his claim prior to his pre-emption entry in the land office in 1864, must yield to the right of way granted by the act of July 1, 1862, to the Central Pacific Railroad Company, even though the actual settlement antedated the act and the subdivision was patented to the settler in 1865.

15. PUBLIC LANDS ⟸129—PATENTS—QUIETING TITLE—EVIDENCE.
In a suit against a city to quiet title to a tract of land claimed by a railroad under its right of way grant, for which the city had paid rental, and against which it had assessed improvement taxes, the city cannot object to oral evidence as to the settlement by the pre-emptioner, from whom it derived title, on the ground that too long a time had elapsed since the pre-emption patent was issued.

16. EVIDENCE ⟸387(3)—ORAL EVIDENCE—CONTRADICTING LAND OFFICE RECORDS.
Oral evidence that the pre-emption settlement on which the patent through which defendant derived title was based was not made on the tract in question until after a grant of plaintiff's right of way by Congress will not be excluded on the ground that the land office records should control.

In Equity. Suit to quiet title by the Southern Pacific Company and another against the City of Reno. Decree entered for plaintiffs.

This is a suit to quiet title to a tract of land situated in the city of Reno, Nev., between Plaza street and the railroad tracks, and extending from Virginia street to Sierra street. It is 300 feet long by 92 feet wide, and within 200 feet from the center of plaintiffs' railroad tracks as originally placed With reference to the government surveys, it is in the S. W. ¼ of the N. E. ¼ of section 11, township 19 N., range 19 E. M. D. B. & M.

The railroad was constructed as contemplated by Act July 1, 1862 (12 Stat. 489, c. 120), and on the 8th day of June, 1868, that portion of it adjacent to the tract of land in dispute had been approved, and was finally accepted by the United States government. July 18, 1863, the government surveys covering the territory later occupied by the town site of Reno, were completed, and on the 1st day of March of the following year the official plat was filed in the United States land office at Carson, Nev. Two days later, March 3, 1864, Myron Lake filed in the same office a declaratory statement, in which he alleged that on April 22, 1861, he settled and improved the S. W. ¼ of the N. E. ¼, and lots 1, 2, 3, 4, and 8 of section 11, in township 19 N., range 19 E., and also declared his intention to claim the land as a pre-emption right under Act Sept. 4, 1841. A receiver's certificate was issued to him August 3, 1864, and a United States patent August 10, 1865. Prior to 1865 Lake had no improvements of any kind in the N. E. ¼ of section 11. His fences, buildings, and cultivation, with the exception of the north end of the bridge across the Truckee river, were all on the south side of that stream, and in the south half of the section.

In Book A of Surveys, page 93, in the recorder's office of Washoe county, appear the records, plat, and field notes of survey of a possessory claim filed for record February 3, 1863, and numbered 88. The survey shows Lake's improvements, and covers 203½ acres of land lying on both sides of the river. The north boundary line of the claim at all points is more than 200 feet south of plaintiffs' railroad, and still further south of the land in controversy. This survey purports to have been made for Myron Lake by the county surveyor. His certificate attached thereto complies with the provisions of an act of the territorial Legislature regulating surveyors and surveying, approved November 29, 1861 (Laws Nev. 1861, p. 267). By that statute the county surveyor was required to execute any survey upon application of any individual or corporation, to keep a correct record thereof, and to make a certificate of such survey describing the tract and the number of acres contained. The certificate, after the date of record, was evidence of possession for one year, and legal evidence in any court of the territory.

By deed dated March 27, 1868, Myron Lake conveyed the S. ½ of the N. E. ¼, and the fractional lots lying north of the Truckee river in the N. ½ of the S. E. ¼, all in section 11, to Charles Crocker. August 1, 1868, a map of the town of Reno was filed in the office of the county clerk of Washoe county. On this map the lands conveyed by Lake to Crocker were subdivided into lots and blocks, intersected by streets and alleys. One tract was left open and marked "Plaza." The parcel of land in controversy constitutes the west end of the Plaza. June 27, 1871, a second map of the town of Reno was filed in the office of the county recorder. This map differs from the first, in that the serial numbers of several blocks are changed. These are the only township maps of Reno in evidence.

From May 9, 1868, Crocker sold lots by reference to "the official map of said town." All his conveyances of real estate, situated within the territory covered by these maps, refer to no lots, blocks, or alleys, by number, letter, or name, which do not have a corresponding number, letter, or name on the township maps. The tract in controversy, since the first maps were filed, has remained open and uninclosed. According to the plats the main Plaza extends along the north side of the railroad track for a distance of four blocks, about 1,450 feet, and from Sierra street to Peavine street. The freight sheds, platforms, and warehouses in a continuous line extend along the south side of the tract and the north side of the railroad for a distance of more than 1,100 feet, and along the south side of the tract in controversy for more than two-thirds its length. The warehouses, three in number, are about 50 feet wide, and have an aggregate length of about 600 feet. Hereafter in this opinion the land in controversy will be termed the Plaza.

The Plaza was used in early days by teamsters hauling freight to and from the railroad, and from the warehouse of D. W. Earl & Co. It is in testimony that the teamsters also used this as a camping ground. Shows, public meetings, and carnivals were held there, and as early as 1873 the town authorities granted permits for the use of the tract by private individuals. In 1907,

by ordinance, the city provided that all open-air meetings should be held on the Plaza. The railroad company also granted and refused applications to use the ground. John Fulton, agent of the company at Reno from 1907 to 1912, testifies that the company, so far as he knew, took exclusive control of the Plaza, and used it for railroad purposes, such as spotting cars, unloading freight, and storing merchandise. He knew of no divided authority over the Plaza by the city and the company. From 1870 to 1899, the authorities at Reno maintained a fire house in the northeast corner of the tract, for which they paid a rental of $5 per year to the railroad company. In 1908 one-half the cost of paving the streets bounding the Plaza, amounting to $5,992.65, was assessed by the city to, and paid by, the railroad company. March 14, 1916, the authorities of Reno caused the Plaza to be plowed up for the purpose of parking and beautifying it as the property of the city. It is admitted that such a park will effectually prevent the railroad company from in any manner enjoying the use and possession of the tract.

Brown & Belford, of Reno, Nev., for plaintiffs.
Lester D. Summerfield, City Atty., of Reno, Nev., for defendant.

FARRINGTON, District Judge (after stating the facts as above). The city of Reno contends that Myron Lake's pre-emption claim attached to the land in controversy before the right of way grant was made, and that Charles Crocker, having acquired Lake's title, sold a large number of town lots in Reno during the years immediately following 1866, by reference to an official map or maps then on file in the offices of the county clerk or county recorder of Washoe county; that Crocker caused these maps to be made and filed; on them there is an open space, marked "Plaza," extending along the north side of the railroad company's tracks, freight platforms, sheds, and warehouses; and that this constituted a valid common-law dedication.

[1] No issue is raised as to whether plowing the tract and converting it into a park is consistent with or destructive of the public use for which the alleged dedication was originally designed. It is hardly possible that Crocker in this instance intended that the Plaza, or any part of it, should be converted into a park, and that the public should thus be shut off, wholly or partially, from access to the railroad, or that the open space, so convenient for receiving and delivering freight, should become a barrier against such activities. It is sufficient to say, in passing, that a dedication for one purpose does not necessarily justify use for another. Riverside v. Maclean, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 288, 102 Am. St. Rep. 164; Sachs v. Towanda, 79 Ill. App. 439; Hopkinsville v. Jarrett, 156 Ky. 777, 162 S. W. 85, 50 L. R. A. (N. S.) 465; Church v. Portland, 18 Or. 73, 22 Pac. 528, 6 L. R. A. 259; 7 Am. & Eng. Ency. L. 73.

[2] Plaintiffs contend that the Plaza never was private property, but that it is a part of the right of way granted by the government of the United States in an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes," approved July 1, 1862. 12 Stat. p. 489.

If this contention is meritorious, the Plaza, since the date of the act, could not in any manner, or for any kind of use, public or private, be alienated, dedicated, or otherwise disposed of without the consent and

approval of Congress, because it had already been dedicated by the government itself to a use then deemed essential to the national prosperity and safety. The provision of the act granting the right of way is as follows:

"Sec. 2. And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; * * * said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required in said right of way and grants hereinafter made."

The provisions of section 3 of the act, which will be considered in construing section 2, are as follows:

"Sec. 3. And be it further enacted, that there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed."

Congress thus conclusively determined that a right of way 400 feet in width was essential to the performance of the public service and duties assumed by the railroad company. Northern Pac. Ry. Co. v. Townsend, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044.

[3] The granting words used in section 2 are in the present tense, and import a present grant. The right granted did not attach to any particular portion of the ground, however, until the route was definitely fixed. In this respect the grant was floating; but, when the route was definitely fixed, the company's title was sufficient to cut off all claims initiated subsequent to the date of the act. In other words, it was a grant in præsenti, and so the courts have uniformly held. Furthermore, it is an absolute grant, subject to no conditions, except those necessarily implied, such as that the railroad shall be constructed and used for the purposes designed.

"The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route. The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists." Railroad Co. v. Baldwin, 103 U. S. 426, 429 (26 L. Ed. 578).

The original scheme of a transcontinental railroad contemplated a main stem to be built by the Union Pacific Railroad Company and the Central Pacific Railroad Company, the former to begin at a point in Nebraska about 200 miles west of Omaha on the 100th meridian, and to construct westward to meet the Central Pacific. The original act of July 1, 1862 (section 9), authorized the Central Pacific—

"to construct a railroad * * * from the Pacific Coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California."

The next section (10) contains the following provision:

"The Central Pacific Railroad Company of California, after completing its road across said state, is authorized to continue the construction of said railroad * * * through the territories of the United States to the Missouri river, * * * on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect."

In the amendatory act of July 2, 1864 (13 Stat. 356, c. 216), section 16 provides that:

"Should the Central Pacific Railroad Company of California complete their line to the eastern line of the state of California, before the line of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first-named company, said first-named company may extend their line of road eastward one hundred and fifty miles on the established route, so as to meet and connect with the line of the Union Pacific road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific road."

Section 2 of the act of July 3, 1866 (14 Stat. 79, c. 159), contains the following provision:

"The Union Pacific Railroad Company, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct, and continue their road from Omaha, in Nebraska Territory, westward, according to the best and most practicable route, and without reference to the initial point on the one hundredth meridian of west longitude, as now provided by law, in a continuous completed line, until they shall meet and connect with the Central Pacific Railroad Company of California; and the Central Pacific Railroad Company of California, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct, and continue their road eastward, in a continuous completed line, until they shall meet and connect with the Union Pacific Railroad."

Defendant contends that the changes wrought by the act of 1866 were such that the Central Pacific Company's title to the Plaza cannot antedate that act. The significance of this is apparent when reference is made to the date of Lake's patent, August 10, 1865. Supporting this contention, defendant argues:

(1) That the company may have failed to file its map within two years after July 1, 1862, and thus having failed to comply with the conditions of the grant of that date, Congress, acting within its undoubted power, extended further opportunity by the act of 1866, and again opened to the company the route east of California.

(2) If the right to continue construction was derived from the act of 1862, there was no need of the later act.

(3) The only map before the court was not filed until 1867, and could only relate back to the last act in effect regarding the right of way, which was the act of 1866:

"When a new act supersedes the first one before the right of way is located, the route when located can only relate back to the superseding act."

(4) The act of 1866 speaks in the present tense, thus:

"And be it further enacted * * * the Central Pacific Railroad Company, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct and continue their road eastward."

The act of 1866 was a new grant of a right of way in different terminology, and under different conditions. In the act of 1862, completion across California was a prerequisite to continuation; in the act of 1866 this condition was dropped, and a new requirement of the consent and approval of the Secretary of the Interior was imposed.

[4] The testimony does not show that the railroad company failed to file its map within two years after July 1, 1862, as required by section 7 of the act of that date; but, if such was the fact, it is nowhere provided that such a default shall work a forfeiture. In section 17 there is a provision for forfeiture in case the roads are not completed by July 1, 1876. The government also reserved the power to complete the lines and reimburse itself out of the income, in case of a failure to comply with the terms and conditions of the act by not completing the road within a reasonable time. In the act of 1866 there is no intimation that the company failed to comply with the terms and conditions inserted in previous statutes, or that the map provided for in section 7 of the act of 1862 had not been filed. Failure to file the map had nothing to do with title to the right of way. The most cursory examination of section 7 shows that the map was required in order to supply information upon which the Secretary of the Interior could withdraw lands from pre-emption, private entry and sale. Delay in filing the map postponed withdrawal, and thus afforded settlers a longer time within which to acquire from the government odd-numbered sections which otherwise would have vested in the company under section 3. Central Pac. R. R. Co. v. Dyer, 1 Sawy. 641, Fed. Cas. No. 2,552; Stuart v. Union Pac. R. R. Co., 227 U. S. 343, 33 Sup. Ct. 338, 57 L. Ed. 535; Id., 178 Fed. 753, 103 C. C. A. 89; Oregon Short Line R. R. Co. v. Quigley, 10 Idaho, 770, 80 Pac. 401, 404.

[5] Whatever right to the Plaza the railroad company derived from congressional grant must date from the act of July 1, 1862. The acts of 1864 and 1866 purported to be amendatory only. They were passed in pursuance of the power reserved by Congress in the first act (section 18) to "add to, alter, amend, or repeal this act" at any time, provided it was done with due regard to the rights of the company.

The three acts deal with the transcontinental railroad, extending from a designated point on the 100th meridian to a terminus on the Pacific Coast at or near San Francisco or the navigable waters of the Sacramento river. Neither of the amendatory acts contemplated any change in the original route. The act of 1864 authorized the Central

Pacific Railroad Company, after reaching the eastern boundary of California, to extend its road eastward 150 miles on the "established route." If there was then an established route, it could have been established only under the act of 1862, which authorized the company to continue construction through the territories of the United States until the roads met and connected. The right to so continue eastward was restored in the act of 1866. The wisdom of allowing the Union Pacific to continue westward and the Central Pacific to continue eastward, subject to the approval and consent of the Secretary of the Interior, was amply demonstrated subsequently, when each manifested an inclination to continue on its way without meeting.

The requirement in the act of 1862 that the Central Pacific should complete its road to the Nevada-California line before proceeding eastward was not so much a contractual or statutory obligation as a physical and economic condition, which at that time Congress could no more eliminate than it could eliminate the mountains or the desert.

The obvious design of the statute of 1866 was to remove a restriction on the eastward progress of the Central Pacific Railroad beyond a point 150 miles east of the western boundary of Nevada, which by some indirection or misunderstanding had found a place in the act of 1864. This is fully explained in the Congressional Globe for 1865–66, at pages 3261 and 3422.

If Congress had intended to recall or declare forfeit the right of way granted July 1, 1862, and to substitute therefor a new grant, not effective until July 3, 1866, and thus subject the company to the delay and expense of condemnation proceedings to secure passage over lands which during that interval had been located in advance of the construction of the road, it is highly probable that such a purpose would have been clearly and explicitly stated, and not left to be deduced by uncertain and questionable implications from the slightly varying terminology of the several acts.

I am unable to discover any justification for such a theory in the circumstance that in the act of 1866 the company was authorized to continue eastward, with the consent and approval of the Secretary of the Interior. 36 Cyc. 1084; Stuart v. Union Pac. R. R. Co., 178 Fed. 753, 763, 103 C. C. A. 89.

Union Pac. Ry. Co. v. Harris et al., 215 U. S. 386, 30 Sup. Ct. 138, 54 L. Ed. 246, on which defendant relies, is not a parallel case, and its authority is much weakened by subsequent decisions in Union Pac. R. R. Co. v. City of Greely, 189 Fed. 1, 110 C. C. A 571, and Stuart v. Union Pac. R. R. Co., 178 Fed. 753, 103 C. C. A. 89; Id., 227 U. S. 342, 33 Sup. Ct. 338, 57 L. Ed. 535. In the Harris Case the court had under consideration rights of way granted to the Leavenworth, Pawnee & Western Railroad Company, the name of which was changed to Union Pacific Railroad Company, Eastern Division, and thereafter to Kansas Pacific Railway Company. In section 9 of the act of 1862 that company was granted a right of way from the mouth of the Kansas river to the initial point of the Union Pacific on the 100th meridian in Nebraska. In the act of 1864 (section 12) the company was authorized to construct its road from the mouth of the Kansas

river so as to connect with the Union Pacific Railroad at any point west of the 100th meridian; in aid of so much of its road and telegraph line as should be a departure from the route provided for in the act of 1862, special provision was made; and by the act of 1866 the connection with the Union Pacific was required to be made, but at a point not more than 50 miles west from the meridian of Denver. After the passage of each act the company filed a map of its then proposed line. The second route was placed west of the first, and the third still further west toward Denver; but the initial point, the eastern terminus, was the mouth of the Kansas river in each case. The land involved in the Harris Case, crossed by the last route, was in Saline county, Kan., 45 miles west of the second proposed line. This tract had been entered as a pre-emption claim prior to July 1, 1862, and in 1865 was transmuted into a homestead entry, which could lawfully be done without breaking the continuity of the claim. The court held that the company's right of way across the Harris tract must date from the act of 1866.

In the Greely Case the lands over which the Union Pacific Railroad Company, Eastern Division, claimed a right of way were situated in Weld county, Colo., and had been settled and entered in June, 1865, under the pre-emption act. The court held that the act of 1866 contained no grant either of lands or right of way; it simply extended the time in which to file the map showing the general route of the road, and fixed the most westerly point at which the road could connect with the main line of the Union Pacific; hence if the lands in question were unappropriated public lands on July 2, 1864, the company's right to a way 400 feet in width over them was undeniable, and all persons acquiring title to, or rights in, any such lands after that date, took subject to such right of way.

In Stuart v. Union Pac. R. R. Co., 178 Fed. 753, 103 C. C. A. 89, and 227 U. S. 342, 33 Sup. Ct. 338, 57 L. Ed. 535, the land claimed to be subject to a right of way was situated near Denver, Colo.; to it Stuart's grantor had initiated a pre-emption claim by settlement and filing a declaratory statement June 16, 1866, a little over two weeks before the passage of the act of 1866. The Circuit Court of Appeals for the Eighth Circuit considered that the company's right of way could not rest on the act of 1862 alone, because the land was west of the 100th meridian, which by that act was fixed as the western terminus of the road; that the terms of the act of 1866 were "restrictive rather than creative or expansive, and indicative of a purpose to limit or confine an existing option or privilege"; that the right to a way over the land must be referred to section 9 of the act of 1864, and the company's title thereto must be regarded as effective from the date of that act, which preceded by almost two years the title which Stuart was asserting. This decision went to the Supreme Court of the United States on writ of certiorari, and was there affirmed.

Neither the act of 1864 nor the act of 1866, contemplated any change in the route of the Central Pacific Railroad through Reno, or along the Truckee river, or for 150 miles east of the eastern boundary of California. In contrast, the act of 1864 permitted the Union Pacific

Railroad Company, Eastern Division, to shift its route westward, without limit. The act of 1866 designated a point beyond which such shifting would not be permitted. In the present case, the act of 1864 fixed a point far east of Reno beyond which the Central Pacific Railroad could not proceed eastward to meet the Union Pacific. The act of 1866 removed the limitation.

[6] The right of way granted in the second section of the act of 1862 is through the public lands, without reservation or exception. In section 3, in aid of the construction of the road, there are granted certain odd-numbered sections of public land "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed." Both have been construed as grants in præsenti, yet there is a marked difference between them. Rights to such odd-numbered sections, initiated and attaching subsequent to the passage of the act and before the line of the road was definitely fixed, were valid as against the grant made in section 3, but invalid as against the right of way in section 2. The reason for this is obvious. The act was passed during the Civil War, when the measure was believed to be essential to the preservation of our Pacific Coast possessions. To that end the government essayed to encourage and speed the construction of a transcontinental railroad, and also to induce settlement of the vacant lands along the way. Both alike were needful to the accomplishment of the larger purpose of the act. It is safe to assume that Congress designedly imposed the exceptions to the land grant in order to encourage settlement, and refrained from making any exceptions or reservations to the right of way in order to facilitate speedy construction of the road. Apparently all public lands along the line of the road were subject to the grant in section 2, but less than all to the grant in section 3. The phraseology of section 3 indicates that Congress was of the opinion there could be public lands which had been reserved, and also public lands to which pre-emption or homestead claims had attached, otherwise the exceptions are superfluous.

"The exception of a particular thing from general words, proves that, in the opinion of the lawgiver the thing excepted would be within the general clause, had the exception not been made." Brown v. Maryland, 12 Wheat. 438, 6 L. Ed. 678.

Again, in Gibbons v. Ogden, 9 Wheat. 1, 190 (6 L. Ed. 23), Judge Marshall says:

"It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted, that which the words of the grant could not comprehend."

If this rule is applied, lands in the path of the road, to which pre-emption or homestead claims had attached, might nevertheless be public lands, and subject to the right of way granted in section 2. If, however, the exceptions were inserted out of an abundance of caution, it would indicate apprehension that the term "public lands," as used in

section 3, might by the courts be construed so broadly as to include and comprehend all lands title to which still remained in the government. Be this as it may, the fact still remains that the right of way grant is made without express reservation or exception, and we are not at liberty to read the exceptions of section 3 into section 2. The failure to include them in section 2 suggests that the lawmakers intended to grant the right of way regardless of the exceptions mentioned in section 3. Stuart v. Union Pac. R. R. Co., 227 U. S. 342, 353, 33 Sup. Ct. 338, 57 L. Ed. 535; United States v. Hanson, 167 Fed. 881, 886, 93 C. C. A. 371; Railroad Co. v. Baldwin, 103 U. S. 426, 430, 26 L. Ed. 578.

In Kindred v. Union Pac. R. R. Co., 168 Fed. 648, 652, 94 C. C. A. 112, a right of way case, the Circuit Court of Appeals for the Eighth Circuit, discussing this statute, said that the application of the exceptions exclusively to the land grant indicated the intention of Congress to give a right of way across all lands without exception, so far as it was within its power to do so. The case was subsequently taken to the Supreme Court of the United States, where the decision of the Circuit Court of Appeals was affirmed, 225 U. S. 582, 32 Sup. Ct. 780, 56 L. Ed. 1216. It was held that the term "public land" could be construed, so as to include Indian lands allotted in severalty to the Indians, and that such lands were subject to the right of way granted in section 2. This conclusion was based on the provision in section 2 that the United States should extinguish as rapidly as might be the Indian title to all lands required for the right of way, implying that the Indian lands, as to which Congress properly could grant a right of way, were intended to be included, whether public lands or not. Notwithstanding the act of May 30, 1854, reserving the sixteenth and thirty-sixth sections in each township for school purposes, it was held that those sections in Nebraska were subject to the right of way grant in section 2 of the act of 1862. Union Pac. Ry. Co. v. Karges (C. C.) 169 Fed. 459.

[7] These two cases seem to me to mark the extreme limit which the courts have reached in construing the right of way grant. The grant is out of the public lands, and to the public lands it is restricted. Many cases have been cited in which congressional grants have prevailed over the rights of bona fide settlers on the public domain; but such cases present no serious difficulty, if we bear in mind the difference between public lands and government owned lands.

One of the earliest and most instructive discussions of the right of a settler who has come short of securing a vested right in lands not yet offered for sale is presented in the Yosemite Valley Case (Hutchings v. Low) 15 Wall. 77, 21 L. Ed. 82. The facts in that case are these: Hutchings in May, 1864, was living with his family in Yosemite Valley on a tract of unsurveyed land, on which he had buildings, fences, and cultivation. He intended to enter it under the pre-emption act, but in June, 1864, Congress granted the whole valley to the state of California in trust for a public resort. Act June 30, 1864, c. 184, 13 Stat. 325. The Supreme Court of California (41 Cal. 634) and the Supreme Court of the United States both held that Hutchings' claims

to the land were wholly defeated by the act of Congress; that nothing short of a vested right in the land could avail him against the grant. Mere entry on the land, with continued occupation, gives no vested interest; it may, however, under the statute, give a privilege of pre-emption, which is nothing more than a privilege to purchase the land in preference to others, when and in case it is offered for sale in the usual manner. The land on which Hutchings settled had never been offered for sale, and, furthermore, Congress by the grant had actually withdrawn it from sale; for this there was ample authority. The pre-emption act was not "intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use." 15 Wall. 87, 21 L. Ed. 82. Claiming he had done everything he could to perfect his title, Hutchings invoked the well-established principle that:

"When an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by misconduct or neglect of a public officer, the law will protect him."

The response was that the claim of pre-emption can never arise when the law does not provide for the sale of the property. Hutchings was unable to acquire title, because the land had been withdrawn from sale and granted to another. This was due, not to the neglect or misconduct of a public officer, but to the action of Congress. The court drew a distinction between acquisition by the settler of a legal right to lands occupied by him as against the owner, the United States, and acquisition by him of a legal right as against other parties to be preferred in its purchase, when the United States has determined to sell. As against the government, his rights are to be measured by the acts of Congress, not by what he may or may not do. There must be settlement and entry in the land office to defeat a congressional grant; but prior settlement, residence, and occupation are sufficient to confer a pre-emption right or privilege to purchase, as against other purchasers under the general law, when the land is finally open for sale, provided the privilege is promptly exercised.

The grant in the Hutchings Case was not restricted to the public lands. The words of the congressional grant were:

"There shall be and hereby is granted to the state of California the 'clift' or 'gorge' in the granite peak of the Sierra Nevada Mountains, * * * and known as the Yo Semite Valley, with its branches or spurs, in estimated length fifteen miles, and in average width one mile back from the main edge of the precipice on each side of the Valley."

To the same effect see Hutton v. Frisbie, 37 Cal. 475, 491; United States v. Hanson, 167 Fed. 881, 886, 93 C. C. A. 371; Buxton v. Traver, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920.

Unquestionably the grant in section 2 of the act of 1862 was a right of way through public lands only. If Congress intended to give a right of way across all lands, without exception, to the full extent of its power, such an intention could and would have been clearly and aptly expressed. The term "public lands" has been and is habitually employed in our legislation to designate "such lands belonging to the government as are subject to sale or other disposal under general laws."

Newhall v. Sanger, 92 U. S. 761, 763, 23 L. Ed. 769; Barker v. Harvey, 181 U. S. 481, 490, 21 Sup. Ct. 690, 45 L. Ed. 963; Bardon v. Northern Pac. R. R. Co., 145 U. S. 535, 538, 12 Sup. Ct. 856, 36 L. Ed. 806; Mann v. Tacoma Land Co., 153 U. S. 273, 284, 14 Sup. Ct. 820, 38 L. Ed. 714.

Pre-emption claims were not allowed on unsurveyed public lands generally, or in Nevada, until the passage of the act of June 2, 1862. 12 Stat. p. 413, c. 95; 12 Stat. p. 410, § 7; St. Paul, Minn. & Man. Ry. Co. v. Donohue, 210 U. S. 21, 28 Sup. Ct. 600, 52 L. Ed. 941. It is therefore questionable, to say the least, whether any pre-emption claim could attach to the land, or whether Lake could initiate any right thereto under the pre-emption law until June 2, 1862, 29 days before Congress granted the right of way.

[8] Plaintiffs and defendant have stipulated that the Plaza was a part of the public lands of the United States July 1, 1862, "unless Myron Lake had acquired a right therein whereby said land ceased to be public land within the meaning of section 2 of said act of Congress." It is unreasonable to assume that Lake's pre-emption entry, made in the land office March 4, 1864, could have a retroactive effect in and of itself, sufficient to overcome or stay the operation of the right of way grant of July 1, 1862; consequently, if on that date the Plaza had ceased to be public land, and therefore was not subject to the right of way grant, it was because of something which Lake had done prior to the passage of the act.

[9] There is no evidence that a map of definite location was filed by the company with the Commissioner of the General Land Office prior to 1867; hence, notwithstanding the fact the land lies within an odd-numbered section, it was at all times between June 2, 1862, and 1867, subject to pre-emption by Lake, and could not have been claimed by the company under its land grant. But as to the right of way grant, the conditions were different. If the land had not ceased to be public land July 1, 1862, it was subject to the right of way grant, and the easement attempted to be created by the act was not lost or impaired by the failure of the land office to include in Lake's patent an express reservation of such an easement. The statute creating the grant was as much a part of the patent as though it had been written therein. Lewis v. Rio Grande W. Ry. Co., 17 Utah, 504, 54 Pac. 981. A congressional grant is one of the highest muniments of title; in dignity, obligation, and effectiveness it is quite equal to a patent issued out of the land office. Whitney v. Morrow, 112 U. S. 693, 5 Sup. Ct. 333, 28 L. Ed. 871.

[10] The right of way grant antedated Lake's patent nearly three years, and must prevail unless it be shown that the patent, in so far as it purports to convey title to the Plaza, is based on a prior equity. That the burden of establishing the existence of such an equity rests on the defendant is clear, and the equity must be proven, if at all, by competent evidence. Megerle v. Ashe, 33 Cal. 74.

[11] The proof offered by defendant consists of Lake's two declaratory statements, the affidavits accompanying them, and other documents tending to show the regularity of the proceedings in the land

office. The statement is not conclusive evidence of the facts it recites as against plaintiffs, who are claiming adversely to the pre-emption, and under the earlier right of way grant. It is competent evidence of the fact that the pre-emption claim was made and entered by Lake in the land office at Carson, March 3, 1864, and that an amended statement was filed in the same office August 3, 1864. It was an essential link in the chain of his title, but when the existence of the facts recited, or the correctness of inferences drawn from them, is challenged, they are no more than ex parte statements by an interested party; and a person claiming under an adverse title procured by another and a different course of procedure is not estopped from showing the truth by ordinary evidence. Megerle v. Ashe, 33 Cal. 74, 85; Uinta Tunnel M. & T. Co. v. Creede C. C. Min. & M. Co., 119 Fed. 164, 169, 57 C. C. A. 200; McCorkell v. Herron, 128 Iowa, 324, 103 N. W. 988, 111 Am. St. Rep. 201, 204.

[12] As no rights are claimed for Lake, except under the pre-emption act, it will be necessary to review some of the salient features of the law controlling pre-emption entries. The pre-emption act was adopted September 4, 1841 (5 Stat. 455, c. 16), and repealed March 3, 1891 (26 Stat. 1097). Under that act every qualified person who—

"has made or shall hereafter make a settlement in person on the public lands" subject to pre-emption, "and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, * * * is authorized to enter with the register of the land office for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land."

The settler, having settled and improved a tract of land subject to pre-emption, was required—

"within thirty days after the date of such settlement, [to] file with the register of the proper district a written statement, describing the land settled upon and declaring his intention to claim the same under the pre-emption laws."

Failing to file such a declaration within the time specified, the land was subject to entry by any other purchaser. If the land was unsurveyed, the pre-emption claimant was required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township, giving a description of the tract and the time of settlement. Rev. St. §§ 2264, 2265.

It may be conceded that, when such a declaratory statement is filed in the proper land office, it is notice to the world that the land is set apart and is subject to the pre-emptioner's option to purchase, so long as he complies with the provisions of the law and the regulations of the land office. The tract thus entered is severed from the mass of public land, and so remains until the entry is canceled or forfeited; in that event, the land reverts to the government, and again becomes subject to entry. The rights acquired by a pre-emptioner on unsurveyed land prior to entry in the land office depend on circumstances. If not made for the purpose of establishing and maintaining a home, temporary residence and improvements on the land do not create any

valid claim under the pre-emption law. Central Pac. R. R. Co. v. Hunsaker, 27 Land Dec. 297; Tarpey v. Madsen, 178 U. S. 215, 20 Sup. Ct. 849, 44 L. Ed. 1042; Hastings, etc., R. R. Co. v. Whitney, 132 U. S. 357, 361, 10 Sup. Ct. 112, 33 L. Ed. 363.

There are numerous decisions of the Supreme Court to the effect that no vested right attaches to a tract until there has been an entry in the local land office. When a settler has filed his declaratory statement, and "performs certain other acts prescribed by law, he acquires for the first time the right of pre-emption to the land; that is, a right to purchase it in preference to others." Buxton v. Traver, 130 U. S. 232, 235, 9 Sup. Ct. 509, 510 (32 L. Ed. 920); Northern Pac. R. R. v. Colburn, 164 U. S. 383, 386, 17 Sup. Ct. 98, 41 L. Ed. 479; Lansdale v. Daniels, 100 U. S. 113, 116, 25 L. Ed. 587; Maddox v. Burnham, 156 U. S. 544, 15 Sup. Ct. 448, 39 L. Ed. 527; Kansas Pac. Ry. Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; Hastings v. Whitney, 132 U. S. 357, 362, 10 Sup. Ct. 112, 33 L. Ed. 363; Sioux City, etc., Land Co. v. Griffey, 143 U. S. 33, 40, 12 Sup. Ct. 362, 36 L. Ed. 64; Tarpey v. Madsen, 178 U. S. 215, 224, 20 Sup. Ct. 849, 44 L. Ed. 1042. It will be assumed, as defendant contends, that the foregoing rule gives way when the land settled upon is unsurveyed, and a qualified pre-emptioner, intending at the time to acquire it in good faith from the government under the pre-emption act, performs such acts as will give reasonable and definite notice of the extent and identity of his claim.

[13] It is unreasonable to suppose that as against other persons desiring to settle on the land, or as against a right of way grant, the right of a pre-emptioner on unsurveyed land is in the nature of a float. It is essential, as Justice White says in Railroad Co. v. Donahue, 210 U. S. 21, 28 Sup. Ct. 800, 52 L. Ed. 941, that the settler "does such acts as to put the public upon notice of the extent of his claim"; otherwise, prior to the time when his declaratory statement must be filed in the land office, he will be able to defeat every attempt of any other qualified person to settle any land within a radius of three-quarters of a mile from the 40 on which his house is located.

[14] It certainly was not the intention of Congress, in permitting pre-emption claims on unsurveyed land, to grant any right so extensive. Under the long-established practice of the land department, when a settler is unable to file a declaratory statement, because the land is unsurveyed, or because there is a vacancy in the office of register or receiver, or both, "the notice effected solely by improvements upon the land is confined to the land within the particular quarter section on which the improvements are situated." St. Paul, Minn. & Man. Ry. Co. v. Donohue, 210 U. S. 21, 28 Sup. Ct. 600, 52 L. Ed. 941; Kenny v. Johnson, 25 Land Dec. 394; Sweet v. Doyle, 17 Land Dec. 197; Union Pac. R. R. Co. v. Simmons, 6 Land Dec. 172; United States v. Central Pac. R. Co., 94 Fed. 906, 36 C. C. A. 546.

In Brown v. Central Pac. R. R. Co., 6 Land Dec. 151, it was held that a right acquired by settlement, in the absence of any claim of record or otherwise, is confined to the limits of the quarter section in which the settlement is made, and that the settlement right existing at

the date when the railroad land grant became effective excepts the land covered thereby from the operation of the grant. But if, as he is permitted to do, he settles on a tract of unsurveyed land which lies in two or more contiguous quarter sections, the settler can defeat an attempted settlement by another before the time when record notice is required (1) by improvements on each subdivision of the land outside of the quarter section on which he has settled; (2) by actual notice to an intruder of the extent of the settlement claimed (see authorities cited above); and (3) by notices defining the extent of the settlement claimed, posted on subdivisions thereof outside of the technical quarter section on which the improvements are placed. Driscoll v. Doherty, 25 Land Dec. 420, 424; Smith v. Johnson, 17 Land Dec. 454; Sweet v. Doyle, 17 Land Dec. 197, 198.

Inasmuch as Lake was unable to file his declaratory statement before March, 1864, and the statute reserved to him the right to do so, it was his duty in the meantime to perform such acts as would put the public upon notice of the extent and identity of his claim. Defendant has failed to show that this was done. The testimony introduced by plaintiffs shows that Lake had no improvements whatever on the northeast quarter of section 11, the quarter in which the Plaza is located, prior to 1865. The testimony offered by plaintiffs to this effect is not in conflict with defendant's showing in Lake's declaratory statements. The recital in the declaratory statements that Lake settled on the tract of land claimed in 1861, and that in 1864 when he made his declaratory statements he intended to claim the land as a pre-emption, and the further fact that he had no improvements on the Plaza prior to 1865, may all be true.

There was no finding of fact by the officials of the land department that Lake's settlement was made in 1861, nor was such a finding required. The first declaratory statement shows that he then settled and improved a tract of land situated in three different quarter sections, but there is no finding that Lake ever settled or improved, or intended to pre-empt, the Plaza, or the quarter section in which it is located, prior to the date of the first declaratory statement; nor is there anything therein, or in the affidavits, to that effect. Furthermore, Lake never declared on lot No. 9 in the S. E. ¼ of section 11, until August 3, 1864, four months after the approved plat of the township was filed in the local land office. This indicates that, even after the approved plat of the township had been filed in the local land office, Lake was still uncertain as to what land he would include in his pre-emption claim.

[15] To plaintiffs' oral evidence, showing that prior to 1865 Lake neither resided on nor had made any improvements on the quarter section in which the Plaza is located, defendant expressly objected, arguing that there is no precedent for such a question being raised 50 years after the issuance of a patent. This objection is not particularly impressive, in view of the conceded fact that the city of Reno for 20 years after 1879 paid an annual rental to the railroad company for the use of the northeast corner of the Plaza, and in 1907 and 1908 assessed to and collected from the railroad company $5,992.65, one-half the cost of paving the streets bounding the Plaza. Apparently the city never seri-

ously asserted any title or exclusive right to the Plaza until it caused the land to be plowed in March, 1916, 53 years after the right of way grant. It is difficult to understand how the company prior to 1916 could be negligent in failing to bring a suit to quiet title, or an action in ejectment.

[16] Defendant also urges, in opposition to the admission of this testimony, that the land office records control, and oral evidence is not admissible on either side. In support of this proposition the case of Tarpey v. Madsen, 178 U. S. 215, 20 Sup. Ct. 849, 44 L. Ed. 1042, and 17 Utah, 352, 53 Pac. 997, is cited. In that case Tarpey was claiming under a railroad land grant, which took effect on the land in controversy November 28, 1868, when the map of definite location was filed in the proper office. Madsen did not settle on the land until 1888, or make his homestead entry until 1896. In order to show that his entry was properly received by the register, he attempted to prove that the land, though in an odd-numbered section, had been withdrawn from the operation of a grant by a pre-emption entry made by one Olney in May, 1869. The grant antedated this entry. Olney's declaratory statement fixed the date of his settlement as April, 1869. This, also, was subsequent to the filing of the map of definite location; so Madsen produced testimony to show that Olney's settlement was actually made early in 1868, before the filing of the map of definite location. This testimony seems to have enabled him to prevail in the land department, and also in the state courts of Utah, though there was no claim that Madsen had succeeded to Olney's rights; Olney having abandoned the claim soon after making his pre-emption entry.

The Supreme Court of the United States held that, even if Olney had settled prior to the filing of the map of definite location, that fact alone was insufficient to withdraw the land from the operation of the railroad grant, because there was no proof that his settlement was with intent to acquire title from the United States. The court then argued that both parties should be held to the record. The whole trend of Mr. Justice's Brewer's argument was toward the conclusion that the date when the map of definite location was filed with the Commissioner of the General Land Office should mark the inception of the company's right, and that the date when the settler's entry was made in the local land office should be regarded as the time when his right attached. That this was his theory is shown by his reply to the objection that such a rule would ignore the privilege given to temporary occupants of the land to make entry within a short time. Furthermore, he limited the application of the rule to controversies similiar to that between Tarpey and Madsen. The case at bar is not such a controversy.

In a controversy, said the court, between two occupants of a tract open to pre-emption and homestead entry, relative rights are not determined by the mere time of filing the respective claims in the land office, but by prior occupancy, which may be established by oral testimony. But in a controversy between a railroad holding under a land grant, and an individual entryman, the question of right, according to decisions of the Supreme Court since 1882, rests, not on the mere matter of occupancy, but on the record. In decisions prior to that date, it

was considered that the line of the "road is definitely fixed" when it is surveyed and marked out on the ground. As a general rule, that fact could only be established by oral testimony.

The uncertainty and instability of titles resting on oral testimony led to the adoption of the rule, since unquestioned, that the line of the railroad could only be regarded as definitely fixed when the map of definite location is filed with the Commissioner of the Land Office. This eliminated oral testimony on that point, and also suggested that the rights of the settler in controversy with the railroad company claiming rights under the land grant should hinge on the record; that is, upon his declaration or entry in the local land office.

The objection to plaintiffs' oral testimony as to Lake's improvements prior to 1865 is overruled. Objections to the so-called Lake possessory claim are sustained, because Lake's connection therewith has not been satisfactorily established. Defendant's testimony fails to show that Lake, prior to or on the 1st day of July, 1862, had made any claim to the Plaza sufficient to deprive it of its status as public land or defeat the right of way grant.

Let a decree be entered in favor of plaintiffs.

SAN ANTONIO PUBLIC SERVICE CO. v. CITY OF SAN ANTONIO et al.

(District Court, W. D. Texas, San Antonio Division. February 15, 1919.)

No. 214.

CARRIERS ⇐=12(9)—CONSTITUTIONAL LAW ⇐=135—FRANCHISE ORDINANCE—PROVISION FIXING RATES—CONTRACT.

Under Const. Tex. 1876, Bill of Rights, § 17, providing that no irrevocable or uncontrollable grant of special privilege or immunities shall be made, but all privileges granted by the Legislature or created under its authority shall be subject to the control thereof, a city having power under its charter "exclusively to * * * regulate everything connected with city railroads" is without authority to make an irrevocable contract fixing the rate of fare in an ordinance granting a franchise to a street railroad company, and such provision is regulatory only, subject to change by the city to protect the public from excessive charge for service, and to the constitutional right of the company to earn a fair return on its investment.

In Equity. Suit by the San Antonio Public Service Company against the City of San Antonio and others. On motion of defendants to dismiss bill. Overruled.

Templeton, Brooks, Napier & Ogden, of San Antonio, Tex., for complainant.

Wm. Aubrey, R. J. McMillan, City Atty., and R. P. Ingrum, Asst. City Atty., all of San Antonio, Tex., for defendants.

WEST, District Judge. The San Antonio Public Service Company, plaintiff, brings suit against the city of San Antonio and its mayor, city commissioners, and city attorney, defendants. Plaintiff will be referred to as "Company" and defendants as the "City."

Company complains that without fault and for causes beyond its control, set out in great detail, it is unable to earn a fair return upon its investment, unless permitted to charge a greater carriage fare than 5 cents per passenger as now fixed by City's ordinance; that on March 28, 1918, the City passed an ordinance prohibiting any public utility company from raising its rates without first obtaining consent of the City so to do; that Company, on August 29, 1918, sought consent to raise its fare to 6 cents per passenger, which was denied by the City in October, 1918, by an ordinance prohibiting a fare charge in excess of 5 cents, and imposed a penalty of misdemeanor by fine and forfeiture of franchise right for any violation; that Company desires to raise the rate of fare to 7 cents per passenger, or to such other sum as the court may find necessary to enable Company to fulfill its duties and obligations as a common carrier, and at the same time earn a fair return upon its investment; that the enforcement of the ordinance prevents Company from increasing its rates, and forces it to dedicate its property to public use, depriving it thereof without due process of law, in violation of the Constitution of the United States.

Company prays: (1) That the court determine (a) whether Company can earn a fair return from a 7-cent fare, and, if not (b) to fix a rate of fare that would enable it to do so; and (2) in the meantime the City be enjoined from carrying into effect the provisions of the two ordinances.

The City moves to dismiss Company's complaint because from Company's petition it appears that Company, as successor to the San Antonio Traction Company, was obligated to transport passengers for a 5-cent fare, and that such ordinance constitutes, in effect, a valid contract between the Company and the City, the enforcement of which was being demanded of the Company; therefore the action of the City in refusing to permit Company to raise its fare could not be a taking of its property without due process of law. The ordinance (1899) under consideration provided:

"Said street car companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other."

In 1903 (Acts 28th Leg. c. 116) the Legislature of the state passed what is known as the "half fare" law, requiring street railways to transport students of schools, under 17 years of age, at one-half the fare required of adults. Altgelt filed suit against the San Antonio Traction Company, predecessor of Company, to compel it to carry students at half fare as provided by the act. The Traction Company contended that the 1899 ordinance constituted a contract with City guaranteeing, during the life of its franchise, a vested right to a return of 5 cents fare for each passenger; that the statute sought to be enforced would impair the obligation of such contract by requiring the Traction Company to perform the service for a less charge than fixed by the ordinance, consequently violative of the Constitution, void, and unenforceable as to the contract in question. This contention was insistently urged by the Traction Company in the

trial court, the Court of Civil Appeals, and in the Supreme Court of the United States, but those courts did not consider that question determinative of the issue. The latter court (San Antonio Traction Co. v. Altgelt, 200 U. S. 308, 309, 26 Sup. Ct. 263, 264, 50 L. Ed. 491), referring to this particular ordinance, says:

"Even if construed as a contract, it was still subject to the provisions of the Constitution of 1876, which in section 17 of the Bill of Rights declared that no irrevocable or uncontrollable grant of special privilege or immunities should be made, but that all privileges granted by the Legislature or created under its authority shall be subject to the control thereof."

The court further declares:

"Under the Bill of Rights of that Constitution the Legislature could not reduce the fares to a confiscatory amount or to an amount which would render it unprofitable to operate the road"

—the Traction Company, however, making no claims of that character in that case (but it does so in the present case)—and finally holding that the Traction Company must issue the half fare tickets, notwithstanding the terms of the ordinance fixing the fare at 5 cents.

The Company contends here that this decision in effect holds that the ordinance in question does not bring into being the contractual relation in the legal sense, but construes the words "shall charge five cents" fare as being mandatory, and regulatory in character, subject to the right of revision by the state, and also subject to the constitutional right of the Company to earn a fair return upon its investment.

The City urges that the contractual relation does exist by virtue of the ordinance, thus limiting the maximum fare to be charged by Company, in any event, to 5 cents, subject to revision by the state. Under this construction the Company would be required to maintain and operate its railroad, charged with its full duty as a common carrier, even though forced to bankruptcy.

The court concedes that, if the contractual relation exists as insisted upon by the City, the rule may not be overstated, and the Company may not ask the court to rewrite, reform, or vary the terms of a lawful obligation, voluntarily undertaken, and the petition should be dismissed.

The power and authority of the City to contract for and fix rates during the term of the Company's franchise, if any such power existed, is shown by the charter in effect at the time of the passing of the 1899 ordinance. Only section 100 of that charter is material. It grants power—

"exclusively to prevent, control and regulate everything connected with city railroads, and to make such rules and regulations for the same as the city council may deem necessary."

The power to "regulate everything connected with city railroads" thus unrestricted would include authority to contract for and fix rates, were it not for the bar interposed by the provisions of section 17 of the Bill of Rights of the Constitution of 1876, declaring that no ir-

revocable grant of special privilege or immunity could be made, but should be subject to legislative control. The grant of a right to a city railroad to charge a fixed sum as a passenger fare during the life of its franchise is an irrevocable grant of special privilege, expressly prohibited by the Constitution.

The City contends that, even if there be an exercise of excess powers, a contract pro tanto nevertheless exists, binding upon the parties, subject to the right of the state to fix and regulate rates, resting this proposition on City of Manitowoc v. Manitowoc & Northern Traction Co., 145 Wis. 25, 129 N. W. 925, and Milwaukee v. Railroad, 153 Wis. 592, 142 N. W. 491, L. R. A. 1915F, 744, Ann. Cas. 1915A, 911. These cases turn upon the construction of two sections of the Wisconsin Statutes. The ordinance in its terms in the latter case is substantially of like effect as in the case at bar. The court held that such an ordinance did not constitute a contract. The City also cites authorities supporting this contention from states where municipalities have been authorized to make inviolable contracts as to rates. Detroit v. Detroit Citizens' St. Ry., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; Vicksburg v. Water Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155. But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power. Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. Ed. 939; Railroad Commission Cases, 116 U. S. 307, 325, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; Vicksburg, etc., Railroad Co. v. Dennis, 116 U. S. 665, 6 Sup. Ct. 625, 29 L. Ed. 770; Freeport Water Co. v. Freeport City, 180 U. S. 587, 599, 611, 21 Sup. Ct. 493, 45 L. Ed. 679; Stanislaus County v. San Joaquin C. & I. Co., 192 U. S. 201, 211, 24 Sup. Ct. 241, 48 L. Ed. 406; Metropolitan Street Ry. Co. v. New York, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381. And see Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. Ed. 257.

It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences slight in themselves may, through their relation with other facts, turn the balance one way or the other. Illustrations of the truth of this may be found in the cases of Freeport Water Co. v. Freeport City, supra, Rogers Park Water Co. v. Fergus, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702, and Knoxville Water Co. v. Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887, where no authorized contract was found. as contrasted with Detroit v. Detroit Citizens' St. Ry. Co., supra, and Cleveland v. Cleveland City Ry. Co, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, where a contrary conclusion was reached.

The Milwaukee Case was taken to the Supreme Court of the United States (Milwaukee v. Railroad, 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254), and judgment affirmed as being the "judicial interpretation of a state statute by the highest court of the state." The court was careful to further limit the effect of its affirmance by use of the following language (238 U. S. 178, 35 Sup. Ct. 821, 59 L. Ed. 1254):

"On hearing in the court of first instance, it was held that there was no contract made by the passage and acceptance of the ordinance which we have quoted, and the complaint was * * * dismissed. Upon appeal to the Supreme Court of Wisconsin, that judgment was affirmed. * * * In the view we take of the case it is unnecessary to pass upon the question whether the ordinance had the effect to make a contract binding between the city and the company until subsequent legislative action by the state."

The United States Supreme Court in the Altgelt Case, 200 U. S. 308, 26 Sup. Ct. 261, 50 L. Ed. 491, expressly declined to decide that this very ordinance constituted a contract pro tanto, being practically the same reservation made by the same court in the Milwaukee Case.

That the 1899 ordinance does not constitute a contract is confirmed by a like construction given to an ordinance of identical effect in Home Telephone Co. v. Los Angeles, 211 U. S. 274, 277, 278, 29 Sup. Ct. 54, 53 L. Ed. 176. The court in that case, after reviewing authorities relied on by the city, says:

"All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear. It does not so appear in the case at bar. The appellant has failed to show that the city had legislative authority to make a contract of exemption from the exercise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract in fact was made."

The City in the present case fails to show that it had legislative authority to make the contract it alleges was made with the Company, because the inhibition of the Constitution of 1876 against irrevocable grants of privilege stands squarely in the way, and as stated by the United States Supreme Court, last quoted, it becomes unnecessary to consider whether such a contract was in fact made. Home Co. v. Los Angeles practically holds that. The ordinance there in question (1) did not state a contractual relation; and (2) if so, the city was without authority to make such a contract. A like condition exists here. The ordinance of 1899, and its acceptance by the Company did not constitute a contract, but, even if that were possible, the City lacked the power and authority to make it.

The City insists that at the time of the consolidation ordinance, July, 1917, the City had the power by constitutional amendment, and the Home Rule Act passed pursuant thereto, to fix rates and make irrevocable contracts. Even if this be true, no material change has been made in the verbiage of the original ordinance of 1899 by the consolidated ordinance, so far as the city railroad is concerned. As was said by the United States Supreme Court in Home Co. v. Los Angeles, 211 U. S. 274, 29 Sup. Ct. 52, 53 L. Ed. 176, referring to an ordinance of like terms and effect, equally applicable here:

"It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. * * * The ordinance here described was not an ordinance to agree upon the charges. * * * It authorizes the exercise of the governmental power and nothing else."

For the purpose of the motion to dismiss, the allegations of the complainant's bill are assumed to be true. There can be no doubt that a cause of action for equitable relief is stated in the bill, unless

the rights of parties are expressed by contract. The court is of opinion that no contract is shown to exist by the ordinance set out, but that the rights of parties are controlled by the terms of the ordinances as enactments of law regulating the conduct of a public servant. The City retains ample power to protect the public against excessive charge for service; the Company, by the terms of the Constitution, is guaranteed against confiscation of its property rights by regulation which would require its use by the public without a fair return upon the outlay.

The motion to dismiss the complainant's bill will be overruled, and defendant City may file further answer thereto within ——— days from this date.

A formal order in accordance with this memorandum opinion will be entered of record in due course.

THE ALICE M. GUTHRIE.

THE ANSON M. BANGS.

(District Court, E. D. Virginia. April 23, 1919.)

1. COLLISION ⊂=75—LIGHTS—"MOTORBOATS."
   A vessel 87 feet long, propelled partly by sail and partly by gasoline engines, is not a motorboat, within Act June 9, 1910, § 1 (Comp. St. § 8277), defining motorboats as vessels propelled by machinery, not more than 65 feet long, and is not governed by section 3 (S279) of that act, providing that motorboats, when propelled by sail and machinery, need not carry the white lights required by the section.

2. COLLISION ⊂=75—LIGHTS—"STEAM VESSEL."
   A vessel more than 87 feet long, propelled partly by sail and partly by gasoline engines, is a steam vessel, within Inland Navigation Rules (Comp. St. § 7873), prescribing that every vessel under steam, whether under sail or not, is a steam vessel, and that the term "steam vessel" shall include any vessel propelled by machinery, and as such was required by article 2 of those rules to carry white masthead lights.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Steam Vessel.]

3. COLLISION ⊂=40, 75—LIGHTS OF STEAM VESSEL—STEAM VESSELS MEETING.
   An auxiliary schooner, propelled by sail and machinery, and a steam tug, both *held* at fault for a collision occurring at night just outside Cape Henry; the schooner for failure to carry the white masthead light required of her as a steam vessel, and the tug for gross negligence of her navigator in starboarding after discovering the presence of the schooner on her port bow.

4. COLLISION ⊂=77—LIGHTS OF STEAM VESSEL—LOOKOUT.
   A steam vessel, failing to carry lights prescribed by inland navigation rules, cannot insist on too rigorous an enforcement of the obligation of other vessels to maintain a lookout.

In Admiralty. Libel by Tobias Johnson, as master of the auxiliary schooner Alice M. Guthrie, against the steam tug Anson M. Bangs, to recover for damages sustained by the sinking of the schooner after collision with the tug. Decree rendered, holding both vessels jointly liable.

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

Macklin, Brown & Purdy, of New York City, and Hughes, Vandeventer & Eggleston, of Norfolk, Va., for respondent.

WADDILL, District Judge. This libel is to recover for damages sustained by the sinking of the auxiliary schooner Alice M. Guthrie, 88 tons gross, 87 feet long, 22 feet beam, 9 feet deep, in a collision with the steam tug Anson M. Bangs, 101 feet long, 23 feet beam, 12.2 feet deep. The collision occurred on Sunday night, June 2, 1918, a short distance outside of Cape Henry, near the gas buoy, a little before 10 o'clock. The weather was good and clear, but a thunderstorm was approaching. The Guthrie was propelled in part by sail and in part by machinery, and at the time of the collision her mainsail had been lowered, but the foresail and forestaysail were set.

The contention of the libelant is that, as the Guthrie rounded the gas buoy off Cape Henry, inward bound, on a course west by north, she discovered some two miles away, outward bound, the lights of the tug, and subsequently, when about a mile away, the red light of the tug, bearing on her port bow, the vessels being port to port; that the red and green lights of the Guthrie were properly set, and burning brightly; that she had no white masthead light, being forbidden as a sailing vessel from exhibiting the same; that she maintained her course and speed; that the Bangs changed its course, so as to show first her red and then her green light to the schooner's red light, and then steadied her wheel, and bore directly down upon the schooner, striking her on the port side at practically right angles, puncturing her hull several feet, from which she quickly sank; the schooner, her cargo, and the effects of the officers and crew proving a total loss. Libelant further insists that the absence of the masthead light in no manner contributed to the collision, and that the Bangs, a steam vessel, charged with the duty of avoiding even the risk of collision, was being navigated by incompetent navigators, without a lookout, and proceeding at undue speed, and was solely at fault for bringing about the disaster.

The respondent alleged that, on the night and at the time of the collision, the Anson M. Bangs was properly equipped and manned, and had her lights properly set and burning brightly; that, having passed through the submarine net at Cape Henry, proceeding at about 10 miles an hour, on a course due east; the weather clear, but with signs of an electrical storm coming up, about 9:50 o'clock, her navigator observed through the flashes of lightning on her port side, and almost dead ahead, a dark object, appearing to be the sails of a vessel, and quickly thereafter, and very close aboard, a red light, which afterwards proved to be the port light of the Guthrie, which up to that time had been obscured and not visible to those on the Bangs; that the Guthrie had some of her sails up, and was being propelled by two 36 horse power gasoline engines, and was a steam vessel within the meaning of the navigation laws of the United States; that she carried no masthead light; that the engines of the tug were immediately stopped and reversed full speed astern, and continued backing until

the collision; and that the accident was not caused by or contributed to by any neglect or fault on the part of the tug, or those in charge of her, and was brought about solely by the neglect and fault of those navigating the Guthrie.

In the view of the court, it will not be necessary to pass upon many of the faults assigned by the parties one against the other, but only to determine several of the more important charges; that is, whether the Guthrie was a sail or steam vessel, and, if the latter, whether she was required to have a masthead light properly set and burning, and the effect of her navigating, under the facts of this case, without the same, and whether those navigating the Bangs were guilty of negligence which contributed to the collision, assuming the Guthrie to have been in fault in the particulars charged. These will be considered in the order named.

[1] 1. Does the Guthrie come within the terms of Motorboat Act June 9, 1910, c. 268, 36 Stat. 462 (Comp. St. §§ 8277–8281, 8283–8286)?

The enacting clause of this act, as well as section 2, class 3, in effect provides that the word "motorboat" shall include every vessel propelled by machinery and not more than 65 feet in length. The proviso to the third section of the act is that motorboats, as defined by the act, when propelled by sail and machinery, or under sail alone, shall carry colored lights, suitably screened, but not the white lights, prescribed by this section. It is insisted under this proviso, although the Guthrie at the time of the collision was being propelled by both sail and machinery, that she was not required to use the white lights prescribed by the act, but only the red and green running lights.

The court cannot concur in this view. The language of the proviso, "motorboats as defined in this act," means vessels under 65 feet in length, and does not apply to a vessel like the Guthrie, which is 87 feet long.

[2] 2. The Guthrie, not being a motorboat within the terms of the act, is subject to the laws regulating vessels propelled by machinery, as distinguished from sail vessels. The "preliminary definitions" of the regulations regarding steam and sail vessels, are as follows:

" * * * Every steam vessel which is under sail and not under steam is to be considered a sailing vessel, and every vessel under steam, whether under sail or not, is to be considered a steam vessel. The words 'steam vessel' shall include any vessel propelled by machinery." Inland Rules of Navigation (Act June 7, 1897, c. 4) § 1, 30 Stat. 96 (Comp. St. § 7873).

This definition in terms prescribed that every vessel under steam, whether under sail or not, is to be considered a steam vessel, and the words "steam vessel" shall include any vessel propelled by machinery. Article 2 of the Inland Rules of Navigation prescribes the masthead lights to be carried by steam vessels, as follows:

Article 2: "A steam vessel when under way shall carry— (a) On or in front of the foremast, or, if a vessel without a foremast, then in the fore part of the vessel, a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles." Comp. St. § 7876.

In the light of this rule, and the definition mentioned, it seems entirely clear that the Guthrie, at the time of and prior to the collision, should have exhibited a white masthead light, as well as the red and green running lights.

[3, 4] 3. The failure of the Guthrie to conform to this rule prescribed for her navigation makes her liable, or at least in part liable, for the disaster, unless it shall appear that her failure in that respect did not and could not have contributed thereto. It is admitted that at the time of the collision she was being navigated in part by steam and in part by sail, that her sails had been taken in and furled with the exception of the foresail and forestaysail, and that the latter was being furled. It cannot be said that the failure to expose the white light may not have contributed to the collision, since it is manifest that those navigating the Bangs only observed the presence of the Guthrie when in close proximity to her. Whether they should have seen her earlier is not so apparent; but as the Guthrie was clearly at fault in failing to do what was required of her, to notify others of her presence, she cannot be heard to insist upon too rigorous enforcement of obligations on their part. Foster v. Merchants' & Miners' Transportation Co. (D. C.) 134 Fed. 964, 969; Baltimore Steam Packet Co. v. Coastwise Transportation Co. (D. C.) 139 Fed. 777, 779.

4. In the view taken by the court of the testimony, the navigators of the Bangs were guilty of gross negligence in the navigation of their vessel after the presence of the Guthrie was known to them, if not, indeed, for their failure to see her earlier; and their conduct, after the presence of the vessel became known, was so culpable, that they should not be excused on account of error in extremis. From their own testimony, the evidence of their navigator and lookout, they appear clearly to have been at fault after the presence of the schooner was known. The mate in charge of the navigation should have acted promptly upon being advised by the lookout, who was also in the pilot house, of the dark object ahead, and when the red light appeared ahead on his port to have insisted upon starboarding, and running into the oncoming vessel, over the protest of the lookout, who seized the wheel and attempted to port the same, was inexcusable.

It follows, from what has been said, that the vessels collided as the result of their joint negligence, and are jointly liable for the disaster, and should be so held.

THE MANAWAY.

THE G. S. ALLYN.

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

COLLISION ⊂=45—STEAM AND SAILING VESSELS—FAULT.

A fishing steamer *held* solely in fault for collision with a meeting schooner at night on Chesapeake Bay, for not sooner seeing the schooner's lights and for proceeding without reducing speed after the schooner was seen 150 yards away, instead of stopping and reversing at once, which, as the burdened vessel, she should have done.

In Admiralty. Suit for collision by M. H. Lumpkin, master of the schooner Manaway, against the fishing steamship G. S. Allyn. Decree for libelant.

Frank Newbill, of Irvington, Va., and John N. Sebrell, of Norfolk, Va., for libelant.

Hughes, Little & Seawell, of Norfolk, Va., for respondent.

WADDILL, District Judge. On the morning of the 14th of September, 1918, between 3:30 and 4 o'clock, the schooner Manaway and the fishing steamer G. S. Allyn were in collision in the waters of Chesapeake Bay, about a mile and a half off and to the northward of Windmill Point Light, with the result that in about 15 or 20 minutes the schooner sank, and its cargo and the belongings of all on board proved a total loss, to recover the value of which this libel was filed.

The Manaway was a two-masted schooner, 63 tons gross, 68.5 feet long, 23 feet beam, 5.8 feet deep; the Allyn was a steamship used in the fishing service, 150 feet long, 24 feet beam. At the time of the collision, the Allyn was proceeding up Chesapeake Bay, returning from the fishing grounds at sea, to her owner's factory at Fleeton, Va., having on board her crew and some 25 fishermen. The Manaway was proceeding down the bay to Rappahannock river, Va., laden with a cargo of cans and can cases.

The assignments of fault by the vessels, one against the other, are numerous; but, in the view taken by the court, the testimony of those material are whether the lights of the sailing vessel, before and at the time of the collision, were properly set and burning, and should have been timely seen by the steamer, and also whether the steamer, after observing the schooner, conducted her navigation with seamanlike skill and promptness.

The court's conclusion, upon a review of all the testimony, is that the sailing vessel had up the regulation lights, and that the same were properly set and burning. Her officers and crew, one and all, so testify, and that the lights had been burning during the night, and were set and burning as the schooner went down. The positiveness and clearness of this testimony, in the light of knowledge and opportunity of knowledge of those testifying, ought not to be lightly ignored, because those engaged in the navigation of the steamship failed to see the lights.

The navigation of the steamship was in charge of a private pilot and a wheelsman, both in the pilot house, and a fireman, who was below. The master had turned in, as had the others of the ship's crew, and there was no one person charged especially with the performance of the duties of the lookout; the same having been intrusted to those in the pilot house. No lights were observed on the schooner by those on the steamship, and its presence was first known when it loomed up about a point on the steamship's starboard. The pilot, in the pilot house, admits seeing her 150 yards away, and the wheelsman, also in the pilot house, 75 yards away. The fireman, the only other person on duty at the time, was not examined. The evidence shows that the first order was to starboard the wheel, then hard astarboard and stop and reverse, and that there was about two minutes between the time of observing the loom of the schooner and the happening of the collision.

The steamship was the burdened vessel, and the one against whom presumptions of fault, if any, are to be solved. She was charged, not only with avoiding collision, but the risk thereof, with this sailing vessel (article 20, Inland Rules of Navigation), and it was incumbent on her not to take chances. The danger of collision was sufficiently present when the schooner, whose course was unascertained, was observed 150 yards away, to admonish the steamship to take no chances. Observing the loom of the schooner within that close proximity on the steamship's starboard, her navigator should have immediately stopped and reversed, giving the appropriate signals to that end, and to have first starboarded, without slackening speed, and then hard astarboarded before stopping and reversing, was a manifest and gross fault of navigation, sufficient in itself to account for, and in the judgment of the court did bring about, the collision. The rules of navigation for preventing collisions at sea (article 23) impose on steamers, in the presence of impending danger, the duty to slacken speed, or stop or reverse, if necessary, and means that such precaution shall be timely taken, and to delay action in that respect, or fail promptly and seasonably to take the necessary steps to avoid risk of collision, must be at the peril of the steamship. Nelson v. The Leland, 22 How. 48, 55, 16 L. Ed. 269; The New York, 175 U. S. 187, 201, 22 Sup. Ct. 67, 44 L. Ed. 126; The State of Alabama (D. C.) 17 Fed. 847, 853, and cases cited.

The steamship in this case is moreover at fault for her failure to see the lights of the sailing vessel earlier, as they were manifestly burning, and ought to have been observed by those in charge of the navigation of the ship, in the exercise of due care on their part. The navigators of the schooner testified that they observed the masthead light of the steamship two miles away, and thereafter steadily maintained the schooner's course and speed.

The libelant further insists that the steamer was at fault for her failure to have a proper lookout, and that she was also reprehensible for her omission to stand by the schooner after the disaster. There is great force in the contention in both respects, and much testimony to support the same; still the court does not feel that it is necessary to rest its decision upon either of these points. The schooner was seen in am-

ple time to have avoided the collision by the exercise of good seamanship by those in charge of the steamship. The court, however, feels that it should say, as respects the failure to have a lookout other than the two persons stationed in the pilot house, that the navigation, in the nighttime, of a vessel of the size in question, on a frequented thoroughfare like Chesapeake Bay, having aboard a large number of persons, without the presence of one whose sole duty it was to act as lookout, without other duties to distract his attention, was of doubtful propriety.

Regarding the charge against the steamship of failure to stand by after the collision, the court is not inclined, in the light of the testimony, to hold that the steamship wholly failed to discharge its duty in that respect. Still it does appear, considering the seriousness of the collision, that something more should have been done than was. Providentially, the lives of all on board the sinking schooner were saved, but not due to anything that the steamship did.

A decree holding the steamship wholly responsible for the collision will be entered on presentation.

THE FJELL.

THE LIVINGSTONIA.

(District Court, E. D. Virginia. March 19, 1919.)

1. COLLISION ⊂=85—STEAMSHIPS—EVIDENCE—SPEED—FOG.
   Evidence *held* to show that neither of two steamships which collided were proceeding at a moderate rate of speed, having regard to the character and density of the existing fog.
2. COLLISION ⊂=82(2)—FOG—SPEED.
   The general rule is that a steamship in a fog should navigate so as to be able to stop in time to avoid collision, providing the approaching vessel is also proceeding at a moderate rate of speed.
3. COLLISION ⊂=144—STEAMSHIPS—DIVISION OF DAMAGES.
   Where a collision was caused by two steamships navigating at an unreasonable rate of speed in a fog, the resulting loss should be borne by the vessels jointly.

In Admiralty. Libel by B. Johannesen, master of the steamship Fjell, against the steamship Livingstonia. Decree that loss be borne by steamships jointly.

Hughes, Vandeventer & Eggleston, of Norfolk, Va., for the Fjell.
Hughes, Little & Seawell, of Norfolk, Va., for the Livingstonia.

WADDILL, District Judge. The collision for which the libel in this case was filed occurred between the Norwegian steamship Fjell, 907 tons gross, 221 feet 6 inches long, 32 feet 2 inches beam, and the English steamship Livingstonia, 4,294 tons gross, 385 feet 5 inches long, 50 feet beam, about 11:56 p. m., on the 30th of June, 1918, on the Atlantic Ocean, off Currituck Sound, on the North Carolina coast; the Fjell being on a voyage from New York to Port Haiti, with a gen-

eral cargo, and the Livingstonia en route from Matanzas to an English port, via Newport News, for bunker coal, with a cargo of sugar. At the time of the collision, the vessels were navigating in a dense fog, which set in about 11:15 p. m., and had increased in density until the happening of the accident, at approximately midnight. The stem of the Livingstonia struck and penetrated the port side of the Fjell abaft of amidship, opposite hatch No. 3, cutting deeply into her, from the effect of which she shortly sank, and with her cargo became a total loss.

Each ship assigns against the other many faults which it is claimed brought about the collision, and each vessel claims that it was virtually at a standstill in the water at the time of the collision, and the other proceeding at undue speed. Save as to the question of speed of the vessels, the testimony is less conflicting than usual in this class of cases. The time, place, and courses of the vessels, the existence of the heavy fog, and when the same set in, are not seriously controverted, and that each ship had been giving appropriate fog signals is not disputed; nor is it denied that each vessel heard the fog signals of the other, and saw their white and running lights an appreciable time before the collision. Indeed, the controversy narrows down to the navigation of the respective vessels after they saw the lights, or at least knew of the presence of the other.

The Fjell insists that upon hearing the whistle of the approaching vessel off her port bow, at approximately 11:45, which afterwards turned out to be the Livingstonia, her engines were put to slow speed, and she thereafter proceeded at very low speed, making little more than steerageway for four or five minutes, when the whistles were again heard on her port bow, somewhat broadened, at 11:50, when her engines were stopped, and continued stopped up to the time of the collision at 11:56, and that upon observing the masthead lights of the Livingstonia, about four points on the port bow, coming apparently rapidly, the latter ship sounded a signal of three whistles, and thereupon the Fjell, practically without headway, ported her helm in the effort to move to starboard, to avoid the full force of the collision, but without effect.

The Livingstonia insists that finding, about 11:50, that the fog was becoming thicker, an order was given to stand by the engines, and a minute later to reduce to slow speed ahead. The vessel slowed to about four knots, and about 11:56 fog signals of a steamship were heard on her starboard bow, when her engines were stopped; that upon seeing the masthead and red lights of the vessel, which afterwards proved to be the Fjell, she swung on her starboard bow; that her engines were placed hard aport, and a short blast of the whistle given to indicate that movement, and that thereafter her engines were put full speed astern, and the appropriate three blasts of the whistle sounded; that under the influence of the reversed engines the ship was almost at a standstill, when the other vessel was observed to be swinging in such a direction as to bring the vessels together, the bow of the Livingstonia striking the port quarter of the Fjell abaft of her port beam, causing her to sink in a very short time.

[1-3] The evidence was acutely drawn on the issue regarding the navigation of the vessels at and about the time of the collision, with the result that each attempts to place the fault on the other; the navigators of each ship swearing that the other failed to take proper steps to avert the disaster, each particularly testifying that the other was proceeding at undue speed in the circumstances. The correct solution of this issue cannot be said to be free from difficulty. Some of the faults sought to be established by the vessels against each other would seem to fall within the class of error in extremis, if indeed a mistake was committed. But the crucial question as to the speed of the vessels has to be determined in the light of all the testimony and the fair and reasonable inferences to be drawn therefrom, and the court's judgment is that neither of the vessels were proceeding at the moderate rate of speed that they should have been making, having regard to the character and density of the existing fog.

The rule generally in that respect may be said to be that they should have been so navigating as to have been able to stop in time to avoid collision, upon an approaching vessel coming in sight, provided, of course, that such approaching vessel was proceeding at the moderate rate of speed required by law. The Colorado, 91 U. S. 692, 23 L. Ed. 379; The Umbria, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Julia Luckenbach—The Indrakuala (D. C.) 219 Fed. 600, affirmed Indra Line v. Palmetto Phosphate Co., 239 Fed. 94, 152 C. C. A. 144; The Hawkhead (D. C.) 248 Fed. 780. Had both vessels on this occasion observed this salutary rule of navigation, there would have been no collision, and the court is forced to the conclusion, from a full consideration of the testimony, that both steamships were navigating in such disregard of this rule as to bring about the disaster, and as a consequence that the loss resulting should be borne by the vessels jointly.

A decree may be entered so ascertaining.

STANDARD OIL CO. v. HOWE et al. (No. 3248.)

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919. Rehearing Denied June 6, 1919.)

1. TAXATION ⟸168—FOREIGN OIL COMPANY—FAILURE TO FIX CASH VALUE OF INCOME—"INTANGIBLE PROPERTY."

Under Civ. Code Ariz. 1913, par. 4834 et seq., requiring the assessment of all taxable property at its full cash value, the tax commission and board of equalization of Arizona had no authority to ignore the cash value of a foreign oil company's property and to tax its intangible property, fixed with an arbitrary value by capitalizing at 25 per cent. its earnings or income, by assessing the valuation against the company generally, not upon any specific items of its property; there being no authority for taxation of earnings, while "intangible property" includes only franchises, credits, choses in action, and the like.

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

2. TAXATION ⟸498—RESTRAINING ASSESSMENT—INADEQUACY OF LEGAL REMEDY—MULTIPLICITY OF SUITS.

Where an oil company, whose "intangible property" was improperly and illegally assessed by the Arizona tax commission and the board of equalization of the state, would become involved in a multiplicity of suits involving a common question of law if it attempted to utilize any remedy under Civ. Code Ariz. 1913, par. 4887, it is entitled to equitable relief by injunction against the tax commission and the board of equalization.

3. COURTS ⟸335(1)—FEDERAL COURTS—CONTROL OF STATE STATUTE—COLLECTION OF TAX—INJUNCTION.

The federal courts, in the exercise of their equity jurisdiction, are not bound by Civ. Code Ariz. 1913, par. 4939, forbidding injunction against the state or any officer to prevent the collection of a tax levied under provisions of law.

4. TAXATION ⟸397—OIL COMPANIES—UNIT RULE—STATUTES.

Civ. Code Ariz. 1913, pars. 4951-4979, providing for the unit rule of value in the taxation of private car lines, railroad property, and telegraph and telephone lines, do not authorize the unit rule valuation for taxation of the property of a foreign oil company, or for the distribution of the unit value between counties in which the property is situated.

Appeal from the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Suit by the Standard Oil Company, a corporation, against Charles R. Howe and others, members of the Tax Commission and of the Board of Equalization of the State of Arizona, and others. From a decree denying prayer for injunction and sustaining defendants' motion to dismiss the bill of complaint, plaintiff appeals. Decree denying the writ and dismissing the bill reversed, and cause remanded, with instructions to issue a temporary injunction.

The Standard Oil Company, a California corporation, has appealed from a decree of the District Court of Arizona denying appellant's prayer for a temporary injunction and sustaining the appellee's motion to dismiss its bill of complaint. The question presented involves the validity of the action of the state board of equalization of Arizona in ordering the assessed value of the property of the Standard Oil Company for the year 1917 to be increased from $342,706, as fixed by the county assessing and equalizing authorities, to $2,019,597.64. The facts as substantially stated by the complaint are these:

The Standard Oil Company owns real estate, motor trucks, sales stations, and like property in various counties in the state of Arizona. The full cash value of the property on January 1, 1918, was $342,706. California is the state of corporate domicile, and the corporation owns, within the state of California, pipe lines, refineries, oil wells, and properties of the value of more than $40,-

000,000. It manufactures gasoline, engine distillate, lubricating oil, and by-products of petroleum in California, and sells and disposes of such products in California and other states and territories in interstate commerce. The Arizona board of equalization determined that appellant's net profits on its Arizona sales for 1917 were $727,649.41. It proceeded then to capitalize those earnings at 25 per cent., and thus produced a total value of $2,910,597.64. From this last-named sum the amount of $342,646, or the value that had been put upon the properties by the county authorities, was deducted, and the difference became the increase complained of in this proceeding. The state board ordered the increase upon all of appellant's property en masse, without any specific increase as to any particular piece or item or class of property.

The complaint alleges that it was not found or determined by the board that any particular item or class had been undervalued by the county authorities, or that any increase in valuation was necessary for any purpose for equalizing taxes or valuation. In a communication to appellant, the board stated that intangible property was made assessable in Arizona, and the method of arriving at the intangible value of the property of the Standard Oil Company was by deducting the net income for 1917 in Arizona, as per the sworn report of the corporation, and deducting therefrom the federal tax paid, which would leave the true net business of the company in Arizona for 1917 as $727,649.41. The board also wrote as follows: "Assuming that this class should earn 25 per cent. net on its assessed valuation, and capitalizing the above true net income at 25 per cent., the total valuation shown, both tangible and intangible, is $2,910,597.64. Deducting from this figure the total amount of your assessments in the several counties, amounting to $342,646, leaves a balance of $2,567,951.64, the amount of the raise." The board advised the company that other oil companies and classes of property were similarly treated, and after specification of certain itemized classifications the letter continued: "From the above table you will note that oil companies are placed in the highest classification and are allowed to earn 25 per cent. on their assessed value, while railroads are only allowed 8 per cent., banks 12½ per cent., and producing mines and smelters 15 per cent."

After arriving at the valuation as outlined, the board effected a distribution of this valuation increase among the 13 counties of the state. The method employed was to require the corporation to segregate its gross sales made in the several counties, respectively, and upon the basis of such segregation it was ordered that the total increase be divided among the counties in the proportion of their several contributions to the corporation's gross sales, without reference to actual value of the properties involved. The board then directed the various county authorities to enter the increase upon their assessment rolls, respectively, and to use this language: "Tangible and intangible valuation on property above enumerated, as set forth in section 4847, Revised Statutes of Arizona 1913, Civil Code, based on excessive earnings." County authorities conformed to the order of the state board, and the state board proceeded to levy taxes for 1917, and fixed the rate for state purposes at 39 cents for each $100 of assessed valuation. The county authorities in turn proceeded to complete and make the levies accordingly for county, school, and municipal purposes. The state board, however, failed to instruct the county board how to distribute the increase among the several incorporated towns, cities, school districts, and local assessment districts within their several limits. As a result the county authorities extended the raise upon the assessment roll in gross, without division or distribution thereof among or between appellant's real estate or improvements thereon, or personal property, leaving such real and personal property listed and assessed for state and county purposes at the valuation originally placed thereon by the county authorities, adding thereto, however, the form of entry specified by the state board and heretofore quoted. In the distribution of the increase for town, city, and other local assessment purposes, the county authorities split up and distributed the raise among such subdivisions in a manner devised to suit themselves, and as a result it is said to be impossible to ascertain the total valuation intended to be placed or the amount of taxes actually levied upon any article, part, piece, or parcel of appellant's property, whether real or personal, and whether for state, county, municipal, school, or other local uses.

The actual figures used by the state board in making up the increase were

taken from a financial report filed by the Standard Oil Company with the state tax commission on May 1, 1918, as authorized by section 4529, subdivision 6, Revised Statutes of Arizona 1913. That report shows a total income from gross sales of $5,299,168.65, made up of sales of fuel oil, $2,164,631.63, gasoline, $2,129,008.36, and other products, $1,005,528.66. All of the fuel oil was sold and delivered by appellant pursuant to contracts negotiated with the purchasers outside of the state of Arizona and was loaded and delivered by it to the purchasers on cars at appellant's distributing points in California, and thence transported by common carriers direct to the consignee in Arizona, without being handled by any of appellant's Arizona branches or agencies. All of the gasoline and other products, except as stated in the complaint, were refined and produced by appellant in California, and were shipped to Arizona to be there sold and delivered direct to purchasers and consumers. Part of the gasoline and other products, of the value of $217,453.52, were loaded and delivered by appellant to purchasers thereof on board cars at appellant's plants and distributing points in California, and were transported directly by common carriers to the purchasers in Arizona, pursuant to sales negotiated in Arizona, but without passing through or being handled by any of appellant's branches or agencies. A large part of the gasoline and of the other products were sold and distributed by appellant in Arizona in the original packages and containers in which the same had been placed by it at its plants and manufactories in California. The item of $951,378.82, net income from operations shown on the report of the corporation, represents the net profit derived by the corporation from its plants, properties, and equipment in the production, purchase, transportation, refining, and manufacture of products in California, and includes the profits accruing to appellant through the operation of its sales plants and agencies, both in California and Arizona.

The corporation alleges that the action of the board was willful, arbitrary, and constructively fraudulent; that the order for the increase was made upon an assumed earning capacity, which includes the earnings and income produced in California, as well as in Arizona; and that the effect of the action of the board is to tax in Arizona property situate in California, as well as to tax the appellant's transaction of interstate commerce business.

Appellant appeared before the state board of equalization and protested against the raise complained of, but the increase was ordered.

The corporation alleges that, if it should pay the taxes assessed, it would have no remedy at law for the recovery of any money so paid; that, if remedy is available, it would have to prosecute suits against many counties, towns, and cities, all of which would depend upon a common question of law arising upon the same facts as are here set forth by appellant; that payment under duress of threatened distraint would involve the payment of interest, costs, and penalties not thereafter recoverable in any proceeding, and that upon failure to pay the taxes here involved they would become delinquent, and the county officials would proceed to enforce the tax liens, with interest, costs, and penalties, and appellant would suffer great damage and be subjected to many suits. Appellant tenders taxes upon the cash value of appellant's properties in Arizona, and prays that, being without adequate remedy at law, the increase complained of be decreed to be void and in contravention of the federal Constitution.

A clear understanding of the issues requires reference to the Arizona statutes concerning taxation. The Constitution of the state (section 12, article 9) vests in the Legislature authority to provide for the levy and collection of license, franchise, gross revenue, excise, and income taxes, and graduated income taxes.

The state tax commission, created in 1912, derives its authority from chapter 1 of title 49, Revised Statutes of Arizona 1913, as amended by the Laws of 1915 (Laws 1915, c. 22) and 1917 (Laws 1917, c. 37). The commission has supervision of the system of taxation and over the administration of the assessment of taxes in the state and over city, town, and local boards and officials having to do with the assessment of property. It may assess the "property, franchise and all intangible values" of railroad and tele-

graph and telephone corporations, excepting certain nonoperating properties and certain public service corporations.

The state board of equalization, created by the Laws of 1913 (chapter 2 of title 49, and particularly paragraph 4834 of the Statutes of Arizona), has full authority to equalize the value and assessments of property throughout the state, and to equalize the assessments of all property in the state between persons, firms, or corporations of the same assessment district, between cities and towns of the same county, between the different counties of the state, and the property assessed by the state tax commission in the first instance. The board of equalization fixes the rate of taxation for state purposes to be levied and collected in each county, examines and compares abstracts, and equalizes assessments, so that all the taxable property in the state shall be assessed at its full cash value subject to rules specified in paragraph 4834 of the statutes. The board of equalization may increase the individual assessments which appear to be too low, first giving notice to the individuals or corporations of their intention to do so. The board is required to transmit to the various county boards of supervisors statements of changes, together with the rates of taxes to be levied and collected.

County taxes are under the supervision of the respective county boards of supervisors. The statutes (paragraph 4846) require that all property in the state, except specifically exempted property, is subject to taxation, but there shall be no double taxation. By paragraph 4847 it is provided that money, goods, chattels, choses in action, evidence of debt, and any interest or equity in, or valid claim to, nonpatented mining claims, shall be personal property, and personal property is declared "to mean and include all property of whatsoever kind or nature, both tangible and intangible, not included in the term real estate," as said term is defined in the section. Paragraph 4849 requires that all taxable property must be assessed at its "full cash value"; that is, "the price at which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property is usually sold, and not the price which might be realized if such property were sold at a forced sale." County assessors must complete their assessment rolls and deliver them to the clerk of the board of supervisors before a certain date each year. The board of supervisors of the county constitutes a county board of equalization, with power to increase individual assessments after notice.

By paragraph 4887, a taxpayer, if dissatisfied with the amount of his assessment as fixed by the board of equalization, may appeal to the superior court of the county, where, by following a prescribed proceeding, review of such assessment may be had. It is required, as a condition precedent to taking such appeal, that the taxpayer shall pay to the county treasurer the full amount of the taxes levied and assessed in accordance with the valuation fixed by the board of equalization. If the court shall find that the assessment is excessive, and that any excess sum has been paid, judgment for refund will be given.

By paragraph 4845 every tax levied is made a lien upon the property assessed, and not to be satisfied or removed until such tax, penalties, charges, and interest are all paid, or the property has absolutely vested in a purchaser under a sale for taxes. The assessment roll must describe real estate by metes and bounds, or common designation or name, and show the full cash value of all real estate and improvements thereon, and the cash value of all personal property.

In case of delinquency the county treasurer is required to make a levy upon all property described in the assessment roll for the taxes which are delinquent, and thereafter he is authorized to levy upon, seize, and distrain personal property and sell the same for taxes. Provision is made for suits to collect delinquent taxes, and for the sale of real property pursuant to judgment, and for the execution of deeds to purchasers after period of redemption has expired.

By paragraph 4939 there can be no test of the validity of a tax upon real or personal property, unless the amount of such tax shall have been paid to the county treasurer, together with penalties thereon, and "no injunction shall ever issue in any suit * * * in any court against this

state, or against any county, municipality, or officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of law; but, after payment, action may be maintained to recover any tax illegally collected, in such manner and at such time as may now or hereafter be provided by law." In case the amount of taxes due shall be finally determined to be less than the amount so paid, the excess shall be refunded in the manner provided in title 49, paragraph 4887, of the act.

Municipal and county taxation are combined (chapter 37, Laws of 1917), to the end that there may be but one assessment of property for the purposes of state, county, city, and incorporated town. Valuations, after equalized and determined by the state board of equalization, become those for the purposes of all taxes. Levies for all city, town, and municipal purposes are made by the governing bodies thereof, and the county assessor extends and carries out such taxes upon the county assessment roll. All taxes for cities, towns, and other municipalities are collected by the county treasurer in the manner in which he collects state and county taxes, and thereafter the amounts due are paid over by him to the treasurers of the cities or municipal corporations, as may be. The provisions of law pertaining to delinquency and collection of taxes are applicable to cities, towns, and municipal corporations. There seems to be a lack of provision for the refund or recovery of taxes after they have been paid to cities, towns, or municipal corporations. This is to be mentioned, because it appears that there are certain town and city taxes involved herein, for instance, taxes in Phœnix, Bisbee, Douglas, Flagstaff, Clifton, Safford, Mohave, Hayden, Ray, and Nogales.

John Mason Ross, Everett E. Ellinwood, and Clifton Mathews, all of Bisbee, Ariz., and E. S. Pillsbury, Oscar Sutro, and Pillsbury, Madison & Sutro, all of San Francisco, Cal., for appellant.

Wiley E. Jones, Atty. Gen., and Clyde M. Gandy and George W. Harben, Asst. Attys. Gen., of Phœnix, Ariz., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] The requirement of the several statutory provisions quoted being that the property of the appellant corporation shall be taxable at its full cash value, has the board exceeded its authority, or has it proceeded upon a fundamentally erroneous principle, in making the assessments involved herein? From the facts heretofore stated, it is evident that the rule of assessment expressed and adopted by the board was that appellant oil company should be "allowed" to earn 25 per cent. on the assessed value of its property. The basis for such a rule was found in the consideration of what were called by the board "excessive earnings," or what was regarded as "intangible" property, not included in the term "real estate." The position of the board is that the method followed was "what is known as the capitalized income plan" for ascertaining or valuing the intangible property of the corporation assessed, and it is argued that the board used the term "excessive earnings" in its ordinarily accepted meaning, intending to convey the information that the increase was on that part of the capitalized income over and above the value of the tangible property, and it is said that such method resolves itself into a simple assessment of intangible valuation.

But there is no statutory authority in Arizona for taxation of the earnings of the appellant corporation; nor is there any provision which authorizes the board to judge of what earnings are excessive, or as

to how heavily such earnings may be taxed. As a general thing, intangible property includes franchises, credits, choses in action, and the like. Commonwealth v. Cumberland Co., 124 Ky. 535, 99 S. W. 605. None of these is included in the present matter; and apparently there was no attempt to bring the assessment within any such inclusions. There was no indication given by the board of any valuation placed upon taxable, intangible property, other than as heretofore indicated, and the increase ordered upon "tangible and intangible valuation of the real and personl property," based on excessive earnings, was made upon the real and personal property en bloc. The judgment of the board seems to have been exerted merely with the purpose of fixing a percentage on the assessed value which, in the opinion of the board, the appellant should be allowed to earn. Having determined that point, the board proceeded to capitalize appellant's earnings at the rate fixed. The next step was to increase the assessment of the corporation to the figure thus arrived at without regard to the cash value of the property owned by the corporation. According to the record, the valuations which were originally put upon the real and personal property by the county authorities were not changed as they appeared upon the several assessment rolls, and the language used by the board with respect to the valuation based on excessive earnings and quoted in the statement of the case appears upon each assessment roll, followed by the distributive share of the total raise in each county. It is impossible to ascertain what value is meant to be put upon the real or personal property of the appellant, or upon its stocks of merchandise, or to say what amount of taxes was meant to be levied upon any of the property of the appellant for city, county, or municipal purposes.

The board argues that its action is not to be judged by the descriptive words used in placing the added assessment on the tax rolls as "tangible and intangible valuation"; that this would, at most, be irregularity, as also were the words "based on excessive earnings." We readily grant that the inapt use of words ought not to render an official assessment void. But when, in the scheme of assessment, we find the careful and continued use of language, and such language has been followed by the distributed portion of the total increase, that argument does not square with the expressions used and the acts done. In the Opinion of the Justices, 220 Mass. 613, 108 N. E. 570, the Supreme Judicial Court of Massachusetts held that property in that state must be taxed upon an ad valorem basis, and that a statute which would undertake to require the valuation of certain classes of property for taxation by capitalizing the income produced thereby at certain rates would be invalid. The court said of such a proposed measure:

"It does not rest the assessment upon any uniform method. It enables the Legislature or a public officer to readjust the multipliers according to a fluctuating judgment of what may be desirable, even to the extent of accomplishing in practice great disproportion. The theory behind the bill would permit manifold classifications of diverse kinds of real as well as personal estate. If extended to its logical conclusions, it would be difficult to trace any remaining constitutional protection to the taxpayer."

[2, 3] Upon the foregoing branch of the case we place our decision that the action of the board was fundamentally erroneous in principle, the assessment was unwarranted in law, and we think appellant should not be denied equitable relief. Assuming that there is a remedy provided by the statutes of the state, an assumption which appellant has forcibly argued is not justified, the enforcement of such remedy would, under paragraph 4887 already referred to, involve a multiplicity of suits involving a question of law common to all of them. A single action at law would not suffice. Union Pacific R. Co. v. Weld County, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. Ed. 1110; Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761; Raymond v. Chicago Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; Oelrichs v. Williams, 15 Wall. 211, 21 L. Ed. 43; Johnson v. Wells Fargo, 239 U. S. 234, 36 Sup. Ct. 62, 60 L. Ed. 243. Nor are the federal courts, in the exercise of their equity jurisdiction, bound by paragraph 4939, heretofore quoted, which forbids injunction against the state or any officer thereof to prevent the collection of a tax levied under provisions of law. In re Tyler, 149 U. S. 184, 13 Sup. Ct. 785, 37 L. Ed. 689; Western Union Tel. Co. v. Trapp, 186 Fed. 114, 108 C. C. A. 226.

[4] There is another important phase of the case to which we advert. We do not mean to dispute the proposition that, in arriving at the cash value of property subject to taxation, income product may properly be regarded; but it would appear that in this matter the state board considered, not merely the earnings and income produced by the property of the Standard Oil Company in Arizona, but "in far greater part" has taken into consideration the earnings and income produced by the properties of the appellant situate in California. Counsel for appellee cites Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, as authority for what is called the unit rule of valuation. In that case the Supreme Court was considering a special law of the state of Ohio which provided for a valuation of the properties of express companies upon a mileage basis. Property situated outside of Ohio was carefully excluded, but there were provisions which prescribed a method of valuation of properties as units, and directed a distribution of the unit valuation among the various counties of the state. Analogies to this legislation may be found in the statutes of Arizona, which provide for the unit rule of value in the taxation of private car lines, of railroad property, and of telegraph and telephone lines. Paragraphs 4951 to 4962, 4963 to 4970, and 4971 to 4979, Revised Statutes of Arizona 1913. The unit rule applicable to assessment of such property, however, rests upon a mileage basis, which avoids the taxation of any property outside of the state. But we are cited to no statute which authorizes the valuation of the property of the appellant oil company under the unit rule, or for the distribution of the unit value between counties in which such property is situate. In Adams Express Co. v. Ohio State Auditor, supra, it is to be noted that the Supreme Court said that—

"While the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply

for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business The same party may own a manufacturing establishment in one state and a store in another, and may make profit by operating the two; but the work of each is separate. The value of the factory in itself is not conditioned on that of the store, or vice versa; nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership. But the property of an express company distributed through different states is as an essential condition of the business united in a single specific use. It constitutes a single plant, made so by the very character and necessities of the business."

The court did not lay down a rule which would uphold a proceeding to assess the value of appellant's Arizona properties without attempting to ascertain what proportion of appellant's capital was employed in Arizona or California or elsewhere, or which authorized the fixing of the value of the Arizona properties of the appellant by capitalizing the income and profits produced by the California properties of the appellant. In Fargo v. Hart, supra, the Supreme Court reviewed an assessment of exress company properties in Indiana. There, in arriving at the total value of the property to be distributed upon a mileage basis, the taxing authorities included certain real and personal property not necessarily used in the actual business of the express company and which was outside the state of Indiana. The court said it was obvious—

"That this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, under the name of enhanced value or good will, if it is not closely confined to its true meaning. * * * That would be taxing property outside of the state under a pretense. * * * The difference is not a mere difference in valuation; it is a difference in principle, and in our opinion the principle adopted by the board was wrong."

In Louisville, etc., R. R. Co. v. Greene, 244 U. S. 522, 37 Sup. Ct. 683, 61 L. Ed. 1291, Ann. Cas. 1917E, 97, the principle was again established that a state may not, consistently with the due process provision of the Fourteenth Amendment, include, at least as against any foreign corporation, any part of its tangible property lying without the state for purposes of taxation. Looney v. Crane, 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230.

Referring again to the averments of the complaint before us, it appears that the income which has been considered by the officials of the state represented in greater part earnings and income produced by appellant's California properties. For example, it is to be taken as true that the income included appellant's entire profits upon all crude petroleum produced by it and sold in Arizona; also the whole profit upon the appellant's manufacture and sale of manufactured products distributed in Arizona. It may become of vital importance at some time to inquire whether a tax levied upon a capitalization of a profit is not a tax upon the profit, and whether a tax in Arizona upon profits produced by California properties would not be a tax on the California properties. Looney v. Crane, supra; Fargo v. Hart, supra; Union Tank Line v. Wright, 249 U. S. 275, 39 Sup. Ct. 276, 63 L. Ed. —, decided since the submission of this proceeding.

For the reasons discussed in the first branch of the case, the decree of the District Court, denying the temporary writ of injunction and dismissing the bill, must be reversed, with costs in favor of appellant. The cause is remanded, with instructions to issue a temporary injunction.

LO HOP v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1919.)

No. 3124

1. APPEAL AND ERROR ⊂⊃11—REVIEW—DISMISSAL.
Under Act Sept. 6, 1916, § 4 (Comp. St. § 1649a), though it was apparently the purpose to have the decree considered on both appeal and error, and the record was somewhat confused, the court will treat the case as properly before it on appeal.

2. ALIENS ⊂⊃32(5)—CHINESE PERSONS—BURDEN OF PROOF.
One admitting that he was of Chinese descent has the burden of establishing a lawful right to remain in the United States.

3. ALIENS ⊂⊃23(2)—CHINESE PERSONS—CHANGE OF OCCUPATION.
Where a Chinese person has been regularly admitted as a merchant, the fact that he subsequently becomes a laborer does not in itself destroy his right to remain, for such a fact is important only as it may tend to show that in reality he entered as a laborer, or for the purpose of immediately becoming a laborer, and so procured his admission through fraud, in violation of the Exclusion Acts.

4. ALIENS ⊂⊃32(3)—CHINESE PERSONS—CERTIFICATES.
Under the treaty with China of December 8, 1894, and Act April 27, 1904 (Comp. St. § 4337), authorizing the issuing of certificates by Chinese authorities showing the mercantile status of Chinese persons desiring to enter the United States, and making such certificates prima facie evidence of the facts set forth, a Chinese person, who was admitted on the production of such a certificate, and whose deportation was thereafter sought on the ground that he had not shown his right to remain, must be advised if deportation is sought on the ground that his entry was fraudulent, for such certificates are entitled to weight, and Chinese persons should be notified of any attack thereon.

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

Deportation proceedings by the United States against Lo Hop. Defendant was ordered deported by the United States commissioner, and on appeal to the District Court the order was affirmed, and defendant appeals. Reversed and remanded for further proceedings.

Mulholland & Hartman and Sholto M. Douglas, all of Toledo, Ohio, for plaintiff in error.

E. S. Wertz, U. S. Atty., of Cleveland, Ohio, and Edward J. Lynch, Asst. U. S. Atty., of Toledo, Ohio.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. [1] Apparently it was the purpose to have the decree in this case considered on both appeal and writ or error, and although the record is somewhat confused we shall, in view of section 4 of the act of September 6, 1916, c. 448, 39 Stat. 727 (Comp. St. § 1649a), treat the case as properly here on appeal. Orders to deport respondent to China were made below (1) by a United States commissioner, and on the ground (stated alike in the affidavit for arrest and the order to deport) that he is "a Chinese person found unlawfully * * * and not lawfully entitled to be or remain in the United States"; (2) by the District Court, upon appeal, for the reason that respondent "at all times since the time of his admission to the United States has been a manual laborer, and has not at any time since his said admission been a Chinese merchant and member of the exempt classes of Chinese persons within the meaning of the Chinese Exclusion Acts."

[2] At the opening of the trial in the District Court respondent admitted that he was of Chinese descent, and, presumably relying upon the settled rule imposing the burden of proof upon respondent to show a lawful right to remain in this country (Bak Kun v. United States, 195 Fed. 53, 55, 115 C. C. A. 55 [C. C. A. 6]), the government rested. Respondent then introduced evidence tending to show that before leaving for this country he had been engaged in the grocery business in China, and for three years in a drug business as a partner to the extent of $10,000 in Hong Kong, and that he had been regularly admitted to the United States, at the port of San Francisco, Cal., July 19, 1911, as a merchant. He remained in San Francisco more than a month looking for business, and then came to Toledo, Ohio; and he was in that city almost continuously until his arrest, November 21, 1914, and indeed until January, 1915, before he claims to have acquired an interest in any business concern. However, it appears by some of the testimony that meanwhile he tried a number of times, in Toledo, Cleveland, and Detroit, to purchase and engage in a mercantile business, though without success until January, 1915, when he bought a half interest in a Chinese general merchandise business in Toledo, the purchase price being subsequently paid in Hong Kong upon his order.

An authenticated copy of a partnership certificate was placed in evidence, dated January 29, 1915, purporting to have been executed in pursuance of section 8099 of the Ohio General Code, and reciting that respondent and another were "interested as partners in the partnership transacting business under the firm name and style of the Sam Wah Company, with its principal office and place of business" at a named location in Toledo. Despite this, it is to be observed of respondent's claimed purchase that his vendor is shown to have applied in Toledo, February 12, 1915, for a Chinese laborer's return certificate, and stated, among other things, that he then owned a half interest in the Sam Wah Company. This must have been the partnership interest said to have been purchased by respondent in the preceding month of January, and the testimony does not satisfactorily explain the discrepancy. It is conceivable, if indeed the sale transaction itself does not naturally import, that the sale was not to be completed

until the purchase price was paid in Hong Kong, and admittedly this did not occur until after the vendor had secured his return certificate and gone to that place.

Difficulty arises, also, from the course pursued by respondent from the time of his arrival in Toledo, say about September 1, 1911, until August, 1916. In that period he was more or less engaged in cooking in the kitchens of restaurants and a grocery in Toledo. According to his own testimony and that of several Chinese witnesses, this work was done gratuitously; yet it is clear enough that he resorted to cooking to diminish, if not entirely to meet, his living expenses while seeking favorable opportunity to engage in some kind of mercantile business; but it is not shown why he continued this practice, although not so regularly, after his interest in the partnership was actually paid for as claimed. True, such a course might have been consistent alike with the business he claims to have entered upon as a merchant and the observance of reasonable economy; in a word, it would seem that, at a time as late as the trial, convincing evidence should have been available to show that the partnership and the certificate in that behalf were a sham, if in truth they were. Above all, the course pursued by respondent after his admission is not decisive of his right to remain in this country. There are other features of the record that must be regarded as controlling.

Respondent introduced an original certificate of identity, dated July 19, 1911, and bearing the official seal and signature of the immigration official in charge at San Francisco, also setting out respondent's name, age, height, etc., and stating his occupation to be that of a merchant. This instrument purports to have been issued in conformity with a departmental regulation of March 19, 1909, and to have been "granted solely for the identification and protection of said Chinese person so long as his status remains unchanged." The inspector, who examined respondent at the time of his arrival at San Francisco, was not satisfied with certain claims he made, or with his appearance, and recommended that his application for admission be denied. The application was afterwards taken to the law division, San Francisco, where the inspector in charge and another inspector on June 23, 1911, jointly determined, "after carefully considering the case," that the recommendation for denial "be reversed and the applicant be admitted."

Furthermore, it appears that, acting in compliance with the provisions of an act of Congress there alluded to, the viceroy at Canton, who had been designated for such purposes by the government of China, issued a certificate on April 24, 1911, showing that Lo Hop was a member of one of the exempt classes described in such act of Congress, and as such had the permission of the government of China to go to and reside within the United States, after "investigation and verification of the statements contained herein by the lawfully constituted agent of the United States in this country," giving a description of Lo Hop, his former occupation as a merchant from 1902 to 1907, and his connection from 1908 to 1911 with a named firm at a stated place in Hong Kong. This certificate was viséed the following May 25th by the American consul general at Hong Kong after making, as

he says, "a thorough investigation of the statements contained" in the viceroy's certificate, and found "to be in all respects true"; the consul general further pointing out that Lo Hop was connected with a particular firm in Hong Kong which was "capitalized at $40,000 Hong Kong currency, of which his share is $10,000," that the firm "has been established for about three years and handles Chinese medicines" and "is registered in Lo Hop's name," and that Lo Hop's declared purpose in going to the United States was to start "a new concern in the business of medicine," etc., and that he was in possession of a "draft for $1,000 gold."

[3, 4] As Mr. Justice Day pointed out in Liu Hop Fong v. United States, 209 U. S. 453, 462, 463, 28 Sup. Ct. 576, 52 L. Ed. 888, article 3 of the treaty with China of December 8, 1894 (28 Stat. 1211), and the Act of Congress of April 27, 1904, c. 1630, re-enacting and continuing certain statutes there referred to (33 Stat. 428 [Comp. St. § 4337]), authorize the issue of certificates such as the one executed by the viceroy and viséed by the consul general in favor of respondent as a merchant; such certificates are by statute made prima facie evidence of the facts they set forth and, as the learned justice said in that case, "certainly ought to be entitled to some weight in determining the rights of the one thus admitted." The significance of this cannot fail of appreciation in the presence of the statements, already shown, of the viceroy and the American consul general concerning the respondent's business and financial condition before leaving China; if those officials were deceived, the fact ought to be shown, and it would not seem difficult to solve the question in a way that would be fair to both sides. The rule is that where a Chinese person has been regularly admitted, for instance, as a merchant, the fact that he subsequently becomes a laborer does not of itself destroy his right to remain; such a fact is important only as it may tend to show that in reality he entered as a laborer, or for the purpose of immediately becoming a laborer, and so procured his admission through fraud and in violation of the Exclusion Acts.[1] Lew Loy v. United States, 242 Fed. 405, 417, and see page 410 on rehearing, 155 C. C. A. 181 (C. C. A. 6); Lui Hip Chin v. Plummer, 238 Fed. 763, 764, 151 C. C. A. 613 (C. C. A. 9); Moy Kong Chin v. United States, 246 Fed. 94, 97, 158 C. C. A. 320 (C. C. A. 7); United States v. Yong Yew, 83 Fed. 832, 838 (D. C., opinion by the late Circuit Judge Adams, then District Judge); Lo Pong v. Dunn, 235 Fed. 510, 512, 513, 149 C. C. A. 56 (C. C. A. 8). Indeed, in view of its facts the rule stated is in effect recognized in Liu Hop Fong v. United States, supra, 209 U. S. at page 463, 28 Sup. Ct.

[1] This is not affected by the provision of the certificate issued by the immigration officer at San Francisco in terms to identify and protect respondent only "so long as his status remains unchanged"; for that certificate, unlike the certificates issued by the viceroy and viséed by the American consul general, is, as we have seen, a departmental regulation and designed as a measure of convenience (Sibray v. United States, 227 Fed. 1, 4, 141 C. C. A. 555 [C. C. A. 3]), and of course can be effective only so far as it is within the law (United States v. Lou Chu, 214 Fed. at 463, 464 [D. C.]; In re Tam Chung, 223 Fed. 801, 803 [D. C.]).

576, 52 L. Ed. 888. The reason underlying all these decisions would seem to find expression in the language of Judge Lowell in Re Yew Bing Hi (D. C.) 128 Fed. 319:

"Speaking generally, the Chinese Exclusion Acts are directed to prevent the unlawful coming of Chinese into the United States. and to remove those who have come in unlawfully. * * * Thus far no indication appears that a Chinaman who has lawfully entered the United States may not change his occupation after entry without risk of deportation."

Now, it is to be remembered that in the instant case the respondent was not advised of any claim on the part of the government that he had effected his entry through fraud or misrepresentation; this is true of the affidavit under which he was arrested, and, so far as appears, of the proceedings had before the commissioner; moreover the government rested its case, as we have said, simply upon an admission of respondent that he was of Chinese descent and the consequent requirement on his part affirmatively to show his right to remain here; and, further, the decree contains no finding of fraud as to respondent's entry and so is not inconsistent with a change of status and intention after his admission. The case differs in this respect from Lew Loy v. United States, supra, 242 Fed. at page 408, 155 C. C. A. at page 184, since it had there been found in the court below that Lew Loy had "really entered the United States as a laborer, and that his coming was in violation of the statutes of this government," and yet this court was constrained to grant a rehearing because of complaint that the government's counsel at the trial had made a "disclaimer of charge of fraudulent entry." 242 Fed. 410, 155 C. C. A. 186.

It follows that as respects a Chinese person who has been admitted in apparent compliance with the treaty and acts of Congress as a member of a privileged class, in any proceeding instituted for his deportation on the basis of fraudulent entry seasonable notice of a charge to that effect must be given to him so that he may have fair opportunity to meet it; anything less than this would ignore the prescribed evidential effect of certificates issued and viséed pursuant to the treaty. We therefore agree with Judge Gilbert, who in Lui Hip Chin v. Plummer, supra, when speaking of the absence of a charge that appellant had entered with the intention of becoming a laborer or had procured his certificate as a merchant through fraud or misrepresentation, said (238 Fed. 765, 151 C. C. A. 615):

"If such fraud or misrepresentation was intended to be relied upon as the ground of his deportation, he was entitled to be advised of it." Lew Loy Case, supra, 242 Fed. 411, 155 C. C. A. 181.

The decree is reversed, and the record remanded for further proceedings consistent with this opinion.

HODGES v. ERIE R. CO.

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

No. 3172.

1. RAILROADS ⟸350(14)—INJURIES ON TRACK—CONTRIBUTORY NEGLIGENCE—CHILD.
   A three year old child is not as a matter of law guilty of negligence in passing under a standing freight train, blocking the pathway to much-used picnic grounds.

2. RAILROADS ⟸350(31)—INJURIES ON TRACK—NEGLIGENCE PER SE.
   It is not negligence per se for a mother voluntarily to risk her own life in attempting to rescue her child, who had crawled under a standing freight train blocking a path to picnic grounds.

3. RAILROADS ⟸300—INJURIES ON TRACK—DUTY TO EXERCISE CARE.
   Though a pathway across a railroad's track to a picnic ground was a private way, where the public was licensed to use it in crossing the tracks, a duty arose on the railroad to exercise reasonable care to avoid injury to those whose presence there reasonably might be anticipated.

4. NEGLIGENCE ⟸23(2)—RAILROADS—ATTRACTIVE NUISANCE—PETITION.
   Petition against a railroad for death of a mother, who had crawled under its freight train standing on a track blocking a pathway to picnic grounds in order to rescue her three year old boy, who had previously crawled there, *held* not to state a case of attractive nuisance or of invitation.

5. RAILROADS ⟸344(3)—INJURIES AT PRIVATE CROSSING—NEGLIGENCE—PETITION.
   Petition against a railroad for death of a mother, who crawled under a freight train standing on a track where it blocked a pathway to picnic grounds, in an attempt to rescue her three year old son, who had crawled under the train before her, *held* not to state a case of actionable negligence on the railroad's part.

6. PLEADING ⟸218(4)—DEMURRER—AMENDMENT.
   Dismissal of action against railroad for a death on its track, on sustention of its demurrer to plaintiff's petition, *held* erroneous; it not being clear that a good cause of action could not be stated by amendment.

7. APPEAL AND ERROR ⟸750(2)—ABSENCE OF SPECIFIC ASSIGNMENT—RULE OF COURT.
   Where the record does not show that plaintiff was given an opportunity to amend his petition after demurrer was sustained to it, the absence of specific assignment for failure to give such permission, as distinguished from the assignment of error in entering judgment for defendant, should not prevent review under rule 11 of the Circuit Court of Appeals (202 Fed. viii, 118 C. C. A. viii).

In Error to the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by William T. Hodges, administrator of Susanna Hodges, against the Erie Railroad Company. To review judgment for defendant, plaintiff brings error. Reversed with directions.

D. F. Anderson, of Youngstown, Ohio, for plaintiff in error.

Paul J. Jones, of Youngstown, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Writ to review judgment for defendant on sustaining demurrer to petition.

According to the petition, after defendant's freight train, on the afternoon of a Sunday in June, had stood about half an hour on a track at the end of a public street running at right angles to the railway track, thereby blocking passage over a long-existing and well-recognized pathway in common use (to the railway company's knowledge), which pathway crossed the railway track on the extended line of the street, and led to a nearby and much-used picnic ground, plaintiff's three year old child walked along the pathway and crawled under the standing freight train. His mother (the decedent) saw the child's danger and attempted to rescue him by crawling under the train. While decedent was in that plight, the train was moved by defendant's employés, without warning, and decedent thereby killed.

The negligence charged consisted in moving the train under the circumstances stated without giving notice that it was to be moved, and in failing to have an employé stationed near the pathway to warn or prevent children from attempting to use it while the train was standing across it.

[1, 2] Whether the demurrer was rightly sustained depends solely upon the question whether the petition states a case of actionable negligence on defendant's part in killing decedent under the circumstances stated. This is so, because decedent's three year old child was not, as matter of law, guilty of negligence in passing under the train. Erie R. R. Co. v. Weinstein (C. C. A. 6) 166 Fed. 271, 273, 92 C. C. A. 189; L. E. & W. R. R. Co. v. Mackey, 53 Ohio St. 370, 41 N. E. 980, 29 L. R. A. 757, 53 Am. St. Rep. 641. And it was not negligence per se for decedent to voluntarily risk her own life in attempting to rescue her child from the impending danger. Pennsylvania Co. v. Langendorf, 48 Ohio St. 316, 28 N. E. 172, 13 L. R. A. 190, 29 Am. St. Rep. 553.

[3] Notwithstanding the pathway in question was not a public highway, but was a mere private way, yet under the case stated in the petition the public was licensed to use it in crossing the tracks, and a duty rested upon the defendant company to exercise reasonable care to avoid injury to those whose presence there might reasonably be anticipated. Felton v. Aubrey (C. C. A. 6) 74 Fed. 350, 360, 20 C. C. A. 436; Tutt v. Railroad Co. (C. C. A. 6) 104 Fed. 741, 743, 44 C. C. A. 320. This obligation has perhaps been most frequently applied in favor of those injured by the movement of a train or in switching operations while attempting to cross a track at the moment unobstructed, as in Felton v. Aubrey, supra; Tutt v. Railroad Co., supra; Trivette v. Railway Co. (C. C. A. 6) 212 Fed. 641, 646, 129 C. C. A. 177; Southern Ry. Co. v. Smith (C. C. A. 6) 214 Fed. 942, 946, 131 C. C. A. 238. Such cases proceed on the theory that the presence of travelers on the crossing is reasonably to be anticipated. As said by Mr. Justice Day, in Tutt v. Railroad Co., supra, 104 Fed. 743, 44 C. C. A. 322:

"The reason of the doctrine being that where the company has the exclusive right to the use of its tracks, and has neither impliedly nor expressly

licensed persons to be there, it has no reason to expect them, and consequently is under no obligation to be on the lookout, or to avoid injury to such persons. But where they may be expected to be, and where an implied license has arisen from the conduct of the company, it is bound to use care commensurate with the circumstances to avoid injury to such persons."

We have also said that, where a train is cut in two to enable the public to cross the track, due warning is required before closing the gap. Southern Ry. v. Smith, supra, 214 Fed. at page 945, 131 C. C. A. 238.

It may be assumed that the petition would not be demurrable, had it contained an allegation that the defendant's employés knew of the child's presence unattended and close to the track, or that it was likely to attempt to pass under the cars (Henderson v. Railroad Co., 52 Minn. 479, 55 N. W. 53), or that defendant's employés had reason to believe that decedent had gone under the cars. But there is an entire absence of such allegation.

It may also be conceded, for the purposes of this opinion, but without so deciding, that, had the petition asserted that people were in the habit, to the knowledge of the railroad company, of passing along the pathway and through or under trains standing across it, a cause of action would be stated upon the theory that the presence of a traveler in such perilous position might reasonably be anticipated, as licensed by defendant. See, in this connection, McCarthy v. Railway (C. C. A. 2) 240 Fed. 602, at page 609, 153 C. C. A. 406 (foot). But, so far as shown by the petition, the defendant had no reason to apprehend that any one would attempt to pass under the train, unless from the mere fact that a much-used pathway crossed the right of way where the train was standing. The nearest approach to such allegation is in the statement that the defendant "knew or in the exercise of ordinary care should have known the use to which the pathway was put, and that men, women, and children used said pathway." This obviously refers only to the general use of the crossing, not to its use when occupied by a train. No authorities are cited, and we have found none, which sustain the proposition that a license to use the pathway over the tracks when not occupied by a train includes a license to cross when the pathway was so occupied, or, otherwise stated, that defendant was bound to assume, from the mere fact that the pathway over the tracks was in common use, that travelers would attempt to pass under the standing cars, or that in the absence of reason to so expect, or to believe that such attempt was being made, defendant was obliged to provide against the possibility of accident by giving notice that the train was about to be moved, or by having employés on the watch to warn against or prevent attempts to so cross. In our opinion the rule is to the contrary. Central R. R., etc., Co. v. Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634; Papich v. Railroad Co. (Iowa) 167 N. W. 686. We should not be understood as committing ourselves to all that is said in the case last cited on the subject of the railroad's duty and liability.

[4] The petition does not state a case of "attractive nuisance" or of invitation, as illustrated by Railroad Co. v. Stout, 17 Wall. 657, 21

L. Ed. 745; Railroad Co. v. Harvey, 77 Ohio St. 235, 83 N. E. 66; Escanaba Co. v. O'Donnell (C. C. A. 6) 212 Fed. 648, 129 C. C. A. 184.

[5] It follows from these views that the demurrer was rightly sustained.

[6, 7] The court, however, not merely sustained the demurrer, but dismissed the case. In this we think there was error. Under well-established practice, plaintiff was entitled to an opportunity to amend (which does not appear to have been given), unless it is clear that a good cause of action cannot be stated by amendment. The learned District Judge thought such was obviously the case. We think the situation disclosed by the petition does not warrant such conclusive assumption, but that it is reasonably conceivable that the circumstances attending the accident were such as—consistently with the allegations of the present petition—would enable the statement of a case of liability. Plaintiff's counsel asserts here a desire to amend. As the record does not show that plaintiff was given opportunity to do so, the absence of specific assignment for failure to give such permission, as distinguished from an assignment of error in entering judgment for defendant, should not prevent review under our rule 11 (202 Fed. viii, 118 C. C. A. viii).

The judgment of the District Court is reversed, with directions to give plaintiff opportunity to amend his petition.

In re LAKE CHELAN LAND CO.

OLIVE v. TYLER.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3223.

1. CORPORATIONS ⟸316(1)—TRANSACTIONS WITH DIRECTORS—LOANS—VALIDITY.
   An insolvent corporation, in need of funds and ready cash, may borrow the amount needed from a director or other officer of the corporation, and secure it by lien on its property or transfer of its assets.
2. BANKRUPTCY ⟸163—LIENS—VALIDITY.
   Where the directors of an insolvent corporation, in good faith and with the intention of saving the business, borrowed money from a director and a stockholder to meet the most pressing obligations, and executed a real and chattel mortgage on all of the corporate assets to secure the same, *held*, the transaction being one in good faith, that the mortgage could not, on the corporation's subsequent bankruptcy, be questioned on the ground that it was preferential and to an officer of the corporation.
3. BANKRUPTCY ⟸467—APPEAL—FINDINGS.
   Findings of the referee, affirmed by the District Court, and supported, will not be set aside by the Circuit Court of Appeals.

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

In the matter of the Lake Chelan Land Company, a corporation, bankrupt. The mortgage claim of C. B. Tyler was allowed by the

referee and established as a preferred claim, and from an order denying the petition of Walter M. Olive, as trustee in bankruptcy, for review, and confirming the order of the referee, the trustee appeals. Affirmed.

This is an appeal by the trustee of the bankrupt corporation from an order of the District Court denying the trustee's petition for a review, and confirming the order of the referee, sustaining the mortgage claim of one Tyler; Tyler having offered proof of a secured claim, which claim was established and allowed as a preferred claim by the bankruptcy court over the objections of creditors. The substance of the referee's findings, as adopted by the District Court, makes this case:

The bankrupt corporation organized in 1909, with a capital of $500,000, to hold, develop, and sell a large tract of land. There were a small number of stockholders, and large sums of money were raised by pro rata assessments upon the stockholders. The company gave its notes for such advances of money, and upon unsecured obligations about $340,000 were borrowed. In addition to these obligations, the company owed debts for money borrowed upon its notes, which were secured by pledges of certain purchase-money contracts, covering lands that the corporation had sold, in the sum of $110,000, $50,000 of which notes were held by the National Bank of Commerce of Seattle, and $60,000 held by certain individuals. In June, 1916, these secured notes were past due, and the bank notified the corporation that payment must be made by January 1, 1917.

About that time one Furey became a stockholder and was elected president of the corporation. He held one-fourth of the total amount of stock and one-fourth ($85,000) of the stockholders' notes that had been issued. After demand was made for payment, Furey assured the stockholders that he could raise the money in the Eastern cities to meet the obligations of the company, but after efforts he failed to do so. To avert the then apparent ruin of the corporation, unless it could borrow money, two stockholders, Green and Tyler, were asked, and agreed, to furnish the needed money to meet the obligations, which by that time amounted to about $116,000, due upon secured notes and other debts, exclusive of notes due to stockholders. After the matter was discussed among the stockholders, it was decided that the corporation should borrow $120,000 from Green and Tyler in order to pay the obligations and to carry the company along for a few months, during which time Furey hoped that he could borrow enough money to save the business. His general purpose was to realize funds through the sale of bonds of an irrigation district to be organized, the district to take over a water system in which the corporation had an interest.

At that time the shares were owned as follows: Tyler had three-eighths, Green one-fourth, Furey one-fourth, and Swalwell one-eighth. There were some shares held by qualifying persons. On December 14, 1916, a stockholders' meeting was held, at which all of the stockholders, seven in number, were present or represented, and the corporation, by unanimous vote, was authorized to borrow $120,000 of Green and Tyler, and to secure the obligation by a mortgage upon all of the property and assets of the corporation. Upon the same day the trustees met and authorized the mortgage, and with provision therein that all of the income should be applied upon the mortgage. The mortgage was duly executed, and among other things provided that, while the company should continue in business and make sales, the income from sales should be applied in the reduction of the mortgage debt. In carrying out this plan, the $120,000 was paid to the company by Green and Tyler, and the company issued 12 notes, of $10,000 each, payable to bearer, dated December 30, 1916, due on or before one year after date, and executed a real and chattel mortgage, dated December 30, 1916, upon all of its property, which mortgage was recorded January 22, 1917. The notes owned by Green were afterwards transferred to Tyler. The secured obligations were paid, as also were the other obligations, except what was due upon stockholders' notes, and any sums due as assessments for irrigation

purposes upon the cultivated lands of the company, which, under the terms of contracts between the company and the water company, were first liens upon the lands to which the water was furnished. The collateral to secure the old notes was delivered to Furey, president, and by using the $4,000 over the sums paid out on secured claims the corporation ran along with the hope of continuing. About August, 1917, 550 acres of the lands of the corporation, valued at about $93,000, were transferred by Furey, as president, to one Brown. Furey turned over to Brown the stockholders' note for $84,500, with interest, which was owned by Furey, to enable Brown to turn the note into the company as a payment for the 550 acres of land.

Tyler, as the holder of all the notes, immediately brought foreclosure proceedings in the United States District Court, alleging that the company had not paid the interest on the mortgage, or taxes on its property. Very soon thereafter, September 13, 1917, a voluntary proceeding in bankruptcy was initiated by the secretary by direction of a majority of the trustees. Afterwards, at a stockholders' meeting held October 4, 1917, the action of the trustees in directing petition for bankruptcy was fully ratified. Furey protested.

After the trustee in bankruptcy was elected, and after the mortgage given to Tyler had been questioned by Furey and others, an order upon Tyler was issued to show cause why the property should not be held by the trustee in bankruptcy free and clear of the lien of his mortgage. Tyler appeared and propounded his claim. Objections were made by certain creditors and by the water company; the contention of the creditors being that the mortgage was preferential, and not given for a valuable consideration, while the water company claimed rights under its contract as superior to Tyler's mortgage.

It was also found that at the time the loan in question was made, and the mortgage was given to secure the same, the corporation was insolvent; that the mortgage was given to secure the money then loaned to the corporation, and was not for any antecedent indebtedness; that Green was an officer of the corporation at the time the loan was made, and knew of its insolvent condition; that, after the disbursement of the fund raised by the loan, the debts remaining unpaid were not pressing for payment, and that the stockholders and directors were fully advised of the purpose of the loan, the apparent necessity therefor, and of the affairs and financial condition of the company; and that the corporation continued its usual course and conduct of business for approximately nine months after the loan, when the conveyance of the 500 acres heretofore referred to was made.

Carroll B. Graves, of Seattle, Wash., and R. S. Ludington, of Wenatchee, Wash., for appellant.

Ira Bronson, J. S. Robinson, and H. B. Jones, all of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1, 2] The contention of the trustee is that majority directors and stockholders of an insolvent corporation, having knowledge of insolvency, cannot take a mortgage on all of the property, assets, and income of the corporation, and thus prefer themselves; that the mortgage in question was made by the directors and officers with intent to prefer their claims; that the mortgage was used by the directors and officers to secure themselves upon a prior obligation, which they had assumed with the Bank of Commerce; that Tyler could not propound and prove the mortgage and secured notes as the real owner of the claims, because one Backus owned $40,000 worth of notes, and Green owned $20,000 worth thereof, and that these interests had not,

in any manner, been transferred to Tyler; and that Green, one of the mortgagees, had never assigned his interest in the mortgage.

The question of the condition of the corporation and of the good faith of the directors and officers at and about the time of the transactions under investigation being most important, we have carefully considered the whole record, with the principle in mind that the mortgagees were bound by those rules of conscience and fairness which courts of equity have laid down in disposing of transactions, where directors of corporations are dealing with the subject-matters of their trust and with the party whose interests are within their care. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328.

It is evident that the loan to the corporation was made after Tyler and Green were urged to lend the money and after the failure of earnest efforts to obtain money from outside sources. It was evident that the corporation would fail unless it could procure money to meet its pressing obligations, but it was believed by stockholders and directors that if funds could be borrowed operation could be continued, and the immediate necessities could be met, and the company could work through its difficulties. Two courses seemed open: The directors could stop business and close up the affairs, or, in good faith, they could lend it money, thus enabling business to go on for the apparent benefit of the corporation. The directors and stockholders chose the latter plan, and, while disaster eventually came, it has been found that good faith on the part of the directors characterized their conduct. We find no foundation for the argument that the money loaned by Green and Tyler was to enable the company to pay its antecedent debt. The advances were present ones, to be used by the corporation to pay its pressing debts, and to enable it to extricate itself from immediate embarrassment, and in the expectation that it could continue in business and meet its obligations. Under such circumstances the mortgage was not invalid, though made to an officer of the corporation. 7 R. C. L. § 775; Sanford Tool Co. v. Howe et al., 157 U. S. 312, 16 Sup. Ct. 621, 39 L. Ed. 713.

Strohl v. Seattle Nat. Bank, 25 Wash. 28, 64 Pac. 916, cited by appellant, was a case where the security was given for an antecedent debt. The decision is not authority for holding that a mortgage given by an insolvent corporation for a present advance is not valid. It is referred to in 10 Cyc. 1261, as sustaining the validity of such mortgages, and Thompson on Corporations, § 6200, makes the following comment upon it and other like cases:

"It must be noted that the cases make a very clear distinction between the fact of securing a director for money loaned or advanced to a corporation and the fact of giving the director preference by way of security for any claim that he may have against the corporation. There is no reason why even an insolvent corporation, in need of funds and ready cash, may not borrow the amount needed from a director or other officer of the corporation and secure him by a lien on its property or a transfer of its assets."

See, also, Twin-Lick Oil Co. v. Marbury, supra; Illinois Steel Co. v. O'Donnell, 156 Ill. 624, 41 N. E. 185, 31 L. R. A. 265, 47 Am. St. Rep. 245; Cook on Corporations, § 692. Of course, if there had

been fraud or action by the mortgagees to secure an undue advantage to themselves, by endeavoring to acquire all of the assets of the corporation under mortgage, a different question would be presented. But the findings are against such conclusions. It is true that a prior indebtedness of $110,000 existed and was secured by contracts for sales, and that the new mortgage by the corporation was for $120,000 and covered the land, and it may be that the security was excessive. However, when it is considered that the property would have to be sold on judicial sale, that the bidding would be open to all, and that a sale would be subject to redemption, and that the mortgagees would only be entitled to receive the amount of the mortgage indebtedness, it is not to be held that undue advantage was being taken by the mortgagees in taking all the assets as security.

[3] As to all other material matters, it is sufficient to say that the findings of the referee, affirmed by the District Court, are supported, and will not be set aside in this court. In re Dorr, 196 Fed. 292, 116 C. C. A. 112.

We think that the lower court was right in holding the mortgage to be valid. The court went no farther, and by its decision did not adjudicate questions of the claim of the water company to a superior lien.

The order appealed from is affirmed.

THE KINAU.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3194.

SHIPPING ⊂=166(4)—INJURIES TO PASSENGER—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence *held* to show that the steamship company, into the hold of whose vessel libelant, a passenger, fell, was guilty of negligence, so that libelant was entitled to recover damages for his injuries, despite libelant's testimony adverse to himself; he having been rendered at least temporarily insane by his fall.

Appeal from the District Court of the United States for the Territory of Hawaii; Horace W. Vaughan, Judge.

Libel by Natalio Peneyra, an insane person, by Adriano Borha, his guardian ad litem, against the American steamship Kinau and the Inter-Island Steam Navigation Company, Limited, bailee, claimant, and owner. From the decree, libelant appeals. Reversed, and cause remanded, with instructions to enter decree for libelant.

Natalio Peneyra, described as an insane person by his guardian ad litem, filed a libel against the steamship Kinau to recover damages for personal injuries sustained as a passenger on the steamship, which was engaged in carrying passengers for hire from Honolulu to a port on the island of Kauai. The libel alleged that on December 9, 1917, shortly after taking passage on the steamship, the second officer of the steamship ordered Peneyra to go into the steerage, and in a rough and improper manner shoved him over towards an open, unguarded, and unlighted hatchway, and he, without fault or negligence on

his part, stepped into said hatchway and fell into the hold of the steamship, and sustained serious and permanent wounds and injuries, to such an extent that he lost his reason and became insane, and that he was declared insane by a court of competent jurisdiction in the month of December, 1917, after he had received said injuries. The appellee in its answer admitted that the appellant, while on the deck of said vessel, fell into an open hatchway in the hold of said vessel, a distance of about eight feet, and struck his head on the floor or some object in said hold, and sustained some injury, the nature and extent whereof it was ignorant.

The court below made no findings of fact, but in an opinion reviewed the statements of Peneyra given in open court three days after the conclusion of the testimony offered on behalf of the parties. The court expressed the opinion that the evidence proved that Peneyra was then sane, and that the only evidence that he ever was insane was the adjudication upon which he was committed to the asylum. Treating the statements of Peneyra as declarations against his interest, the court denied his right to recover. The testimony so taken in open court was all in answer to questions by the judge, and it consisted mainly in Peneyra's answer of "Yes" to leading questions. The record shows the following:

"Q. Did you have a ticket at the time you got on board? A. I wasn't given yet a ticket. Q. Did you take your little girl on the boat with you? A. Yes. Q. Did you walk up on the upper deck? A. We did. Q. Did you leave the little girl on the upper deck? A. Yes. Q. And you went down to see about your baggage? A. Yes. Q. That's what you went down for? A. Yes. Q. Did you remember when you fell on the steamer? A. I did. Q. You remember falling? A. Yes. Q. How came you to fall? A. I was dizzy. Q. Were you facing towards the hatch when you fell? A. Yes. Q. You were facing the hatch? A. Yes. Q. Did you fall forward through the hold or hatch? A. Yes. Q. Because you were dizzy? A. Yes. Q. Did you fall backwards through it? A. No. Q. When you fell, do you remember them picking you up? A. Yes. Q. You remember them picking you up after you fell? A. I do. Q. You remember them picking you up out of the hatch and taking you back on the shore? A. Yes. Q. You remember that? A. Yes. Q. Did you know at that time they were taking you back to the shore? A. Yes. Q. Did you have them take your little girl with you? A. Yes. Q. Was the little girl taken back on shore? A. Yes. Q. How did you get back from the ship to the shore? A. The boss of the steamer ordered me to go ashore. Q. Are you crazy? A. No. Q. Have you been crazy? A. No. Q. Did you know that you were out here at the asylum? A. Yes. Q. What were you doing out at the asylum? A. I was out there simply sitting around. Q. Did you know what you were doing there? A. I was doing nothing. The American told me to go out to work, but I worked only a month. Q. When you fell on the ship, were you squatting down or were you standing up? A. At that time I was standing up; when I got dizzy, I stooped down. Q. Was the hatch open? A. Yes. Q. Was there a rope around it? A. Yes. Q. How many sides—was the rope around all four sides of the hatch? A. Yes; the rope was around all four sides. Q. When you fell in? A. Yes."

George A. Davis and J. J. Banks, both of Honolulu, T. H., for appellant.

L. J. Warren and Smith, Warren & Whitney, all of Honolulu, T. H., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). We are of the opinion that the court below erred in wholly disregarding the testimony against the appellee, and accepting the statements of Peneyra as declarations against interest, and as conclusive of the merits of the controversy. Peneyra's statements suggest their own

improbability. According to him, a man in good health, not intoxicated, becomes dizzy, stoops toward the floor, and then pitches face first into an open hatch, notwithstanding that a rope stretched 30 inches above the deck extends around the four sides of the hatch for his protection. Some portions of the statements are proven to be false by the undisputed facts in the case. Thus he stated that he had not purchased a ticket. The appellee admits that he had purchased a first-class ticket, and Aki testified that he saw the ticket in his hand. Also he stated that the rope was stretched around the four sides of the hatch when he fell in. The first officer testified that the rope was down on one side. The evidence is that, when Peneyra fell, he received a severe injury upon the head rendering him unconscious, that he was taken to a hospital, where he remained a week, showing insanity by his acts, and that he was thereupon adjudged insane and sent to an insane asylum, in which he remained four months, and from which he had been discharged only two days before his statement was taken in court. There was the evidence of one witness that while in the asylum Peneyra had no recollection concerning his fall, and denied that he had fallen while on the steamship. One of the physicians who examined Peneyra at the time of his discharge testified that he doubted his complete restoration to sanity for the reason that he found his memory "pretty hazy" as to what had occurred on the steamship.

The evidence which we think should countervail Peneyra's statements in court is the following: Peneyra was one of a group of passengers standing in the between-decks, where the boatswain was in charge. It is shown, and it is not disputed, that immediately after the accident the first officer asked the boatswain how it happened, and that the latter said, "I told them to get away, but this fellow fell down." The boatswain testified that he told the deck passengers, "Clear away!" and he motioned with his hand, and "while I was making these motions of separation to the deck passengers, this man in question fell into the hatch, and I immediately went to help him." Aki, a fellow passenger, testified that it was dark in the between-decks, that the hatch was open, and that Peneyra was there, but that he did not see him fall; that immediately after he fell the first officer said it was the boatswain's fault in not covering the hatch up. Cabache, also a fellow passenger, was present at the time when Peneyra fell, but did not see him fall. He testified that he also heard the first officer say it was the boatswain's fault. All who testified to Peneyra's condition said that his scalp was cut and bleeding and that he was unconscious when taken from the hold.

Sanchez is the only witness who testified that he saw Peneyra fall. He was a fellow passenger. He testified that the boatswain told the group of passengers to move back, because they were loading crates of chickens; that Peneyra was standing about six feet from the hatch, with his back toward the hatch; and that the boatswain raised his hands saying "Move back, you fellows!" and that Peneyra moved back and fell into the hatch. The appellee points to alleged discrepancies in the testimony of Sanchez, upon which it contends that

his testimony should be wholly disregarded. We have carefully considered that contention, and we find nothing substantial in it. One alleged discrepancy is that Sanchez testified at one time that Peneyra had his bag with him, and at another time he testified that Peneyra had no baggage when he came aboard. This apparent discrepancy disappears when Aki's testimony is considered. It indicates that Peneyra's baggage had been sent on board ahead of him, and that when he got aboard he was looking around for his baggage, and that he went from the upper deck to the between-decks to search for it. Sanchez may have been in error in testifying that Peneyra had his little girl by the hand at the time when he fell, but he had seen him holding his girl's hand when he came on board the ship, and he probably thought that the little girl was still with him when he fell. Such discrepancies as these have not the effect to discredit a witness.

It is not denied that Sanchez was standing near the boatswain at the time when the order to move back was given. He testified, and it is not disputed, that he translated it to the other Filipinos in aid of the boatswain's directions and at his request, and that while he was still so engaged Peneyra, who stood near the hatch, stepped back and fell in. If there is any testimony here which should be scrutinized on account of interest or motive to color it, it is not that of the fellow passengers of Peneyra, but that of the officers of the appellee. They, however, dispute none of the testimony as to the essential incidents above adverted to. The accident occurred at about the time of sunset. The electric lights had not been lit in the between-decks. Witnesses for the appellee, all of whom were its employés, testified that it was light. One of them testified that objects were plainly discernible, except in one portion at some distance from the hatch. The witnesses for the appellant testified that the light was dim. We reach the conclusion that the light was not sufficient to reveal clearly the danger of the open hatch.

It seems evident that, if Peneyra had recovered his sanity at the time when he made his statements in court, his memory had been so impaired, by the blow upon the head which caused his insanity, that little or no reliance can be placed in it. If, indeed, he had a spell of dizziness, it is very remarkable that it occurred at the very moment when he stepped back in compliance with the boatswain's order. The evidence in the case convinces us that the appellee was guilty of negligence, and that the appellant is entitled to recover damages therefor in the sum of $600.

The decree is reversed, and the cause is remanded to the court below, with instructions to enter a decree for the appellant in the sum of $600 and costs.

HARDWICK v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3240.

1. PERJURY ⇐9(2)—SELECTIVE SERVICE REGULATIONS—AUTHORITY TO ADMINISTER OATH.

Under the Selective Service Regulations, published November 8, 1917, pages 7 to 14, associate member of the legal advisory draft board of a county in California *held* to have had authority to administer to a registrant an oath on the occasion of such registrant's verifying his questionnaire as to the details of persons dependent upon him, as a wife.

2. PERJURY ⇐19(2)—INDICTMENT—FRAUD IN OBTAINING EXEMPTION FROM SELECTIVE DRAFT.

Where the indictment, charging defendant with having unlawfully, improperly, and fraudulently endeavored to obtain the allowance of his application for exemption and discharge from the selective service draft on the ground that he had a dependent wife, charged that he willfully and falsely stated in the affidavit to his questionnaire that he had a wife dependent on his labor for support, etc., such indictment was not defective because failing to aver that the wife was mainly dependent for support on defendant's labor.

3. CRIMINAL LAW ⇐97(1)—JURISDICTION OF COURT—PERJURY IN OBTAINING EXEMPTION UNDER SELECTIVE SERVICE ACT.

The United States District Court in California had jurisdiction to try a prosecution for having unlawfully, improperly, and fraudulently endeavored to obtain allowance of an application for exemption and discharge from the selective service draft on the ground defendant had a wife dependent on his labor for support, where the indictment alleged that the affidavit involved was prepared and sworn to in California, though it charged that defendant registered in the state of Washington.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Noah F. Hardwick was convicted of perjury by having unlawfully, improperly, and fraudulently endeavored to obtain allowance of his application for exemption and discharge from the selective service draft, and brings error. Affirmed.

George D. Collins, Jr., of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., and Chauncey F. Tramutolo, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The defendant, who was represented by counsel, pleaded guilty and was sentenced to imprisonment under an indictment which, after certain preliminaries not now material, charged that on June 5, 1917, at Walla Walla, Wash., he registered under the act to authorize the President to increase temporarily the military establishment of the United States (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, § 2044a et seq.]); that he was called for military service in the Northern district of California, and on the 15th of January, 1918, he prepared and filed with the local board for the county

of Walla Walla, Wash., in support of a claim made by him for exemption and discharge from selective service draft, with the intent of deceiving the officers of the local board for said county in Washington, and "of unlawfully, improperly, and fraudulently endeavoring to obtain the allowance of his application for exemption and discharge" from the selective service draft on the ground that he had a wife dependent upon his labor for support, a certain affidavit, subscribed and sworn to before George M. Hench, associate member of the legal advisory board of San Joaquin county, Cal., "an officer competent and authorized by the laws of the United States of America to administer oaths, and to administer the oath to defendant to testify and tell the truth"; that in the affidavit mentioned "it was material and necessary to set forth whether or not the said defendant had any person or persons dependent upon his labor for support," and the defendant, so having taken the oath as aforesaid, "* * * did then and there willfully, unlawfully, feloniously, and falsely, intentionally and contrary to such oath," state that he, the said defendant, did have a wife named Gynetha G. Hardwick, dependent upon his labor for support, "whereas, the defendant then and there well knew that said Gynetha G. Hardwick was not at that time, nor at all, his wife, and dependent upon his labor for support, and that said false statement was and is a material matter and a material part of said affidavit."

In the lower court there was no challenge as to the sufficiency of the indictment. By writ of error defendant here presents the question whether the indictment states an offense.

Perjury is defined by section 125 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1111 [Comp. St. § 10295]) as follows:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years."

[1] It is said that under the Selective Service Regulations, published November 8, 1917, pages 7 to 14, the associate member of the legal advisory board of San Joaquin county, Cal., had no authority to administer the oath on January 15, 1918. But the regulations prescribed that the oath required could be administered (section 10, paragraph 4) "by any person designated to act in the capacity of legal aid or adviser to registrants." Under section 30, page 14, of the Regulations:

"The Governor shall constitute legal advisory boards in such numbers and within such districts that there shall be convenient to every registrant who is to appear before a local or district board within the state, a legal advisory board. * * * The Governor shall call upon all members of the bar within the state, and if necessary, upon competent laymen, to offer their services to such legal advisory boards for the purpose of being present at the headquarters of the local boards and rendering aid and advice to registrants. Such persons

shall be known as associate members and no formal appointment by the President shall be necessary."

The President was authorized to utilize the services of any or all officers or agents of the several states and subdivisions thereof in the execution of the act, and all persons designated or appointed under the regulations prescribed by the President, whether such appointments were made by the President himself, or by the Governor or other officer of any state, to perform any duty in the execution of the act, were required to perform such duty as the President should order or direct, and all persons so designated or appointed were given full authority for all acts done by them in the execution of the act by the direction of the President. Section 6 of the act (Comp. St. 1918, § 2044f). By rule (section 27) the Governors were charged with general supervision over all matters arising in the execution of the selective draft within their states, and it was also provided:

"The determination of exemptions and deferred classifications is within the exclusive jurisdiction of local and district boards, subject only to review by the President, but all other functions and duties of boards, departments, officers, agents and persons within the state, * * * designated or detailed under authority of the selective service law, shall be under the direction and supervision of the Governor."

By section 28, the Governors were charged with the organization of the legal advisory boards throughout their states. By section 30, the Governor—

"shall constitute legal advisory boards in such numbers and within such districts that there shall be convenient to every registrant who is to appear before a local or district board within the state, a legal advisory board to which such registrant may apply for all necessary advice and assistance in preparing claims, questionnaires or any other papers required by these regulations to be submitted by a registrant."

The Governor was authorized to nominate for appointment by the President lawyers to be permanent members of such boards "to take charge of this work within each such district and to be held responsible that there shall always be a competent force of lawyers or laymen available to such registrants at any time during which the local or district boards within such district are open for business"; also to call upon the members of the bar to offer their services to such legal advisory boards for the purpose of being present at the headquarters of the local board and of rendering aid and advice to registrants. "Such persons shall be known as associate members and no formal appointment by the President shall be necessary." Section 45 declares that legal advisory boards have been provided for; that they are composed of disinterested lawyers, with associate members to be present at all times during which local boards are open for the transaction of business, with a view to advising and assisting registrants to make full and truthful answers to the questionnaire and to aid generally in the just administration of the law and regulations. By section 2 it was provided that certain sections and parts of the rules and regulations should become effective at noon on November 20, 1917, and thereupon supersede all pre-existing rules and regulations relating to the same subject-

matter, namely, sections 9 to 13, inclusive. Enough has been stated to make it clear that section 10, hereinbefore quoted, was in effect on November 20, 1917, and therefore obtained at the time that the oath described in the indictment herein was administered to the defendant.

By section 91, which pertains to the questionnaire, grounds for exemption are dealt with; the rule directing that the questionnaire shall contain, "as an integral part thereof, affidavits in support of claims for exemption or deferred classification in certain cases hereinafter specified." Among the definitions we find this provision:

(k) "The term 'deferred classification' is equivalent to discharge or exemption from draft, whether permanent, temporary, conditional or unconditional."

Our attention is not called to any section of the Selective Draft Law which forbids one from registering in one locality and then making affidavit in support of a claim for exemption in another place. The whole scheme of the law appears to have been to facilitate registration, and in doing so to allow one whose duty it was to register to fulfill his obligation at the place he happened to be when the law required the duty to be performed.

Inasmuch as the regulations prescribed by the President for the determination of the status of a registrant require a showing for exemption to be made by affidavit, and inasmuch as the regulations have the force and effect of law, we think it appears that the person who took the oath was authorized by law to administer it.

[2, 3] Defendant urges that the averment that the defendant well knew that the woman named in the indictment "was not at that time, nor at all, his wife, nor dependent upon his labor for her support," was fatally defective, because of the omission of an averment that the wife was *mainly* dependent for support upon the labor of the accused. But, as the charge is that defendant willfully falsely stated in the affidavit that he had a wife dependent upon his labor for support, whereas he well knew that the woman named was not then, or at all, his wife, and dependent upon his labor for her support, defendant was sufficiently informed and could not possibly have been misled or prejudiced. The materiality of the false statement and affidavit is too apparent to require comment.

It is said that the United States District Court in California was without jurisdiction, because the indictment shows that the offense, if any, was committed in the state of Washington, and not of California. The fact being alleged that the affidavit involved was prepared and sworn to in San Joaquin county, Cal., plainly there was jurisdiction in the lower court.

This disposes of the principal points urged. We have considered the others argued in the brief, and find none well founded.

The judgment is affirmed.

WHITESIDE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3263.

1. PERJURY ⟸9(2)—FALSE AFFIDAVIT TO SELECTIVE SERVICE QUESTIONNAIRE —AUTHORIZATION OF OATH.
Under Selective Service Regulations 1917, §§ 91, 94, 95, a registrant who swore to the affidavit verifying his questionnaire, which falsely stated that he had a wife dependent on him for support, committed perjury, despite his claim that there is no statute authorizing such an oath, and no authorization by the regulations.

2. PERJURY ⟸19(2)—INDICTMENT—IDENTITY OF PERSON CHARGED.
Indictment for perjury by having sworn falsely that defendant, a registrant under the Selective Service Act (Comp. St. 1918, § 2044a et seq.), had a wife dependent on him for support, *held* sufficient in its charge that defendant was the person who subscribed and took the affidavit.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

William Lloyd Whiteside was convicted of perjury by making a false affidavit, under the selective service draft, that he had a wife dependent on him for support, and brings error. Affirmed.

George D. Collins, Jr., of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., and Chauncey F. Tramutolo, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Whiteside was indicted for having violated the perjury statute of the United States. Section 125 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1111 [Comp. St. § 10295]). As the statute has been quoted in our opinion in Hardwick v. United States, 257 Fed. 505, — C. C. A. —, it need not be set forth in full.

It is charged that on January 7, 1918, at San Francisco, Cal., defendant, who had been duly registered under Act May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, § 2044a et seq.), entitled "An act to authorize the President to increase temporarily the military establishment of the United States," was subject to military service, the serial number of the registration card of the defendant having been drawn at Washington, D. C.; that defendant on the day mentioned filed with the local board for division No. 10, San Francisco, in support of a claim for exemption and discharge from selective draft and with the intent of deceiving the officers of the local board and fraudulently endeavoring to obtain allowance of his application for exemption on the ground that he had a wife dependent upon his labor for support, a certain affidavit; that the affidavit was subscribed and sworn to before William Klein, associate member of the legal advisory board of San Francisco, an officer authorized by law to administer oaths, and that the said William Klein, as such associate member, administered the oath to de-

fendant; that it was material and necessary to set forth whether defendant had any person dependent upon his labor for support, and that defendant, having taken the oath to testify truly as to all matters referred to in the affidavit, did willfully, feloniously, and falsely, knowingly and contrary to the oath, state in substance and effect that he did have a wife, named Gertie J. Whiteside, dependent upon his labor for support, whereas, in truth and in fact, defendant at that time and place then and there well knew that the said Gertie J. Whiteside was not then his wife, and was not dependent upon the labor of defendant for support; and that said false statement was and is a material matter and a material part of the affidavit. No question of the sufficiency of the indictment was raised in the District Court.

Defendant was tried before a jury, convicted, and sentenced to prison. By writ of error he presents the question whether the indictment charges perjury.

[1] The point that there is no statute authorizing the oath referred to in the indictment and no authorization by the Selective Service Regulations is, in part, covered by what we have said in the case of Hardwick v. United States, 257 Fed. 505, —— C. C. A. ——. That an affidavit was required from the registrant, who claimed exemption or discharge, cannot be well disputed. The registrant was obliged to file a questionnaire, of which the affidavit was an integral part. The regulations are that the questionnaire—

"shall also contain, as an integral part thereof, affidavits in support of claims for exemption or deferred classification in certain cases hereinafter specified." Sections 91, 94, and 95, Selective Service Regulations 1917.

[2] It is said that it does not appear who subscribed to the affidavit taken by the defendant. But it is alleged that the affidavit was subscribed and sworn to, and that the associate member of the legal advisory board administered the oath to the defendant, and that in the affidavit hereinbefore referred to defendant, having taken the oath to testify to matters referred to in the affidavit, falsely and knowingly stated, in effect, that he had a wife who was dependent upon his labor for support. This makes it perfectly clear that the defendant was the person charged with having subscribed and taken the affidavit.

We are satisfied that the defendant was legally charged with perjury and that the judgment against him cannot be disturbed. Noah v. United States, 128 Fed. 270, 62 C. C. A. 618.

Affirmed.

ALASKA ANTHRACITE R. CO. v. MOLLER.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3265.

1. CONTINUANCE ⟸26(4)—ABSENCE OF WITNESS—DILIGENCE—DISCRETION OF COURT—STATUTE.
In a railroad servant's action for injuries, denial of the road's motion for continuance to enable it to secure the testimony of a witness, whom a counter affidavit showed to be an employé of defendant company, *held* within the discretion of the court, under Comp. Laws Alaska 1913, § 1001, in view of showing as to diligence.

2. TRIAL ⟸253(4)—INSTRUCTIONS—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—IGNORING ISSUES.
In a railroad servant's action for injuries, the road's requested instructions on assumption of risk and contributory negligence *held* properly refused, as not fitting the case, but ignoring an allegation of the complaint.

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

Action by Arnold Moller against the Alaska Anthracite Railroad Company. To review a judgment for plaintiff, defendant brings error. Affirmed.

R. M. Jones, of Seattle, Wash., Lyons & Ritchie, of Valdez, Alaska, and Lyons & Orton, of Seattle, Wash., for plaintiff in error.

Donohoe & Dimond, of Valdez, Alaska, and R. F. Lewis, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The defendant in error, Moller, a laborer with a track-laying gang, was injured while returning from work upon a work train belonging to the railroad company. The car upon which Moller rode was a "home-made affair," of light weight, and with a standard flat car behind was being pushed by the engine. The track was new; the rails having been laid but a week before, without artificial grade. The train was running about 20 miles an hour. There was a sag, and as the car was pushed up it jumped the track, the cars piled up, and Moller was hurt. The defendant corporation denied allegations of excessive speed, denied any negligence, and pleaded assumption of risk and contributory negligence. Defendant rested upon a motion for nonsuit. The motion was overruled, the jury was instructed, and verdict rendered for plaintiff. Writ of error was brought.

[1] The railroad company contends that the court erred in denying its motion for a postponement of the trial of the case. Our inquiry is solely whether or not there was an abuse of judicial discretion. The affidavit with the motion for a continuance was made on May 27, 1918, by one of the attorneys for the railroad company. It set forth that since the institution of the action, December, 1917, none of the officers of the company had been in Alaska; that affiant was informed by Mr. Lyons, his co-counsel in Seattle, that since January, 1918, all of the offi-

cers of the company had been in Washington, D. C., on important business for the corporation; that when the case was brought to issue in April, 1918, "or shortly before that date," affiant informed his co-counsel in Seattle by letter that the case would probably be set for trial late in May, and that it would be "necessary for defendant to be ready for trial before the end of that month"; that affiant was informed by letter and cablegrams from his co-counsel at Seattle that he had been diligently "trying to secure testimony in behalf of defendant for the past two months," but that because of the absence of the officers of the company from Seattle "said Lyons was unable to learn until a few days ago what witnesses and evidence defendant would produce in its behalf"; that this information came partly in a letter received from said Lyons on May 23, 1918, and partly in a cable message received on May 25, 1918; that said cable message stated that affidavits for a continuance would be made "to-day" at Seattle; that, so far as affiant had information, the substance of the testimony contained in the affidavits would be as follows: That one Nelson, in charge of construction work for the railroad company by virtue of a contract with defendant, would, if sworn, testify that he was in charge of construction in the summer of 1917; that he employed all laborers and had a monthly settlement with the company, his own compensation being 7½ per cent. of his expenditures; that the foreman (Palmer) named in plaintiff's complaint was employed by him and under his direction, and was not employed by the railroad company, or subject to its orders; that there was a standing order to all employés not to ride upon the car upon which plaintiff was riding when he was injured; that the foreman, Palmer, would testify that there was such a standing order to employés, and that it was well understood by the men; that upon the evening of the accident the men could have ridden on the standard flat car, as they were ordered to do; that to the best of his knowledge and belief affiant's co-counsel was unable until very recently to find and talk to said Nelson, the foreman; and that to the best of affiant's knowledge and belief Lyons had not been able to locate Palmer, the foreman.

The action was instituted December 12, 1917; summons was served upon defendant's agent in Alaska January 10, 1918; defendant filed a motion on February 9, 1918; the motion was denied March 15th, and answer was filed April 13th; reply was served on April 17th; on May 1st the court set the trial for May 17th, upon which day the motion for continuance and the affidavit in support thereof were filed.

The plaintiff below resisted the motion for a continuance, and his counsel by affidavit set forth that, when the motion to strike from the plaintiff's complaint was heard, plaintiff's attorneys announced in open court that they would earnestly urge and insist upon a trial at the first jury term of the court; that plaintiff, since his injury, had been confined in a hospital at Cordova, Alaska; that he was "entirely without means and unable to perform any kind of labor by which he could earn a livelihood"; that he had made a journey from Cordova to Valdez, bringing witnesses in support of his case; that he was ready to proceed with the trial, and that to continue the case over the term would

practically be a denial of justice, as he would be unable again to assemble his witnesses at the next jury term of the court; that by a motion filed on April 18, 1918, plaintiff had sought to require defendant to furnish plaintiff inspection of the contract alleged to have been entered into between Nelson and the defendant railroad company for the construction of the railroad; that the court ordered production for inspection before May 15th, but that after that date one of the counsel for the defendant company notified counsel for plaintiff that defendant did not have such a contract, and that therefore such inspection could not be had; that the only contract between Nelson and the company, pertaining to the employment of Nelson for construction, was contained in the minutes of a meeting of the board of trustees of the railroad company held May 9, 1918, but that an examination of said minutes disclosed that Nelson was employed by defendant and was receiving a salary, and that his duties were supervising and directing construction of the railroad.

Section 1001, Compiled Laws of the Territory of Alaska 1913, provides as follows:

"A motion to postpone a trial on the ground of absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and a statement of facts showing that due diligence has been used to procure it, and also the name and residence of the witness or witnesses."

We think plaintiff in error has failed to show diligence used to procure the attendance of Nelson as a witness. The showing is rather to the contrary, for the affidavit of counsel for defendant is that his cocounsel, Mr. Lyons, "was unable until very recently to find and talk to said George W. Nelson." Exactly what counsel meant by "very recently" is not disclosed; but apparently there was ample time between the date that the court set the case for trial and the date of the calling of the case for trial in which counsel could have procured the testimony of Nelson, or obtained an affidavit stating precisely what he would swear to if called to testify. Furthermore, there was the counter affidavit. The minute book of the company showed that Nelson was an employé of the defendant company and was receiving a salary.

With respect to evidence by Palmer in the affidavit in support of the motion for continuance, counsel does not assume to say that Palmer would be present to testify if the trial were postponed. There was no showing of effort, much less diligent effort, to find Palmer in order that his evidence might be had. The motion presented a matter for the exercise of judicial discretion, and no sound reason is given for interference with the decision rendered.

[2] It is urged that the court erred in refusing a requested instruction, stating substantially that the plaintiff knew the condition of the roadbed, or should have known it by observation, and that he took whatever risk was involved in riding upon the train upon which he was injured, and in refusing a request that, if it were more dangerous for Moller to ride on the front of the car at the head of the train than upon the standard car, he was guilty of contributory negligence in riding where he was. Counsel for plaintiff in error, in commenting upon

the issues of assumption of risk and contributory negligence, say that the court's instructions were "a fair statement of the law, but not so explicitly worded to fit the facts of the case." Surely, however, the requests did not fit the case, for they wholly ignored the important allegation of the plaintiff's complaint, which charged negligence on the part of defendant in driving the train and car on which the plaintiff was riding over the defective railroad track at an unusually high rate of speed, as well as the uncontradicted evidence in support of this allegation.

We find no error in the action of the court. Rio Grande Western Railroad Co. v. Leak, 163 U. S. 280, 16 Sup. Ct. 1020, 41 L. Ed. 160; Seaboard Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. Upon a careful examination of the record, we find that the case was one for submission to the jury, and that there was no error of law against the rights of the plaintiff in error.

The judgment is affirmed.

PIERCE et al. v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. April 15, 1919. Rehearing Denied July 15, 1919.)

No. 5145.

1. CREDITORS' SUIT ⟸7—RIGHT TO REMEDY—JUDGMENT IMPOSING FINE IN CRIMINAL CASE.

   Under Rev. St. § 1041 (Comp. St. § 1705), providing that a judgment imposing a fine for an offense against the United States "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced," such a judgment may support a creditors' bill in aid of an execution which has proved fruitless.

2. CORPORATIONS ⟸259(8)—STOCKHOLDERS—LIABILITY—JUDGMENT AGAINST CORPORATION FOR FINE—CREDITORS' SUIT.

   Where a corporation pending a criminal prosecution against it by the United States, resulting in a judgment imposing a fine, sold all of its property and distributed the proceeds among its stockholders, such stockholders may be held liable in a creditors' suit for the judgment against the corporation to the extent of their distributive share of its funds, and this although the purchaser assumed all of its debts and liabilities.

3. WORDS AND PHRASES—"DEBT."

   In a broad sense a debt may signify any duty to respond to another in money, labor, or service. It may even mean a moral or honorary obligation, unenforceable by legal action. When used restrictively, it may mean, without more, an obligation founded on contract to pay a definite or certain sum of money, and whether the duty to pay a sum of money is or is not a debt depends upon the particular sense in which it is used.

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

4. FINES ⟸6—ENFORCEMENT—OFFENSE AGAINST UNITED STATES—"EXECUTION."

   The word "execution," as used in Rev. St. § 1041 (Comp. St. § 1705), providing for the enforcement of a judgment imposing a fine for an offense against the United States by execution against the property of the defend-

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

*Rehearing denied 260 Fed. 158, 171 C. C. A. 194.

ant, signifies generally the means for enforcing the judgments of courts in civil cases, and embraces those processes and proceedings in aid of or supplemental to an execution that are customary in civil cases.

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

Wade, District Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by the United States against Clay Arthur Pierce and others. Decree for the United States and certain defendants appeal. Affirmed.

Albert D. Nortoni and Truman Post Young, both of St. Louis, Mo. (Samuel W. Fordyce, Jr., John H. Holliday, Thomas W. White, and George T. Priest, all of St. Louis, Mo., and J. Markham Marshall, of New York City, on the brief), for appellants.

Robert A. Hunter, Sp. Asst. Atty. Gen., and W. H. Woodward, Asst. U. S. Atty., of St. Louis, Mo., for the United States.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, Circuit Judge. This suit in equity was brought by the United States in the United States District Court for the Eastern District of Missouri, against the Waters-Pierce Oil Company, a Missouri corporation, and certain of its stockholders, to recover the amount of a judgment obtained against that company in the United States District Court for the Western District of Louisiana. The government was given a decree against three of the stockholders, and they appealed.

The facts, briefly stated, are these: In January, 1907, the Waters-Pierce Oil Company was indicted in the court in Louisiana for receiving rebates on interstate shipments contrary to the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [Comp. St. §§ 8597–8599]). In July, 1913, the Waters-Pierce Oil Company sold and conveyed all its property and assets to the Pierce Oil Corporation, organized under the laws of Virginia, for $5,000,000 in money and $10,500,000 of the common stock of the latter. The vendee assumed all the vendor's "debts, liabilities and obligations." The money and shares of stock were lodged with trustees, who distributed them ratably among the stockholders of the Waters-Pierce Oil Company, including the three appellants, and that company thereupon ceased business. In March, 1914, the case in Louisiana was tried, with the result that the Waters-Pierce Oil Company was convicted and fined $14,000. The offense under the Elkins Act was punishable by a fine only. In March, 1915, the judgment was affirmed by the Fifth Circuit Court of Appeals. 137 C. C. A. 293, 222 Fed. 69. An execution was issued to the marshal of the Louisiana district and returned nulla bona in August, 1915. This suit was begun in February, 1916. In March, 1917, another execution was issued on the judgment in Louisiana, but directed to the marshal for the Eastern district of Missouri. See Rev. St. § 986 (3 U. S. Comp. Stat. 1916, § 1632). This execution was also returned nulla bona; and in August of that year the government filed an amend-

ed complaint, setting forth the facts regarding the second execution. The decree against the three appellants was not in excess of the amounts of money they received in the distribution of the proceeds of the sale. The controlling questions in the case are whether a judgment imposing a fine in a criminal prosecution by the United States may support a creditors' bill in aid of an execution that has proved fruitless, and, if so, whether the appellants can be held liable, to the extent of their distributive shares of the funds, for the judgment against their corporation under the circumstances of this case.

[1] It is contended by the appellants that the relation of debtor and creditor is essential to a proceeding in equity in aid of an execution at law, that a liability to a fine for a penal offense does not give rise to the relation, and that the character of the judgment is determined by that of the liability upon which it is founded. The term "debt" has a variety of meanings, not a settled or invariable one. It takes color from its surroundings. Whether the duty to pay a sum of money is or is not a debt depends upon the particular sense in which it is used.

[3] In a broad sense a debt may signify any duty to respond to another in money, labor, or service. It may even mean a moral or honorary obligation, unenforceable by legal action. United States v. Realty Co., 163 U. S. 427, 440, 16 Sup. Ct. 1120, 41 L. Ed. 215. When used restrictively, it may mean, without more, an obligation founded on contract to pay a definite or certain sum of money. There is much nice learning upon the subject, some of it of a historical character, but it need not be reviewed here. It is provided by an act of Congress that a judgment imposing a fine for an offense against the laws of the United States "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced." Rev. St. § 1041 (3 U. S. Comp. Stat. 1916, § 1705).

[4] We think the provision of the statute is broad enough to embrace those processes and proceedings in aid of or supplemental to an execution that are customary in civil cases. A poor offender may escape a fine by taking the oath of poverty; but we do not think it was the intention to relieve one able to pay because his property is incorporeal or equitable in character, or one who, for the purpose of defeating the judgment, removes his tangibles beyond the reach of an ordinary writ of execution. As employed in the statute, "execution" signifies generally the means for enforcing the judgments of courts in civil cases.

[2] Upon the other question the government contends that the Waters-Pierce Oil Company rendered itself insolvent by the sale of all its property and the distribution of the proceeds among its stockholders, that upon the insolvency of a corporation its property becomes a trust fund for its creditors, and that in the case at bar the proceeds in the hands of the stockholders are substituted for the property and may be followed in a suit to enforce the trust. The Supreme Court has many times declared that the property of an insolvent corporation is held in trust for the benefit of its creditors.

There is some question about the precise nature of the trust and when it arises. It has been said:

"It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113.

Again, the trust has been held to arise at the moment of insolvency. McDonald, Receiver, v. Williams, 174 U. S. 397, 404, 19 Sup. Ct. 743, 43 L. Ed. 1022. However this may be, the nearest approach to the case at bar in its facts is Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577. There the plaintiff had an unliquidated claim for damages against three corporations, which sold substantially all their property, distributed the proceeds and remaining assets among their stockholders, and quit business. There was, as here, no contention that otherwise than by the sale and the distribution of proceeds and assets the corporations were or became insolvent. The suit was against a part of the stockholders. The court said:

"The theory of the bill is that the assets of the vendor corporations, which have been distributed to and received by the defendants as stockholders, constitute a trust fund for the payment of all debts and demands against the companies, and may therefore be followed in the hands of, and recovered from, such stockholders, to the extent necessary to discharge valid claims against the corporations from which they were received. The funds sought to be reached are undoubtedly applicable, under proper proceedings against all necessary parties, to the payment, so far as may be needed, of outstanding indebtedness against the corporations which distributed the same; but the difficulty here is that the complainant has not adopted the requisite and necessary procedure to subject said funds thereto. It has no judgment against the corporations by which it was defrauded, nor are such corporations made parties defendant to the suit or brought before the court."

The bill was ordered dismissed without prejudice, because plaintiff's claim had not been reduced to judgment, and the debtor corporations had not been made parties. Neither of the reasons which stood in the way of relief in that case are present in the case at bar. Here the government has a judgment on which execution has been returned unsatisfied, and the Waters-Pierce Oil Company, the judgment debtor, is a party defendant. The case cited seems persuasive, if not decisive, of the liability of the appellants.

The assumption by the vendee company of the debts, liabilities, and obligations of the Waters-Pierce Oil Company does not relieve the stockholders who have received the proceeds of the sale of the assets of their corporation from responsibility to a creditor. Though it may be said that an action against the vendee might be maintained upon the ground of a contract between two persons for the benefit of a third, the remedy is not exclusive in the absence of novation when one of the contracting parties is the primary debtor. The assumption by the vendee company is rather for the assurance and benefit of the Waters-Pierce Oil Company and its stockholders. What we have said of the liability of stockholders in a case like that at bar must not be understood as applying to a case of consolidation of cor-

porations by authority of law, nor to the reorganization of the affairs of an insolvent corporation according to the settled principles of equity.

The decree is affirmed.

WADE, District Judge (dissenting). I cannot concur in the majority opinion, for the reason that, as I view the case, the plaintiff (in the trial court) had an adequate remedy at law, and that resort to the extraordinary remedies here sought in a court of equity cannot be had, in any event, until such legal remedies are exhausted.

If this judgment is a "debt" as held by the majority, it is certainly covered by the express language of the contract by which the Pierce Oil Corporation assumed "all debts, obligations, and liabilities of the Waters-Pierce Oil Company," and the plaintiff could have proceeded in an ordinary suit at law to recover upon such covenant.

It may be true, as stated in the majority opinion that "the assumption by the vendee company of the debts, liabilities, and obligations of the Waters-Pierce Oil Company does not relieve the stockholders, who have received the proceeds of the sale of the assets of their corporation, from responsibility to a creditor"; but the creditor is only interested in getting his money, and, if he can get it by an ordinary law action, he cannot invoke the powers of a court of equity. I can also agree that "the remedy [against vendee] is not exclusive"; but I hold that resort must first be had to the ordinary remedy at law, and that plaintiff can come into equity only when that fails. Not only this, but in equity and in justice the vendee should pay this judgment, if any one does. For a valuable consideration it agreed to pay this judgment (if it is a debt, obligation, or liability), and the stockholders, who received nothing except what they were legally entitled to, should not be held primarily liable.

I agree with the majority that the assets of a corporation constitute in a sense a trust fund, which under certain circumstances may be subjected in the hands of stockholders to the payment of corporate debts. But this is not an action to reach certain "assets" of the corporation; it is an action for a personal judgment against the stockholders. It is not averred that they now have any of the assets, nor is it sought to trace these "trust funds" into anything that defendants now own. So far as the record discloses, these defendants did not have, at the time of the trial, a dollar or a share of stock received at the time of the distribution. Under these circumstances, if liable, why are they liable? Their liability can rest only upon the fact that they are wrongdoers, because by fraud (actual or constructive) they have been parties to the dissipation of the assets of the corporation which the corporation should have first applied to the payment of its obligations.

The plaintiff is in no position to refuse to proceed at law. There are no equities in its favor. The indictment rested untried for six years before the transfer of the property was made. It was not brought to trial for nearly a year after the transfer. It is in no position to appeal for special relief, certainly not against men who, as stockholders of the old and of the new corporations, made specific provision for the payment of all debts, obligations, and liabilities.

Furthermore, the record shows that on February 4, 1916, before this action was commenced on February 18, 1916, the plaintiff had brought suit at law in Louisiana to enforce against the vendee the covenant of assumption to pay all the "debts, obligations, and liabilities of the Waters-Pierce Oil Company," and that such action at law is still pending. I do not hold that this is an absolute election of remedies, but I do hold that, having so elected and proceeded, and it not being claimed that the remedy in that court is not adequate, this court should grant no relief.

If these defendants are liable, such liability is only secondary; if the judgment can be enforced against the Waters-Pierce Oil Company or its vendee, the defendants are not liable at all.

THORN et al. v. BROWNE.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1919.)

No. 5083.

1. FRAUDS, STATUTE OF ⟸115(3)—CONTRACTS—SIGNATURE—COTTON FUTURES ACT.
   Under Cotton Futures Act Aug. 11, 1916, § 4 (Comp. St. § 6309d), providing that "each contract of sale of cotton for future delivery * * * shall be in writing plainly stating, or evidenced by written memorandum showing, the terms of such contract, * * * and shall be signed by the party to be charged, or by his agent in his behalf," a broker's seller's slip or buyer's slip, duly signed "by the party to be charged" in accordance with the rules of the exchange, is sufficient to prove a valid sale or purchase, and it is not essential that the contract be signed by both parties, or that both the seller's and buyer's slips shall be introduced in evidence.

2. STATUTES ⟸188, 225¾—CONSTRUCTION—USE OF WORDS OR PHRASES WITH ESTABLISHED MEANING.
   When a legislative body selects and uses in a statute words or clauses which had previously acquired by judicial interpretation or common consent and use a well-understood meaning and legal effect, the legal presumption is that it intended that they should have that meaning and effect in the statute.

3. STATUTES ⟸241(1)—CONSTRUCTION—PENAL STATUTES.
   Courts may not lawfully extend the denunciation of a penal statute to a class of persons excluded from its effect by its plain terms.

4. EVIDENCE ⟸69—PRESUMPTIONS—REGULARITY OF COURSE OF BUSINESS.
   Under a rule of a cotton exchange requiring a seller to deliver to the buyer a signed seller's slip and to furnish a corresponding buyer's slip, which shall be signed and returned by the buyer, the introduction in evidence of one of such slips raises a legal presumption that the corresponding slip in the same terms was also executed.

5. FRAUDS, STATUTE OF ⟸116(9)—COTTON FUTURES—CONTRACT DISCLOSING PRINCIPAL'S NAME.
   Where contracts for purchase and sale of cotton futures are made between brokers on an exchange, where brokers only can make such contracts, Cotton Futures Act Aug. 11, 1916, § 4 (Comp. St. § 6309d), does not require that the contracts should show the names of the principals for whom they act.

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6. BROKERS ⟸85(1)—ACTION AGAINST PRINCIPAL—EVIDENCE.
Evidence of purchases and sales of cotton futures, including the seller's and buyer's slips, *held* competent in an action by the brokers against their principal to recover a balance due on the transactions.

7. JURY ⟸37—IMPAIRMENT OF RIGHT—REVIEW—ISSUES DETERMINABLE ONLY BY JURY.
Where, because of the erroneous exclusion of evidence offered by plaintiffs to prove the contract sued on, which rendered recovery impossible, they introduced no evidence on a second issue of fact, upon which they had a constitutional right to a jury trial, such issue cannot be determined by the appellate court to sustain a judgment for defendant entered upon a directed verdict.

8. APPEAL AND ERROR ⟸856(3)—DETERMINATION OF CAUSE—ERROR AS TO GROUNDS OF DECISION—DIRECTED VERDICT.
Where a verdict is directed on limited, but untenable, grounds, it may not be sustained on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated, if they had been called to the attention of the defeated party, and he had been given an opportunity to meet them by evidence and argument.

Carland, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Action at law by Charles B. Thorn and another, copartners as Thorn & Maginnis, against Fred Browne. Judgment for defendant, and plaintiffs bring error. Reversed.

Certiorari denied 249 U. S. ——, 39 Sup. Ct. 494, 63 L. Ed. ——.

Ira D. Oglesby, of Ft. Smith, Ark., and Joseph E. Johnson, of Atlanta, Ga. (Oglesby, Cravens & Oglesby, of Ft. Smith, Ark., on the brief), for plaintiffs in error.

James B. McDonough, of Ft. Smith, Ark., for defendant in error.

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

SANBORN, Circuit Judge. The plaintiffs, Thorn & Maginnis, a partnership, were cotton brokers and members of the New Orleans Cotton Exchange, and the defendant Browne was a resident of Sebastian county, Ark. They sued him for the balance of an account of $23,215, which they alleged he owed them on the purchase and sale of 2,000 bales of cotton, and for commissions on such purchases and sales, which they bought and sold for him on his telegraphic orders between January 24 and February 2, 1917, subject to section 5 of the United States Cotton Futures Act (Act Aug. 11, 1916, c. 313, 39 Stat. 476 [Comp. St. § 6309e]) and the by-laws, rules, and conditions of the New Orleans Cotton Exchange. By his answer the defendant denied every allegation of the plaintiffs' complaint, except an averment therein that the plaintiffs had in their possession $6,760 of his money on February 1, 1917. He alleged that any contracts of purchase or sale the plaintiffs made on his orders were illegal and criminal under the Cotton Futures Act, that the alleged transactions were gaming transactions, and that he was entitled to recover of the plaintiffs $6,760, for which he pleaded a counterclaim in his answer.

The trial proceeded in this way: Over the objections of the defend-

ant that the testimony was incompetent, irrelevant, and immaterial, and that the only competent evidence of the purchases and sales were the alleged written contracts required by the Cotton Futures Act, and with leave to the defendant to move to strike out the evidence, the plaintiffs proved, by telegraphic orders that they received from Browne, that he ordered them to buy and sell the 2,000 bales of cotton to be delivered in the following May, and they proved by the testimony of witnesses who knew the facts that they did buy and sell these 2,000 bales of cotton for Browne in accordance with the telegraphic orders he had sent them, that by contracts, settlements, and ring settlements they paid for the cotton which they bought for Browne the amounts charged to him in their account with him, and credited him with the amounts they received from him and from the sale of cotton, all of which he ordered them to sell on February 1, 1917. They proved by the testimony of one of the members of their firm that they sent to Browne a statement of the account between them, showing the amounts of their purchases and sales for him, and the balance for which they sued, that after he received this account he admitted to one of the members of the plaintiffs' firm that he sent the telegraphic orders, and that the account was correct. When the trial had reached this point, the plaintiffs produced, identified, and offered in evidence the sellers' slips or contracts of sale of the 2,000 bales of cotton which they bought for Browne, which slips were signed by the respective brokers who sold these 2,000 bales of cotton to them, and they also offered in evidence the buyers' slip of the 2,000 bales which they sold for Browne, which was signed by the brokers who bought them, and they offered to prove by the testimony of witnesses that they signed and delivered to each of the parties from whom they received one of the sellers' slips a buyers' slip containing the same words as the corresponding sellers' slip, except that the word "bought" in the former was in place of the word "sold" in the latter, and the bought slips were signed by them and ran in favor of the brokers who sold the cotton, and that they delivered to the brokers who gave them the bought slip a corresponding sellers' slip mutatis mutandis which was signed by them. To the introduction of these sellers' slips and of the bought slip signed by the parties respectively to be charged by the plaintiffs and their principal, Browne, defendant objected on the ground that they were invalid and were incompetent evidence, because they were not signed by both parties to the transactions out of which they arose, and because the corresponding buyers' slips and sellers' slips signed by the plaintiffs were not offered in evidence, and they objected to the parol evidence offered to the effect that the latter were delivered to the sellers and purchaser respectively by the plaintiffs when the respective transactions were made, on the ground that it was incompetent, because the written slips signed by both parties to the transaction were the only competent evidence of the transactions of purchase and of sale, and the court sustained all these objections, ruled out these slips, held that the contracts required by the Cotton Futures Act could not be proved without the introduction of the sellers' slips and the buyers' slips relating to each transaction, ruled out all evidence subsequently offered, and on motion struck out all evidence

previously offered, on the ground that it was all irrelevant and immaterial, in the absence of the buyers' and sellers' slips of each transaction, and then, as no evidence remained in the case, instructed the jury to return a verdict for the defendant, before the latter offered any evidence.

[1] Although many minor questions are suggested, the ruling which threw this case was that a broker's sellers' slip or buyers' slip, duly signed, was insufficient to prove a valid contract of sale or purchase of cotton futures under sections 4 and 5 of the Cotton Futures Act, unless that contract was signed by both the parties to the transaction, or the corresponding buyers' or sellers' slip was also introduced in evidence. The portion of the statutes by which this issue must be determined is the first sentence of section 4 of the act, which reads in this way:

"That each contract of sale of cotton for future delivery mentioned in section 3 of this act shall be in writing plainly stating, or evidenced by written memorandum showing, the terms of such contract, including the quantity of the cotton involved and the names and addresses of the seller and buyer in such contract, and shall be signed by the party to be charged, or by his agent in his behalf." Comp. St. § 6309d.

It is provided by rule 47 of the New Orleans Cotton Exchange that:

"It shall be the duty of the seller, on the day on which transactions in contracts take place, or at not later than 9 a. m. on the following day, to furnish a contract or slip, and deliver his own already signed, and the opposite one in blank to the buyer; the latter shall then sign his contract, or slip, and return it to the seller."

Testimony was offered that this rule was complied with in the case of each of the purchases made by the plaintiffs for Browne and in the case of the sale they made for him. Here are copies of two of the sellers' slips offered in evidence at the trial below:

"New Orleans, La., Jan. 25, 1917.

"Sold to Thorn & Maginnis, of New Orleans, La., and agreed to deliver them subject to the by-laws, rules and conditions of the New Orleans Cotton Exchange and subject to the United States Cotton Futures Act, § 5:

Bales Cotton.	Delivery.	At Cents Per Pound for Middling.
Three Hundred	May	16.84

"Silvan Newburger & Co.

"Silvan Newburger & Co. of New Orleans, La."

"New Orleans, La., Jan. 25, 1917.

"C. P. Ellis & Co., Cotton Exchange Bldg., sold to Thorn & Maginnis, of New Orleans, La., and agreed to deliver them subject to the by-laws, rules and conditions of the New Orleans Cotton Exchange and subject to the United States Cotton Futures Act, § 5:

Bales Cotton.	Delivery.	At Cents Per Pound for Middling.
One hundred	May	16.70
Three "	"	16.83
Two "	"	16.83
One "	"	16.90
Two "	"	16.81
One "	"	16.84

"C. P. Ellis & Co., of New Orleans, La."

Is a writing or written memorandum signed by both the parties to a contract of sale of cotton futures, or two writings or written memoranda of the contract, one signed by each of the parties to the transaction, indispensable to the proof of a writing or written memorandum "signed by the party to be charged or by his agent in his behalf," under section 4 of the Cotton Futures Act?

It is a general rule of law that a written contract signed by both parties to it is valid, and that a written contract between two parties signed by one of them is likewise valid and enforceable against him who signed it by the other party to it, who accepts and seeks to enforce it, although he has never signed it. If Congress had intended to require every transaction in the sale of cotton futures to be evidenced by a writing or by written memoranda signed by both parties to it, it would naturally have required the writing of which it treats to be signed by the parties to it or their agents in their behalf, and not "by the party to be charged or by his agent in his behalf" only. This provision of the statute states clearly and without ambiguity that the contract must be signed by the party to be charged or his agent in his behalf. The selection of one party is the exclusion of the other, and the strong legal presumption is that the Congress intended what it so plainly declared, that the statute ought to be held to mean what it expresses, and that the signature of no one but the party to be charged is requisite to it to evidence a valid contract. Brun et al. v. Mann, 151 Fed. 145, 157, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154; Grainger & Co. v. Riley, 201 Fed. 901, 904, 120 C. C. A. 415, 418; United States v. Alamogordo Lumber Co., 202 Fed. 700, 706, 121 C. C. A. 162, 168.

[2] When a legislative body selects and uses in a statute words or clauses which before the enactment of the law had acquired by judicial interpretation or common consent and use a well-understood meaning and legal effect, the legal presumption is that it intended that they should have that meaning and effect in the statute it enacts. Butler v. United States (D. C.) 87 Fed. 655, 661; United States v. Trans-Missouri Freight Association, 58 Fed. 67, 7 C. C. A. 15, 71, 24 L. R. A. 73. For many years before the Cotton Futures Act was passed, the statutes of fraud of England and of many of the states of this nation had provided that certain classes of contracts specified therein should be void unless they were evidenced by a writing or by a written memorandum "signed by the party to be charged or his agent," and long before the passage of the act under consideration it had become the universal and well-understood judicial construction of these statutes that the signature of the party to be charged alone was sufficient to evidence a valid contract thereunder, and that the other party to the contract, although he had not signed it, could enforce it in the courts against him who had signed it. Browne on Statute of Frauds (1895) § 395; Wood on Statute of Frauds (1884) p. 764; 20 Cyc. 272, and note 78; Walker v. Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. and note at pages 681, 694, 696, 49 Am. St. Rep. 222; 23 Cent. Digest, 2286, §§ 244, 245; 9 Decennial Digest 1906, p. 1422, § 115 (3) and § 115 (4); Lee v. Vaughan's Seed Store, 101 Ark. 68, 73, 141 S. W. 496, 37 L. R. A. (N. S.) 352; Vance v. Newman, 72

Ark. 359, 80 S. W. 574, 105 Am. St. Rep. 42; In re Pettingill & Co. (D. C.) 137 Fed. 143; Bowers v. Whitney, 88 Minn. 168, 92 N. W. 540; Bristol v. Mente, 79 App. Div. 67, 80 N. Y. Supp. 52, and 178 N. Y. 599, 70 N. E. 1096; Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576; Harriman v. Tyndale, 184 Mass. 534, 69 N. E. 353; Borie v. Satterthwaite, 180 Pa. 542, 37 Atl. 102, 103.

Congress took this well-adjudicated clause, "signed by the party to be charged or by his agent," and inserted it in the Cotton Futures Act in the form "signed by the party to be charged, or by his agent in his behalf," and it is incredible that it intended thereby that this clause should have a meaning so radically different from that which it then had as to require the writing or memorandum to be signed by others than that one of the parties so clearly designated by the law.

[3] And when the fact is considered that, if this section 4 be construed to mean that the writing or memorandum must be signed by both parties to the contract, one who makes or takes a contract of sale of cotton futures signed by the party to be charged only becomes guilty of the penal offense denounced by section 14 of the Cotton Futures Act (Comp. St. § 6309*o*), there remains no doubt that the meaning of the clause under consideration may not lawfully be extended by construction, so as to require every writing or written memorandum of a contract for the sale of cotton futures to be signed by both parties to it. For courts may not lawfully extend the denunciation of a penal statute to a class of persons excluded from its effect by its plain terms, even though in their opinion the acts of the latter are as heinous as those of the members of the class whose deeds the statute penalizes. United States v. Wiltberger, 5 Wheat. 76, 96, 5 L. Ed. 37; United States v. Brewer, 139 U. S. 278, 280, 11 Sup. Ct. 538, 35 L. Ed. 190; United States v. Field, 137 Fed. 6, 8, 69 C. C. A. 568, 570; United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 12, 2 L. R. A. (N. S.) 185. The conclusion is that the sellers' slips and the buyers' slips signed by the parties respectively to be charged by the plaintiffs and their principal, Browne, did not fail to comply with the Cotton Futures Act, and were not inadmissible evidence of the contracts of sale because they were not also signed by the plaintiffs, or because the corresponding buyers' slips and sellers' slips signed by the plaintiffs were not also offered in evidence.

[4] There is another reason why the sellers' slips and the buyers' slip signed by the respective parties to be charged were admissible in evidence and would have proved the purchases and sale in the absence of countervailing evidence, even if the Cotton Futures Act had required the execution of a buyers' slip and a sellers' slip for each transaction, as does rule 47 of the Cotton Exchange, and that is that the introduction of one of these corresponding slips under such a requirement raises the legal presumption that the corresponding slip in the same terms mutatis mutandis was also executed and delivered, a presumption which ought to and will prevail in the absence of proof to the contrary. Hawes v. Forster, 1 Moody & Robinson, 368, 371, 374; Parton v. Crofts, 16 C. B. Reports (N. S.) 11, 13, 14, 21; Benjamin on Sales (5th Ed.) 289, 297, 303. And inasmuch as, when one of these

slips is offered in evidence, the legal presumption is that the corresponding slip expressed the same terms of sale as those specified in the slip offered (see authorities, supra), and the plaintiffs were competent witnesses to prove the fact that they signed slips corresponding to those offered in evidence and delivered them to the other parties to the respective contracts at the times of the respective transactions, it was error to exclude their testimony to that effect.

[5, 6] Counsel for the defendant urges other, but less serious, objections to the slips which were offered in evidence. He contends that they are insufficient under the Cotton Futures Act: (1) Because, while they specified May delivery, they do not specify the year of the delivery, but they are dated in January and February, 1917, and there can be no doubt that the year of the delivery intended by the parties was 1917. (2) Because the names and addresses of the buyers and sellers are not set forth in the slips, but the buyers and sellers in the contracts under consideration were the New Orleans brokers, whose names and addresses appear on the slips. None but members of the Cotton Exchange could buy or sell cotton futures thereon. The statement of their names and addresses was no less a compliance with the statutes because they bought or sold for undisclosed principals, and the statute nowhere requires the disclosure in the contracts of the names or addresses not disclosed to opposing parties of the principals or others for whom the brokers make contracts the burden of which they personally assume. (3) Because under article 5, page 10, Treasury Regulations No. 36, which provides that no contract shall be deemed to comply with section 5, section 6a, or section 10 of the United States Cotton Futures Act (Comp. St. §§ 6309e, 6309g, 6309k), if it contain any provision by reference or otherwise inconsistent or in conflict with any requirement of section 5, section 6a, or section 10 of the Cotton Futures Act. These slips contain agreements of sale, purchase, and delivery of cotton futures "subject to the by-laws, rules and conditions of the New Orleans Cotton Exchange, and subject to the United States Cotton Futures Act," and section 3, rule 1 (15), of the Cotton Exchange provides in effect that verbal contracts "shall have the same standing, force and effect as written ones (if notice in writing conforming to the requirements of section 4 of the United States Cotton Futures Act), if such contract shall have been given by one of the parties thereto to the other party during the day on which such contract was made or the next business day thereafter." But a verbal contract may lawfully precede a written contract in the purchase or sale of cotton futures under the act of Congress, and these slips provide that the contracts they evidence shall comply with both the Cotton Futures Act and the rules of the Exchange. There is nothing in the rules of the Exchange cited which prohibits or is inconsistent with such a compliance. The legal presumption is that these contracts were made in accordance with the provisions of both. All that the Cotton Futures Act requires is that the contracts of sale shall be evidenced by written memoranda signed by the parties to be charged. These contracts are so evidenced, and even if they were verbal contracts before they were evidenced by a writing or the written memoranda, yet, when

they were evidenced thereby within a day of two after the bids were made which preceded the contracts they were as complete a compliance with the Cotton Futures Act as they would have been if the written memoranda had been made a few hours earlier. Nothing in contradiction of or inconsistent with section 5 of the act, or with the compliance therewith is found in the rules of the Cotton Exchange, the buyers' and sellers' slips, or in the sales or purchases they evidenced. (4) Because some of the slips—for example, the sellers' slip signed by C. P. Ellis & Co.—evidenced several sales, the third and sixth of which, charged in the Ellis slip, one of the plaintiffs testified were bought by them for the defendant, and his counsel argues that this slip was not a compliance with the act, and that the testimony selecting these items of purchase was incompetent, because the slip itself fails to identify the purchases evidenced thereby bought for Mr. Browne; but, as has already been said, brokers buying and selling for undisclosed persons on the Cotton Exchange are the buyers and sellers within the meaning of the Cotton Futures Act, and are not required thereby to disclose in their slips the names or addresses of those for whom they buy or sell. This is not an action to enforce these contracts. It is an action for a balance of an account for purchasing and selling cotton futures for the defendant, and the testimony of the plaintiffs as to what particular parts of the cotton futures which they made valid contracts to buy or to sell they bought or sold in obedience to defendant's orders was clearly competent and material against him.

The conclusion of a consideration of all the objections to the slips offered in evidence is that they complied with the requirements of the United States Cotton Futures Act and that the court fell into an error (1) in refusing to admit them in evidence; (2) in refusing to admit in evidence parol evidence that the plaintiff signed and delivered a corresponding buyers' slip to the sellers and a corresponding sellers' slip to the buyers who signed the respective slips offered in evidence; (3) in ruling out of the case practically all of the other evidence offered by the plaintiffs, a large part of which was competent and material, on the erroneous view that the slips offered in evidence failed to evidence contracts in compliance with the Cotton Futures Act; (4) and especially in ruling out the parol evidence in explanation of the defendant's telegram "Stop ten seventeen twenty and ten seventeen fifteen" and other trade terms.

[7] Passing from these slips and the rulings in the trial of the case, counsel for the defendant also contends that, notwithstanding the errors which have been mentioned, the judgment for the defendant should be affirmed, because the transactions out of which the claim of the plaintiffs arose were gambling transactions. Whether they were or not was an issue of fact before the jury. The seventh amendment to the Constitution reads:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."

"This," said the Supreme Court in Parsons v. Bedford, 3 Pet. 433, 446, 448, 7 L. Ed. 732, "is a prohibition to the courts of the United

States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings." This rule of law has often been reaffirmed in later cases. Barreda et al. v. Silsbee, 21 How. 146, 166, 167, 16 L. Ed. 86; Justice v. Murray, 76 U. S. (9 Wall.) 274, 277, 19 L. Ed. 658; Chicago, Burlington & Quincy R. R. v. Chicago, 166 U. S. 226, 246, 17 Sup. Ct. 581, 41 L. Ed. 979; Capital Traction Co. v. Hof, 174 U. S. 1, 8, 9, 19 Sup. Ct. 580, 43 L. Ed. 873. The plaintiffs accordingly were entitled to a jury trial of the question of fact whether or not the transactions regarding the purchases and sales were gambling transactions. They have been deprived of that trial, because the court below, under an erroneous view of the law upon another question, made it impossible for the plaintiffs to recover below, even if the transactions were not gambling transactions, and ruled out all the evidence they offered. The instruction to the jury to return a verdict for the defendant was made after these erroneous rulings, in the midst of the attempt of the plaintiffs to introduce their evidence, when they had not rested their case, although they had ceased to offer evidence because under the rulings of the court no amount of evidence in their favor on the question, gambling transactions vel non, or on any other issue in the case, could secure a judgment in their favor. In this state of the case the issue, gambling transactions or not, is not triable or determinable by this court, and the plaintiffs are entitled to a new trial of this entire case by a jury. This court may not lawfully affirm a judgment below on the ground that the evidence conclusively showed the defense that the transactions on which the plaintiffs relied were gambling transactions, when all the plaintiffs' evidence was excluded on an erroneous ground which made it useless for them to introduce their evidence on that issue. Baker v. Kaiser, 126 Fed. 317, 319, 320, 61 C. C. A. 303. There is nothing in the record to show that they would not have introduced persuasive and substantial evidence that the transactions were not gambling transactions, if the erroneous rulings of the court had not rendered the introduction of such evidence futile.

[8] The only theory upon which counsel for the defendant could possibly sustain the judgment is that the errors in the trial were not prejudicial to the plaintiffs. In the case in hand the verdict was not directed on the ground that the transactions relative to the purchases and sales of cotton futures were gambling transactions. The court had overruled a demurrer to the complaint and held that it stated a good cause of action. During the trial no objection or suggestions that the transactions were gambling transactions was made by counsel or the court, and the ground on which the verdict was directed was that the sellers' slips and the buyers' slips failed to comply with the requirements of the Cotton Futures Act. So it is that the rules on the introduction of evidence and the direction of the verdict were founded on a limited and untenable ground, and counsel for the defendant

seeks to sustain it on another ground. The rules of law on this subject are:

First. That when a verdict is directed on limited, but untenable, grounds, it may not be sustained on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated, if they had been called to the attention of the defeated party and he had been given an opportunity to meet them by evidence and argument at the time the direction was made. Peck v. Heurich, 167 U. S. 624, 17 Sup. Ct. 922, 42 L. Ed. 302; Baker v. Kaiser, 126 Fed. 317, 319, 320, 61 C. C. A. 303.

Second. When a court has directed a verdict upon a specific, but untenable, ground, after the defeated party had been permitted to introduce all the legal evidence he offered and has rested his case, and it is clear beyond doubt, from a bill of exceptions which contains all the evidence, that the evidence would not sustain any other verdict, an appellate court may lawfully affirm the verdict on some new or other ground. And the reason that it may do so in such a case is that, when the defeated party has been permitted to introduce all the legal evidence he offered and has rested his case at the trial, he has thereby admitted, and in that way has estopped himself from denying, that he can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in his favor. Bank of Havelock v. Western Union Telegraph Co., 141 Fed. 527, 526, 72 C. C. A. 580, 4 L. R. A. (N. S.) 181, 5 Ann. Cas. 515, and cases there cited.

The case at bar does not fall under the second rule, nor under its reasons or conditions. The plaintiffs were not permitted to introduce the legal evidence they offered, but all of it was excluded, and the erroneous rulings of the court made it useless for them to introduce evidence on the issue of gambling transactions or not. It is not clear beyond doubt that if the plaintiffs had been permitted to introduce the evidence that was ruled out, and the objection that the evidence that the transactions were not gambling transactions was insufficient had been called to their attention before the verdict was delivered, they could not or would not have obviated that objection by other testimony. The case therefore falls under the first rule, and the question whether or not the record in this case conclusively proved that the transactions were gambling transactions is not reviewable by this court, and the judgment below must be reversed.

And, finally, if that question were reviewable, the record did not sustain a finding that the pleadings and evidence in the case so conclusively show that the transactions were gambling transactions that that issue was not for the jury, and that because, first, the court below adjudged on a general demurrer to the complaint that the latter stated a good cause of action; in other words, that it did not show that the transactions were gambling transactions; that ruling was not changed at the trial or before the verdict was directed, and it cannot now be questioned by the defendant for he has sued out no writ of error; second, because all the evidence offered was ruled out on the objection or motion of the defendant, and he is now estopped from denying that there is no evidence whatever in the case because that is the fact,

therefore there is, and was when the verdict was directed, no evidence in the case that the transactions were gambling transactions; and, third, if the complaint and the excluded evidence could be lawfully considered by this court at this time on this question of gambling transactions or not, they would not so conclusively prove that the transactions were gambling transactions as in our opinion to warrant the withdrawal of that question from a trial by a jury.

Let the judgment be reversed, and let the case be remanded to the court below, with instructions to grant a new trial.

CARLAND, Circuit Judge (dissenting). I cannot concur in the views of the majority. The plain case as shown by the record appears to me as follows:

Thorn & Maginnis sued Browne to recover the amount paid out by them at the request of defendant and for his use in and about the purchase and sale of 2,000 bales of cotton on the New Orleans Cotton Exchange and commissions for their services in buying and selling such cotton. The case, after issue joined, came on for trial, and the plaintiffs offered to show: That upon the telegraphic request and upon the account and risk of the defendant they purchased cotton on the New Orleans Cotton Exchange for May delivery as follows:

January	25,	1917	200	bales	at	16.83	cents	per pound
"	"	"	400	"		16.84	"	" "
"	27	"	200	"		17.06	"	" "
"	29	"	400	"		17.08	"	" "
"	"	"	300	"		16.88	"	" "
"	30	"	200	"		16.93	"	" "
"	31	"	300	"		17.13	"	" "

That on February 1, 1917, at the telegraphic request of defendant, they sold for his account and risk 2,000 bales of cotton on the New Orleans Cotton Exchange for May delivery at the price of 14 cents per pound. That in the purchase and sale of said cotton plaintiffs paid out and advanced for the defendant the sum of $29,675, and earned in commissions the sum of $300. That no part of the same had been paid, except the sum of $6,760. Plaintiffs further offered to show that, at the time of the purchase of the cotton above mentioned, each vendor executed and delivered to plaintiffs a memorandum in writing, of which the following is a sample:

"New Orleans, La., Jan. 25, 1917.

"C. P. Ellis & Co., Cotton Exchange Building, sold to Thorn & Maginnis, of New Orleans, La., and agreed to deliver them subject to the by-laws, rules and conditions of the New Orleans Cotton Exchange and subject to the United States Cotton Futures Act, § 5.

Bales Cotton.	Delivery.	At Cents per Pound for Middling.
One hundred	May	16.70
Three "	"	16.83
Two "	"	16.83
One "	"	16.90
Two "	"	16.81
One "	"	16.84

"C. P. Ellis & Co., of New Orleans, La."

That at the time the 2,000 bales of cotton were sold the purchasers executed and delivered to plaintiffs a memorandum in writing, of which the following is a copy:

"Office of Thorn & Maginnis, 209 Varieties Place.

"New Orleans, La., Feb. 1, 1917.

"Bought from Messrs. Thorn & Maginnis, of New Orleans, La., and agreed to receive from them subject to the by-laws, rules and conditions of the New Orleans Exchange and subject to the United States Cotton Futures Act, § 5:

Bales Cotton.		Delivery.	At Cents per Pound for Middling.
Twenty	hundred	May	14. cts.
One	"	"	14.20
One	"	"	14.25
One	"	July	16.10
One	"	May	14.45
Three	"	July	16.10
One	"	"	16.10
One	"	May	14.80
One	"	May	14.50

"Airey & Stouse, of New Orleans, La."

The trial court excluded all evidence relating to the purchase and sale of the cotton for the reason that the purchases and sales were made in violation of the Cotton Futures Act (39 Stat. 476). This ruling resulted in a directed verdict for the defendant. Counsel for plaintiffs claim that the exclusion of the evidence offered and resulting verdict was error. Counsel for defendant contends that the ruling of the trial court was right for the following reasons:

That the contracts of purchase and sale were made in violation of the Cotton Futures Act, in the following particulars: (a) The memorandums offered were only a memorandum signed by the vendee in the sale of the cotton, and memorandums signed by the vendors in the purchase of the cotton, there being no signature of the vendor in the sale of the cotton or by the vendees in the purchase of the cotton. (b) That if the memorandums offered can be held to be the contract referred to in section 3 of the Cotton Futures Act (Comp. St. § 6309c), they did not specify the time of delivery. (c) They were not signed by the party to be charged, or by his agent in his behalf. (d) The names and addresses of the seller and buyer were not mentioned. (e) The memorandums were in violation of the regulations of the Treasury Department. (f) The purchase and sale of cotton under the facts offered to be shown were criminal offenses in which the plaintiff participated as aiders and abettors, and for that reason they cannot recover for disbursements made or commissions earned.

The following sections of the Cotton Futures Act are relied on by the counsel for defendant:

"Sec. 3. That upon each contract of sale of any cotton for future delivery made at, on, or in any exchange, board of trade, or similar institution or place of business, there is hereby levied a tax in the nature of an excise of two cents for each pound of the cotton involved in any such contract.

"Sec. 4. That each contract of sale of cotton for future delivery mentioned in section 3 of this act shall be in writing plainly stating, or evidenced by written memorandum showing, the terms of such contract, including the quantity of the cotton involved and the names and addresses of the seller and

buyer in such contract, and shall be signed by the party to be charged, or by his agent in his behalf. If the contract or memorandum specify in bales the quantity of the cotton involved, without giving the weight, each bale shall, for the purposes of this act, be deemed to weigh five hundred pounds.

"Sec. 5. That no tax shall be levied under this act on any contract of sale mentioned in section 3 hereof if the contract comply with each of the following conditions:

"First. Conform to the requirements of section 4 of, and the rules and regulations made pursuant to, this act.

"Second. Specify the basis grade for the cotton involved in the contract, which shall be one of the grades for which standards are established by the Secretary of Agriculture, except grades prohibited from being delivered on a contract made under this section by the fifth subdivision of this section, the price per pound at which the cotton of such basis grade is contracted to be bought or sold, the date when the purchase or sale was made, and the month or months in which the contract is to be fulfilled or settled: Provided, that middling shall be deemed the basis grade incorporated into the contract if no other basis grade be specified either in the contract or in the memorandum evidencing the same."

Subdivision 7 of section 5 provides as follows:

"The provisions of the third, fourth, fifth, sixth, and seventh subdivisions of this section shall be deemed fully incorporated into any such contract if there be written or printed thereon, or on the memorandum evidencing the same, at or prior to the time the same is signed, the phrase 'Subject to United States Cotton Futures Act, Section 5.' "

"Sec. 11. That the tax imposed by section 3 of this act shall be paid by the seller of the cotton involved in the contract of sale, by means of stamps which shall be affixed to such contracts, or to the memoranda evidencing the same, and canceled in compliance with the rules and regulations which shall be prescribed by the Secretary of the Treasury." Comp. St. § 6309*l*.

"Sec. 12. That no contract of sale of cotton for future delivery mentioned in section 3 of this act which does not conform to the requirements of section 4 hereof, and has not the necessary stamps affixed thereto, as required by section 11 hereof shall be enforceable in any court of the United States by, or on behalf of, any party to such contract or his privies." Comp. St. § 6309m.

"Sec. 14. That any person liable to the payment of any tax imposed by this act who fails to pay, or evades or attempts to evade the payment of such tax, and any person who otherwise violates any provision of this act, or any rule or regulation made in pursuance hereof, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than $100 nor more than $20,000, in the discretion of the court; and, in case of natural persons, may, in addition, be punished by imprisonment for not less than sixty days nor more than three years, in the discretion of the court." Comp. St. § 6309*o*.

The contention that the trial court was right in directing a verdict on the ground that the evidence offered showed a gambling transaction will not be considered, as the trial court made no ruling in relation thereto. The defendant, it is true, pleaded this defense, but none of the objections to the introduction of evidence were based on this ground, and the trial court made no reference thereto in any of its rulings, but, on the contrary, ruled in the exclusion of evidence with reference to the Cotton Futures Act.

Coming to the Cotton Futures Act, I may say that, as the present action is not one to enforce the contracts for the purchase and sale of cotton, section 12 of that act above quoted has no application. The serious question presented by the record is this: Laying aside the ques-

tion of gambling, did the evidence offered show that the plaintiffs knowingly engaged in an illegal business or transaction in the purchase and sale of the cotton? If so, plaintiffs cannot recover, and the exclusion of the evidence was not error. Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819, supra; In re Green, 7 Biss. 338, Fed. Cas. No. 5,751; Melchert v. Tel. Co. (C. C.) 3 McCrary, 521, 11 Fed. 193; Bartlett v. Smith (C. C.) 13 Fed. 263; Raymond v. Leavitt, 46 Mich. 447, 9 N. W. 525, 41 Am. Rep. 170; Cobb v. Prell (C. C.) 15 Fed. 774; Steers v. Lashley, 6 T. R. 61; Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269; Fareira v. Gabell, 89 Pa. 89; North v. Phillips, 89 Pa. 250; Ruchizky v. De Haven, 97 Pa. 202; Dickson's Ex'r v. Thomas, 97 Pa. 278; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Tenney v. Foote, 95 Ill. 99; Phelps v. Holderness, 56 Ark. 300, 19 S. W. 921.

Whether the business was illegal depends upon the fact as to whether it was conducted in violation of the Cotton Futures Act, as section 14 of that act, above quoted, makes it a crime punishable by fine and imprisonment for any person to violate any of its provisions. There is no pretense that the tax imposed by section 3 was paid. Section 5, however, provides that the tax need not be paid on any contract of sale, if the contract comply with the conditions named in said section. Assuming that the memorandums offered in evidence constituted the contract mentioned in the Cotton Futures Act, it appears that they contain this indorsement: "Subject to the United States Cotton Futures Act, Section 5." Under the law, this incorporated into the contract all of the provisions of section 5, except subdivisions first and second. The weight of the cotton not being mentioned, each bale was deemed under the law to weigh 500 pounds. The memorandums of purchase and sale offered in evidence were signed only by the brokers who sold the cotton and by the vendee who bought the same. This being so, counsel for defendant contends that the memorandums were not signed by the party to be charged or by his agent in his behalf. I see no merit in this contention, as the Cotton Futures Act does not make it necessary for the agent to say, when he signs the contract or memorandum, that he signed it in behalf of his principal, meaning him. To hold otherwise would be to abolish the law in regard to the acts of an agent for an undisclosed principal. The plaintiffs show they were the agents of the defendant, and acted as such in the purchase and sale of the cotton; and this either party could do, even in cases where the law requires the contract to be in writing (Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Ford v. Williams, 21 How. 287, 16 L. Ed. 36); the only exceptions being instruments under seal and promissory notes (21 R. C. L. 891). The contention that the memorandums did not specify the time of delivery has no merit. The memorandums all bore dates in January and February, 1917, and specified May as the time of delivery. This could only mean May, 1917. The contention that the names and addresses of the seller and buyer are not mentioned is based upon the fact that the names and addresses of the brokers alone were mentioned. Under the rules of the Cotton Exchange, only members thereof may

buy or sell cotton on the Exchange. The brokers, so far as the Exchange is concerned, are the buyers and sellers.

Congress, in legislating as to the sale of cotton for future delivery on the Cotton Exchange, must have been familiar with the manner of transacting business thereon, and as to who are called sellers and buyers. It is claimed that the written memorandums are in violation of the regulations of the Treasury prescribed under the Cotton Futures Act in this: That the memorandums refer to the rules of the Cotton Exchange which permit verbal contracts, but to refer in a written contract to the provision in the rules mentioned would not violate the Treasury regulation if the verbal contract could not be substituted for the written one.

I am satisfied that, if the memorandums offered could be held to be the contracts referred to in the Cotton Futures Act, then they comply substantially with the provisions of section 5; but, conceding they do comply with the provisions of section 5, it still remains to be determined: Are they evidence of a contract? Are they, standing alone, evidence of a written contract? The difficult question in the case is: What did Congress mean by the following language found in section 4: "And shall be signed by the party to be charged, or by his agent in his behalf." An instrument in writing, not signed by both seller and buyer, would not constitute a contract in writing. It is provided by rule 47 of the New Orleans Cotton Exchange as follows:

"It shall be the duty of the seller, on the day on which transactions in contracts take place, or at not later than 9 a. m. on the following day, to furnish a contract or slip, and deliver his own already signed, and the opposite one in blank to the buyer; the latter shall then sign his contract, or slip, and return it to the seller."

Notice may be taken that this is the manner of doing business on the great exchanges of the country. Sometimes the instruments executed are called buyers' slips or sellers' slips; sometimes bought and sold notes. Nicol v. Ames, 173 U. S. 509, 19 Sup. Ct. 522, 43 L. Ed. 786. The language used by Congress, above quoted, would seem to be unfortunate, as Congress could not make an instrument signed by one party only a contract.

Some courts, in deciding questions under the statute of frauds, have decided that a party to a contract which the law required to be in writing, who did not sign the same, may enforce the contract against the party who did, and the language used by Congress might have come from this source; but, as the language, if literally interpreted, would be meaningless, because both the seller and the buyer are to be charged in any contract for the purchase or sale of cotton, I think it must be held that the language means that any party to the contract who is to be charged thereby must sign it, either himself or by his agent. Moreover, this is not a suit to charge either party to the contracts of purchase and sale.

Counsel for plaintiff at the trial offered oral evidence to show that Thorn & Maginnis signed contracts agreeing to purchase cotton from the brokers who signed the memorandums which were offered in evidence similar in all respects to the contracts offered, except that they

read "bought from," instead of "sold to," and that each of them contained the exact wording of ones offered with that exception, and were delivered to the brokers signing the memorandums offered: that these other brokers were all residents and citizens of the state of Louisiana, and that said instruments were in the state of Louisiana, and outside of the jurisdiction of the court. The trial court denied this offer, for the reason that the evidence offered was not the best evidence, and there had been no sufficient effort made to obtain the originals or copies thereof to allow the introduction of secondary evidence as to their contents. I think the court was right in this ruling. Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299, and Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641, decide nothing to the contrary. It is not clear whether any such offer was made with respect to the sale of the 2,000 bales of cotton. It is contended that, the present suit not being on the contracts, the evidence offered was collateral to the main issue, and therefore it was not necessary to produce the original contracts or copies. I cannot agree that the evidence was offered on a collateral issue. It stood without contradiction in the case that the tax provided by law on the purchase and sale of cotton at the New Orleans Cotton Exchange had not been paid. The purchase or sale without such payment was a crime under the Cotton Futures Act. The plaintiff participating in such offense could not recover for their disbursements and commissions unless they showed they complied with those provisions of the Cotton Futures Act, which would relieve them from the payment of the tax. It was consequently one of the important issues for the plaintiffs to meet. The law is that the agent must know that he is committing an illegal act, but in this instance the plaintiffs were bound to know the law, and, as they knew the facts, they must be held to have knowingly transacted the business. Whatever offense was committed, the plaintiffs were aiders and abettors therein, and under section 332 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. § 10506]) were principals.

It thus appears on the face of the record that Browne or his agents, Thorn & Maginnis, did not sign the memorandums offered in evidence, and if there were buyer and seller slips signed and executed by Thorn & Maginnis in connection with the purchase and sale of the cotton in controversy, they have not been produced, and for all the purposes of this case, must be treated as not having been executed. With the case in this position, I am of the opinion that, so far as the present record is concerned, the Cotton Futures Act was violated in this: That no tax was paid as provided by law on the purchase and sale of the cotton on the New Orleans Cotton Exchange, nor has there been shown such a compliance with the Cotton Futures Act as would relieve the sellers from the payment of the tax. The transaction in regard to the purchase and sale of the stock was therefore illegal.

In such cases, the law will leave the parties where it finds them, not lending its aid to either. The plaintiffs therefore may not recover.

CENTRAL STATE BANK v. McFARLIN.

In re B. A. LOCKWOOD GRAIN CO.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1919.)

No. 5051.

1. WAREHOUSEMEN ⟸15(2)—TRANSFER OF WAREHOUSE RECEIPTS—RIGHTS OF INDORSEE.
The indorsement of warehouse certificates for grain to a bank as security transfers to the bank the legal title to the grain represented thereby.

2. WAREHOUSEMEN ⟸20—CONDUCT OF BUSINESS—MIXING OF GRAIN.
Under Code Supp. Iowa 1913, §§ 3138a23, 3138a24, a warehouseman may mingle grain or products covered by outstanding warehouse receipts with other grain or products of like grade, whether owned by the warehouseman or other parties, and it will not constitute conversion or confusion of goods.

3. WAREHOUSEMEN ⟸25(7)—ISSUANCE OF WAREHOUSE RECEIPTS—CONVERSION.
The grinding of wheat covered by warehouse receipts held by a bank by the warehouseman, which also operated a mill, without replacing it with other wheat, did not constitute conversion, so long as the products were kept on hand; but their sale, leaving insufficient wheat and products to satisfy the certificates, constituted conversion to the extent of the deficiency.

4. BANKRUPTCY ⟸340—ADVERSE CLAIM TO PROPERTY—WRONGFUL SALE BY BANKRUPT—TRACING PROCEEDS.
Assuming it to be permissible for a claimant to trace personal property wrongfully sold by a person subsequently becoming a bankrupt into accounts receivable belonging to the bankrupt, such tracing must be specific and the identification clear. The burden of proof is on claimant, and a mere showing that the general assets of bankrupt, including accounts receivable, have been increased by the wrongful sale, is not sufficient.

Appeal from the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

In the matter of the B. A. Lockwood Grain Company, bankrupt; M. McFarlin, trustee. The Central State Bank appeals from an order denying priority to its claim. Affirmed.

Frank T. Jensen, of Des Moines, Iowa (Charles S. Bradshaw, of Des Moines, Iowa, on the brief), for appellant.

Charles Hutchinson, of Des Moines, Iowa (Oscar Strauss and Clark, Byers & Hutchinson, all of Des Moines, Iowa, on the brief), for appellee.

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

BOOTH, District Judge. This is an appeal from a judgment which denied the bank's petition to have the unpaid balance of its claim against the bankrupt allowed as a preferential claim, to be paid out of the proceeds of certain accounts receivable belonging to the bankrupt and collected by the trustee. The following facts appear:

The Shannon & Mott Company was an Iowa corporation, dealing in grain and products, owning and operating a mill and elevator at Des

Moines, Iowa. The B. A. Lockwood Grain Company was also an Iowa corporation, owning and operating elevators and dealing in grain and other products at Des Moines, Iowa. In 1911 the Lockwood Company bought all of the assets of the Shannon & Mott Company, but continued to carry on the milling business in the name of the Shannon & Mott Company. This ownership was, however, not known to the bank. Between January 26 and April 21, 1914, the Shannon & Mott Company issued to the Lockwood Company certain negotiable warehouse certificates, and the Lockwood Company thereafter indorsed to the bank these certificates as collateral security to certain promissory notes, made by the Lockwood Company to the bank, and bearing even dates with the indorsements of the certificates respectively. The form of the warehouse certificate is as follows:

"Shannon & Mott Company, Des Moines, Iowa.

"Grain Storage Certificate No. 6.

"This certificate is to certify that the Shannon & Mott Co., a corporation whose address is the city of Des Moines, Iowa, having complied with chapter 10, title 15, of the Code of Iowa of 1897, by executing the declaration required in such cases by said statutes and causing the same to be filed in the office of the recorder of deeds and duly recorded, as shown on the back of this certificate, which is made a part hereof, for value received, in hand paid by B. A. Lockwood Grain Co., of the city of Des Moines, Iowa, do hereby sell and convey, assign and transfer, unto the said B. A. Lockwood Grain Co. thirty-five hundred bushels of wheat and products stored in the buildings and structures hereinafter described at the several places hereinafter named, as follows:

"In said Shannon & Mott Co.'s iron-covered cribbing and frame elevator building, and frame iron-covered warehouse situated on their property at 15th and Mulberry streets, Des Moines, Iowa, and attached to and adjoining their mill building proper, to be delivered to the said B. A. Lockwood Grain Co., or their order, upon presentation and surrender of this certificate.

"Signed and executed at its office in the city of Des Moines, Iowa, in pursuance with the provisions of the above named statute.

"Dated this 26th day of January, 1914.

"[Signed] Shannon & Mott Company,
"By W. A. Applegate, Sec."

Six warehouse certificates, of similar form and purporting to cover 19,000 bushels of wheat and products, were indorsed by the Lockwood Company to the bank between June 5 and August 15 as collateral to notes amounting to $15,000. Other similar certificates, covering corn, are not here involved. The Lockwood Company was adjudicated a bankrupt August 24, 1914. None of the notes had been paid. From January 26, 1914, the Shannon & Mott Company had continued to receive into its elevators and warehouses large quantities of grain, to manufacture the same into products, and to sell the same.

Subsequent to April 21, 1914, there was never as much as 19,000 bushels of wheat on hand at any one time. At the time of the bankruptcy there was a certain quantity of wheat and products on hand. By stipulation between the bank and the receiver, this wheat and the products were sold, and the proceeds, amounting to something over $11,000, turned over to the bank, and applied upon its claim, without prejudice to the rights of either party. The balance of the bank's claim is approximately $6,800.

Among the assets of the bankrupt were certain accounts receivable, arising from mill products sold. The trustee collected approximately $8,700 of these accounts, and the bank petitioned that the balance of its claim be paid out of these proceeds, in preference to the claims of other creditors. The court below denied the bank's petition, but held the claim should be allowed as a general claim. It is admitted that 19,000 bushels of wheat, if on hand at the time of the bankruptcy, would have been more than sufficient to pay the bank's claim.

The issue is stated by the appellant bank as follows:

"The correctness of the claim against the estate is not disputed, and the issue is whether or not there has been a proper tracing of trust funds."

The appellee takes the same position.

The acquiring by the bank of the warehouse certificates involved several distinct transactions. These several transactions began, so far as the bank was concerned, on the dates when the warehouse certificates were indorsed by the Lockwood Company to the bank. The issuance of warehouse receipts by Shannon & Mott Company to the Lockwood Company was a mere bookkeeping transaction, inasmuch as the Lockwood Company owned all of the assets of the Shannon & Mott Company, and was in reality running the business of that company. The Lockwood Company, therefore, stands in the transactions with the bank as the warehouseman dealing directly with the bank.

[1] The indorsement of the warehouse certificates to the bank transferred the legal title to the wheat and products which they represented. The warehouse certificates so read, the statutes of Iowa so provide, and such is the general law in the absence of statute. Section 3138a41, 1913 Supp. to Code of Iowa; Gibson v. Stevens, 8 How. 383, 12 L. Ed. 1123; Dale v. Pattison, 234 U. S. 399, 34 Sup. Ct. 785, 58 L. Ed. 1370, 52 L. R. A. (N. S.) 754. This title thus vested in the bank, though liable to be divested by the payment of the notes, was nevertheless a legal title, and not a lien. The certificates cover wheat and products. Appellant bank claims that this was legal under the Iowa statutes, and we shall assume, without deciding, that this is so. No specific proportion between wheat and products is mentioned.

[2] Under the statute of Iowa the warehouseman had the right to mingle the wheat and products thus belonging to the bank with other wheat and products of like grade, whether belonging to the warehouseman or to third parties. This did not constitute conversion, nor confusion of goods. Sections 3138a23, 3138a24, 1913 Supp. to Code of Iowa; Sexton v. Graham, 53 Iowa, 181, 4 N. W. 1090.

[3] The bank knew that the Shannon & Mott Company was constantly grinding the wheat into products. We conclude, therefore, that the mere grinding of the bank's wheat, without replacing it with other wheat, but still keeping the products on hand, would not have been a conversion.

But the grinding of wheat into products and selling of those products down to a point where there was not sufficient wheat plus products left on hand to satisfy the bank's certificates constituted conversion to the extent of the deficiency. Such conversion would give rise to an action for damages. A further result might also follow. The

products so sold being made up in whole or in part of wheat belonging to the bank, there might arise, in the absence of countervailing circumstances, a constructive trust attaching to the accounts payable by the purchaser.

[4] Bearing in mind the foregoing, let us examine the several transactions between the Lockwood Company and the bank. On June 5, 1914, the Lockwood Company transferred to the bank warehouse certificate No. 7, for 3,500 bushels of wheat and products. As the tables of figures in evidence show that it was not impossible that this amount of wheat and products was on hand at the time, and as there is a presumption that the Lockwood Company, carrying on the business and being in fact the warehouseman, would not negotiate the certificate, unless that amount of wheat and products was on hand, it may be taken for granted that the certificate represented existing wheat and products. On July 1, however, there was on hand but 1,900 bushels of wheat, so that at least 1,600 bushels of certificate No. 7 must be traced into products which were on hand June 5, 1914, or manufactured subsequent thereto, or into the accounts resulting therefrom. The bank cannot claim ownership in 1,600 bushels of wheat subsequently put in, merely because this amount of wheat had possibly been on hand June 5, and had been ground into products. The certificate covered wheat and products indifferently. The 1,900 bushels of wheat remaining on hand July 1, 1914, can permissibly be traced into the 3,332 bushels on hand August 24, 1914.

By this analysis and similar analyses of the other several transactions relating to the remaining warehouse certificates, it appears that the only accounts which can be properly looked to, so far as certificate No. 7 is concerned, as possibly originating from the bank's products, are those accounts originating subsequent to June 5, 1914; as to certificate No. 10, subsequent to July 14, 1914; as to certificate No. 11, subsequent to July 21, 1914; as to certificate No. 6, subsequent to July 25, 1914; as to certificate No. 8, subsequent to August 10, 1914; and as to certificate No. 9, subsequent to August 15, 1914—these being the respective transfer dates. Furthermore, in each instance the account must be shown to have originated from a sale of products, which left less wheat and products on hand than were called for by the outstanding certificates.

There has been no such identification of the accounts going to make up the $8,700 now in the hands of the trustee. The utmost that appellant bank can claim is that these accounts originated subsequent to April 21, 1914; and this is attempted to be deduced from the wording of an ambiguous stipulation, and not from direct evidence bearing upon the matter. It is claimed by the appellee that the record shows that the accounts represented by the $8,700 are identified merely as originating subsequent to January 26, 1914. There is no presumption that the $8,700 represents only accounts which originated during the periods heretofore specified, and in amounts so specified as to the particular periods, nor that any of said accounts originated at any particular time. The burden of proof rests upon the bank. Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806. And the proof must be

clear. Empire State Surety Co. v. Carroll Co., 194 Fed. 593, 114 C. C. A. 435; State Bank v. Alva Bank, 232 Fed. 847, 147 C. C. A. 41; Zenor v. McFarlin, 238 Fed. 721, 151 C. C. A. 571.

Furthermore, the presumption which the parties seem to have conceded attached to the wheat and products on hand August 24, that they were either the identical wheat and products covered by the bank's certificates, or wheat and products which had been set aside by the bankrupt to replace wheat and products which had unquestionably belonged to the bank, cannot, in our judgment, apply to the accounts receivable. Such presumption as to the wheat and products on hand August 24 rests upon a supposed intention on the part of the bankrupt to replace and keep intact trust property, even after it had been once wrongfully used, coupled with the fact that such substituted property of the same kind is found remaining in the bankrupt's possession. But these accounts receivable were not fungibles. Each account had a definite origin, at a definite date, and was for definite products sold, and had behind it a definite individual credit. The bankrupt could not legally substitute in place of an account to which a constructive trust had attached another account; therefore no such intention on its part will be presumed.

The theory of the bank seems to be that during the period after April 21, 1914, the bank owned all the wheat on hand and which afterwards came in, all the products made from said wheat, all the accounts originating from sales of said products, or that its ownership first attached to 19,000 bushels of wheat; next, attached to the products and resulting accounts derived from said wheat; next, on the coming in of more wheat, the ownership shifted from the accounts and the products, and attached itself again to the new wheat; and so on, as wheat was transferred into products and acccounts, and other new wheat brought in.

Both forms of this theory are dependent upon the doctrine that a claimant whose property has helped to swell the general assets of a party subsequently becoming bankrupt, has a prior right in those general assets without specific identification or tracing of the claimant's property. That doctrine has been expressly repudiated by this court. Empire State Surety Co. v. Carroll Co., 194 Fed. 593, 114 C. C. A. 435; Macy v. Roedenbeck, 227 Fed. 346, 142 C. C. A. 42, L. R. A. 1916C, 12; State Bank v. Alva Bank, 232 Fed. 847, 147 C. C. A. 41; Zenor v. McFarlin, 238 Fed. 721, 151 C. C. A. 571.

The conclusion reached by the trial court was right, and the judgment is affirmed.

MOORE et al. v. SIMMS.

(Circuit Court of Appeals, Sixth Circuit. November 12, 1918.)

No. 3174.

1. BANKRUPTCY ⟸328—PROOF OF CLAIMS—TIME.
Under Bankruptcy Act, § 57n (Comp. St. § 9641), claims shall not be proved subsequent to one year after adjudication in bankruptcy, except where claims are liquidated by litigation and final judgment is rendered within 30 days before or after expiration of the time, when they may be proved, if filed within 60 days after rendition of the judgment.

2. BANKRUPTCY ⟸328—TIME FOR FILING CLAIMS—"LIQUIDATION BY LITIGATION."
Claim sought to be proved against a bankrupt's estate by his coguarantors, who with him agreed to pay to banks all money advanced for a certain company, *held* not "liquidated by litigation," within Bankruptcy Act, § 57n (Comp. St. § 9641), extending the time for filing of claims so liquidated; the bankrupt not having been a party to suits by a bank.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liquidated by Litigation.]

3. BANKRUPTCY ⟸331—PROOF OF CLAIM BY COGUARANTORS—STATUTE.
Where a bank had the right to prove its claim against a bankrupt, who had signed a guaranty of repayment to it of moneys advanced to a company, the bankrupt's coguarantors had the right, under Bankruptcy Act, § 57i (Comp. St. § 9641), to prove the bank's claim in case the latter failed to do so, and whether the indebtedness was then due or not.

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

In Bankruptcy. Petitions by Thomas Moore and others for permission to file and prove claims against the bankrupt estate of R. H. Edelen, opposed by Ben F. Simms, trustee, etc. From judgment the claims were not provable (248 Fed. 580), petitioners appeal. Affirmed.

Augustus E. Willson, of Louisville, Ky., for appellants.

J. V. Norman and John S. McElroy, both of Louisville, Ky., for appellee.

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

McCALL, District Judge. This is an appeal from a judgment of the District Court. The question for decision is whether the petitioners should have been permitted to file and prove their claims against the bankrupt estate of R. H. Edelen. The court below adjudged that the claims were not provable, since they were not filed with the trustee within the time prescribed by section 57n, Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 560 [Comp. St. § 9641]).

The material facts are undisputed, and are in substance as follows: The claimants and the bankrupt on March 7, 1912, by a written instrument guaranteed and agreed to pay to certain banks all sums of money advanced by the banks to or paid by them for Distillers' Cooperage Company. Each of the signers of the agreement was bound for the whole amount of the indebtedness incurred by virtue of said written

instrument, but the signers thereof, as between themselves, were liable only in proportion to the amount of stock held by them respectively in the Distillers Cooperage Company. By virtue of this instrument, on September 11, 1912, four notes were executed by L. B. Samuels, treasurer of said Cooperage Company, to the People's Bank of Bardstown, aggregating $15,000. On April 5, 1915, Edelen was adjudicated a bankrupt. On October 21, 1917, suits were brought on these notes by the bank in the Nelson circuit court of the state of Kentucky, against the signers of the instrument referred to, except the bankrupt, Edelen, and judgments rendered thereon, amounting to $16,118.05. These judgments have been paid by claimants. On November 12, 1917, more than 2½ years after adjudication, petitioners filed their claims against the bankrupt estate for 31.6 per cent. of the total claims. The trustee filed two objections to the allowance of the claims, one of which was decided adversely to him, and need not be further noticed. The other was that—

"No one proved or attempted to prove any part of the claim now asserted against the estate within one year of the date of adjudication; no steps were taken by claimants or any one else within one year of the date of adjudication to liquidate any part of the claims asserted; and claimants are barred by section 57n of the Bankruptcy Act of 1898 from proving said claims or any part thereof."

[1] The general rule is that claims shall not be proven subsequent to one year after adjudication in bankruptcy. There is an exception which provides that where claims are "liquidated by litigation," and final judgment therein is rendered within 30 days before or after the expiration of such time, then they may be proven, if filed within 60 days after the rendition of such judgment; section 57n, Bankruptcy Act 1898.

[2] Since the time extension relates to claims "liquidated by litigation," the primary question presented is whether the claims under consideration were so "liquidated" in so far as they relate to Edelen.

The litigation in the Nelson circuit court was a suit by the owner of the notes, on which judgments were based, against the claimants in this proceeding. The bankrupt, Edelen, was not a party thereto, nor were the judgments in those cases rendered against him. Until that litigation was ended by the judgments against claimants, and they had paid off the same in whole or in part, they had no claim against Edelen arising out of their obligation to the bank and their relations to each other. It is insisted that there is a real debt due and owing by the bankrupt, Edelen, to claimants under the instrument in question. That may or may not be true. There appears no obstacle to Edelen requiring such claim to be "liquidated by litigation." It does not appear that his liability under the instrument has been admitted by him, nor has it been "liquidated by litigation." If it is a claim which has not been "liquidated by litigation," clearly it could not be proven, if presented after expiration of one year from adjudication. If the litigation in the Nelson circuit court, to which Edelen was not a party, did not bind him, that is, did not estop him from litigating either his liability to the bank, or from litigating with his co-obligors his liability to contribute,

then in what sense can it be said that the claims now presented have been "liquidated by litigation" as to Edelen, within the meaning of section 57n? If claimants had obtained a judgment against Edelen for his share of their joint liability in a suit begun before bankruptcy, and had filed that as a provable claim against the bankrupt estate, another and different question would have been presented. That has not been done. If any effort has been made by claimants to "liquidate by litigation" with Edelen the claim now presented, other than filing their claims in this proceeding, this record does not disclose it.

[3] It does not result from this conclusion that claimants were without an adequate remedy for their protection, except by invoking the provision for liquidating by litigation. Claimants and the bankrupt were, as between themselves and the bank, not merely sureties for the corporation, nor, as between themselves and the bank, were they accommodation indorsers, although as between themselves and the corporation they might be mere sureties or indorsers. They signed the agreement by reason of their interest in the corporation. In that agreement neither the word "surety" nor the word "indorser" is found. The signers agree not merely "to be responsible for and guarantee the payment of all" moneys advanced to or paid for the corporation by the bank, but that they would "guarantee and pay to said bank all notes, bills, or other demands executed" to the bank by or in the name of the corporation through its treasurer, "as fully and to have the same effect as if we were personally present and signed each and every note," etc. The bank had thus the right to prove its claim against the bankrupt, and claimants had the right, under section 57i of the act, to prove the bank's claim in case the latter failed to do so, and whether the indebtedness was then due or not. This being so, it is unnecessary to consider what the rights and remedies of claimants might have been had claimants and the bankrupt been, as between themselves and the bank, merely sureties or indorsers for the corporation.

Entertaining these views, we do not deem it necessary to construe the clause "within thirty days before or after the expiration of that time," found in section 57n.

Our conclusion is that the litigation in the case of the bank and others against claimants in the Nelson circuit court was not a "liquidation by litigation" of the claims now presented by claimants against the bankrupt estate of Edelen, within the meaning of section 57n of the Bankruptcy Act.

In so far as it may be thought that Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, Powell v. Leavitt, 150 Fed. 89, 80 C. C. A. 43, and other cases cited by appellants, are contra to the conclusion reached, we find nothing to support such contention. The facts there involved are materially different from the facts here, and the present case is clearly distinguished.

Affirmed, with costs.

ROBINSON v. PARHAM.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1919.)

No. 3222.

1. BROKERS ⇐=54—REALTY BROKER—RIGHT TO COMPENSATION—WRITTEN PROMISE.
   Where a realty broker procured a purchaser acceptable to the owner, and ready, able, and willing to buy on the agreed terms, his right to recover the agreed compensation from the owner, though the sale fell through on account of a deficiency in acreage, was not impaired by the owner's giving, after execution of the sale contract, a written promise to pay the broker his specified compensation.

2. BROKERS ⇐=63(1)—REALTY BROKER—RIGHT TO COMPENSATION—FAILURE OF SALE.
   Realty broker is entitled to compensation, where he procures a purchaser acceptable to the owner, and ready, able, and willing to buy on the agreed terms, though the sale fails of consummation through the fault of the owner alone.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by E. R. Parham against H. W. Robinson. To review a judgment for plaintiff, defendant brings error. Affirmed.

Parham, a licensed real estate agent and broker, brought this action against Robinson to recover $7,500 for finding a purchaser of a plantation, consisting of 3,800 acres, beloging to Robinson and situated on St. Francis river in Arkansas. The suit was originally brought in the chancery court of Shelby county, Tenn., a court having jurisdiction of the subject-matter and the parties in the cause, and was removed to the court below, where it was transferred to the law side of the docket. The pleadings were then reformed accordingly. A jury having been duly waived, the cause was heard by the court, and judgment rendered in favor of Parham for the sum claimed, with interest from January 1, 1918. Robinson prosecutes error.

The court's findings and conclusions follow:

"On the evidence in this case I find that the plaintiff procured a purchaser for the land of his client, Robinson (the defendant), as per their agreement. The purchaser (Kirkland) and Robinson executed a written contract for the purchase and sale of the land. Immediately thereafter the defendant promised to pay to plaintiff $7,500 for his services in the matter, and gave to plaintiff a written statement to that effect. Subsequently, and without plaintiff's knowledge, Robinson and Kirkland mutually agreed to abandon the trade. This action grew out of Robinson's misrepresentation or mistake made in the contract of sale as to the number of cleared acres in the plantation. The plaintiff had no knowledge of the number of cleared acres, other than was stated to him by the defendant, both before and on the day the contract of sale was made, and that was that there were 2,100 cleared acres. I find that the plaintiff had performed all that was required of him under his contract with Robinson in effecting a sale of the defendant's land. That a deed was not executed and the transaction consummated between Robinson and Kirkland, as per contract, was the result of the misrepresentation or mistake of Robinson, in his representation to Kirkland in the contract of sale that there were at least 1,900 cleared acres in the plantation. I find the issues in favor of the plaintiff, and a judgment will be entered for $7,500, with interest at 6 per cent. per annum since January 1, 1918, and costs, against the defendant."

R. Lee Bartels, of Memphis, Tenn., for plaintiff in error.

W. W. Farabough, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Our examination of the evidence convinces us that it amply sustains the court's findings. The controversy grew out of the acreage contained in the plantation, which in reality had been cleared and previously cultivated. The contract between the owner, defendant Robinson, and the proposed purchaser, Kirkland, among other things provides:

"Robinson represents that there are 1,900 acres of the above-described land that are cleared and have been in actual cultivation, and he covenants and agrees that there shall be in all at least 2,100 acres of said plantation cleared and ready for cultivation in time for the planting of crops in the spring of 1918."

At the time plaintiff was employed to find a purchaser of the plantation, defendant represented to him that there were 2,100 acres of cleared land; and plaintiff, in reliance upon this representation, had communicated it to Kirkland, and succeeded in procuring an offer from him as to terms of sale which were satisfactory to defendant, though Kirkland, after examining the plantation, was doubtful as to the acreage of the cleared and cultivated land. This doubt resulted in the above-quoted provision of the contract, and also in an arrangement to have the acreage tested by a survey. It turned out that there were only 1,723 acres of cleared and previously cultivated land, and thereupon, without the knowledge of plaintiff, the owner and purchaser abandoned the transaction.

[1] The District Judge finds, as we have seen, that immediately after the execution of the sale contract defendant "promised to pay to plaintiff $7,500 for his services in the matter, and gave to plaintiff a written statement to that effect." It will be observed that this occurred while plaintiff was without knowledge of any shortage in the cleared and cultivated acreage, and before the survey and the abandonment. It is insisted that considering this written statement in connection with the sale contract, the payment was to be made on condition that the sale should be carried out. It is to be said of this that the contention ignores the fact that the plaintiff's services were secured and rendered before his compensation was definitely fixed. The language of the memorandum is entirely consistent with a treatment of the sale as consummated. The effect of the written statement was, not to impair plaintiff's accrued right of recovery, but rather to avoid the risk of differences and contest touching the value of his services.

[2] The settled rule is that an agent is entitled to compensation where he procures a purchaser who is acceptable to the principal, and ready, able, and willing to buy on the agreed terms, despite failure of consummation of sale through fault alone of the principal. Dotson v. Milliken, 209 U. S. 237, 245, 28 Sup. Ct. 489, 52 L. Ed. 768; Hannan v. Moran, 71 Mich. 261, 262, 38 N. W. 909, opinion by Mr. Justice Campbell; Schweid v. Storandt, 157 App. Div. 855, 859, 143 N. Y. Supp. 161, affirmed in 217 N. Y. 637, 112 N. E. 1075, and followed in Ritchey v. Murphey, 181 App. Div. 429, 430, 431, 168 N. Y. Supp. 830.

The effect of an agent's reliance upon his principal's representation, which proves to be inaccurate, finds analogy in a principal's default through failure of title (Cheatham v. Yarbrough, 90 Tenn. 77, 79, 80, 15 S. W. 1076; Fitzpatrick v. Gilson, 176 Mass. 477, 479, 480, 57 N. E. 1000; Smith v. Peyrot, 201 N. Y. 210, 214, 215, 94 N. E. 662, and citations), or capricious refusal (Kock v. Emmerling, 22 How. 69, 74, 16 L. Ed. 292; Home Banking & Realty Co. v. Baum, 85 Conn. 383, 386, 82 Atl. 970).

The judgment must be affirmed, with costs.

McLAUGHLIN v. PENNSYLVANIA CO.

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

No. 3203.

1. CARRIERS ⊂⊃347(3)—PASSENGERS—DEATH ON TRACK—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.
Whether an intending passenger, struck on railroad tracks while attempting to cross to board a train, was negligent, is a question for the jury, unless it is clear that reasonable minds can reach only the conclusion that a person of ordinary prudence would not have made the attempt under the circumstances.

2. CARRIERS ⊂⊃347(3)—PASSENGERS—DEATH ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
In an action for death of an intending passenger, struck by an express train which she thought was her train, and which she crossed the tracks to board, question of contributory negligence *held* for the jury under the evidence.

In Error to the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Action at law by Elmer McLaughlin, administrator of the estate of Naomi Seidner, deceased, against the Pennsylvania Company. To review judgment for defendant, plaintiff brings error. Reversed, with directions to award new trial.

Francis R. Marvin, of Cleveland, Ohio, for plaintiff in error.

Thomas M. Kirby, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Upon the trial, at the conclusion of the opening statement of plaintiff's counsel, the court sustained defendant's motion for direction of verdict in its favor upon the pleadings and opening statement. This writ is to review the judgment thereon.

The gist of the opening statement was that decedent, a lady more than 50 years old, desiring to take a local passenger train from Beloit, Ohio, to Columbiana, in that state, where she resided, bought a ticket for such transportation from defendant's ticket agent and station master at Beloit shortly before the train was due to leave, and was then informed by the agent that her train was due in five minutes. Soon after-

wards the whistle of an approaching train was heard, which the agent informed decedent was her train. She then started to take it, accompanied by her two daughters, one of whom was to accompany her on the train. To do so she was obliged to cross three sets of tracks to reach a cinder platform, elevated a foot or so above the tracks, and on the farther side of the track on which her east-bound train was to run; it being necessary to use this platform to board her train. There was no crossing or walkway provided over the tracks and no planks between the rails; the space between tracks and rails being filled with slag. As decedent and her daughters started to cross the tracks, there was approaching from the west a train which she and her daughters supposed to be her train, and which they supposed was going to stop at the station. It was in fact a fast train of defendant's, which was not to stop at Beloit, and which was running behind its schedule at a speed of 50 to 60 miles per hour, on the track which should have been occupied by decedent's train, and practically on the time of that train. As decedent reached the farther rail of the last track she stumbled and fell, and was struck and killed by the fast train. The direction of verdict was on the ground that decedent was, as matter of law, guilty of contributory negligence in passing in front of the swiftly moving train.

Defendant properly assumes that the opening statement showed negligence on defendant's part, and we have therefore omitted that part of the statement. The only question thus is whether it conclusively appears that decedent was guilty of contributory negligence in crossing the third track in front of the approaching train.

[1, 2] It does not so conclusively appear, unless it is clear that reasonable minds can reach only the conclusion that a person of ordinary prudence would not have so crossed under the circumstances appearing. We think this cannot be said. True, it must be assumed that until she reached the last track she was in a place of safety, that she knew when she started to cross the track that a train was approaching upon it, and that it would eventually pass beyond the place where she was trying to cross. But it is not accurate to say that she knew or believed that the train would, in the nature of things, intercept her path. On the contrary, according to the statement, defendant had assured her, and she believed, that the approaching train was her train; and, so believing, a reasonable person would naturally assume that it would stop but a few feet beyond the point where she proposed to cross, and that it would thus have nearly come to a stop when it reached her place of crossing.

Assuming that she saw the train but three seconds before she was struck, if running at a speed of but 50 miles an hour it was then 216 feet away. To cover that distance the train which decedent expected to take, slowing down for a stop, but running even 20 miles an hour, would require seven seconds as against three seconds for the fast train—a margin of four seconds. Or, otherwise stated, the slow train would travel in the three seconds but about 87 feet, as against 216 feet, leaving a clear margin of safety of 129 feet. If the train was seen more than three seconds before the collision, or if it was running

more than 50 miles an hour, it was more than 216 feet away when seen, and the margin of safety was correspondingly increased. Consistently with the opening statement, decedent may well have thought that she had ample time to cross the track ahead of the approaching train, assuming, as she had the right to do, that it was to stop at the accustomed place; and a jury may equally well have thought, not only that she would have had ample time to cross had the train been the one she expected to take, and which she had been led by defendant to believe was her train, but that decedent was not negligent in attempting to cross under the conditions thus appearing. If, as the statement seems to mean, decedent's daughters thought the approaching train was her train, such fact, if communicated to decedent, could properly be taken into account by her as affecting the prudence of crossing the tracks.

Without regard, therefore, to the doctrine of "intervening track," the judgment of the District Court must be reversed, with directions to award a new trial.

BURROUGHS ADDING MACH. CO. v. DIAL.

In re COLLIER.

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

No. 3157.

1. SALES ⊜464—CONDITIONAL SALES—RETAKING POSSESSION—STATUTE.
Gen. Code Ohio, § 8570, imposes a limitation only on the right of a conditional seller to retake the property on default, and was not intended to vitiate the contract, but merely to protect the purchaser.

2. SALES ⊜484—CONDITIONAL SALES—RETAKING POSSESSION—STATUTES.
Where it does not appear that, on attempting to retake possession of property conditionally sold, or otherwise, the seller had violated Gen. Code Ohio, § 8570, nor any law of Ohio, section 12464, providing that a seller who violates any of the provisions of law, in taking possession or repossession of the property, shall be fined, is not applicable.

3. SALES ⊜464—CONDITIONAL SALES—VALIDITY.
Conditional sale contracts are valid at common law, and, in the absence of an Ohio statute declaring such contracts, made in the state, illegal, or declaring it an offense either to make or attempt to enforce such conditional contracts, except under circumstances not existing in the present case, the Circuit Court of Appeals cannot hold that such an Ohio contract is illegal.

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

Petition by the Burroughs Adding Machine Company against George S. Dial, trustee in bankruptcy of George A. Collier, bankrupt. From an order dismissing the petition, petitioner appeals. Reversed and remanded, with directions.

Floyd A. Johnston, of Springfield, Ohio, for appellant.

George S. Dial, of Springfield, Ohio, pro se.

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

McCALL, District Judge. This case is here on appeal from an order of the District Court, dismissing an intervening petition of appellant filed in the proceedings of George A. Collier, bankrupt, to recover from George S. Dial, trustee in bankruptcy, one Burroughs adding machine, or the balance of the unpaid purchase money due thereon. The case was heard on an agreed statement of facts, which present two questions for decision: (1) Was the contract of sale and purchase a Michigan or an Ohio contract? (2) If an Ohio contract, is it a legal and valid one?

The contract was executed by and between appellant and George A. Collier, the bankrupt, for an adding machine, and is in the usual form of conditional sales contracts; the consideration being $150, with $15 cash payment, title reserved in the vendor to secure deferred payments. The clause of the contract which is the occasion for this controversy reads as follows:

"In default of any payment, you or your agents may, at your option, take possession of and remove said adding machine without legal process; and in such case all payments theretofore made by the undersigned on account of this order shall be deemed and considered as having been made for the use of said adding machine during the time the same remained in the possession of the undersigned purchaser, and shall be retained and kept by you as such payment for rental and as liquidated damages; that the purchaser herein for himself and his successors in interest hereby waives, so far as is consistent with public policy, the benefits of any statute of this state, that may conflict with the conditions of this order, and any causes of action thereby given."

The contention of the trustee is that the contract under the laws of Ohio is illegal, and that therefore appellant is not entitled to any relief, for the reason that it cannot make out its case without the enforcement of an illegal agreement. The court below took this view, and held that the contract was in contravention of section 8570 of the Ohio General Code as construed and applied in Croneis Bros. v. Toledo Scale Co., 89 Ohio St. 168, 106 N. E. 5. Said section, in so far as it is here involved, is as follows:

"When such property * * * is so sold or leased, * * * the person who sold * * * shall not take possession of such property without tendering or refunding to the purchaser, * * * or any party receiving it from the vendor, the money so paid, * * * anything in the contract to the contrary notwithstanding. * * * But the vendor shall not be required to tender or refund any part of the amount so paid unless it exceeds twenty-five per cent. of the contract price of the property."

[1] Speaking generally, the only prohibition in the statute is that the vendor shall not repossess himself of property conditionally sold without tendering or refunding to the purchaser the money theretofore paid on the property, although the contract may provide otherwise; but the vendor shall not be required to tender or refund any part of the amount paid unless it exceeds 25 per cent. of the contract price of the property. It imposes a limitation only on the right of the vendor to retake the property. It was not intended to vitiate the contract, but it does protect the purchaser.

[2] The agreed statement of facts shows that a true copy of the contract was duly filed in the office of the recorder of Clark county, as

required by section 8568 of the Ohio General Code. It not appearing that, on attempting to retake possession of the property or otherwise, the vendor had violated section 8570, supra, nor any law of Ohio, section 12464, which provides that a vendor who violates any of the provisions of law in taking possession or repossession of such property, shall be fined not more than $100, is not applicable.

[3] Conditional sale contracts are valid at common law, and in the absence of a statute of Ohio declaring conditional sale contracts made in that state illegal, or declaring it an offense either to make or attempt to enforce conditional contracts, except under circumstances not here existing, we are unable to agree with the court below in its conclusion.

The appellee cites and relies on Croneis Bros. v. Toledo Scale Co., supra, as determinative of this case. We find nothing in the syllabus of that case (which in Ohio is considered the ruling law of the case) contra to the views herein expressed, nor to the conclusion we reach that, under the laws of Ohio as applied to the case before us, the contract in question was neither illegal nor void. In the Croneis Case the vendor had never parted with the possession of the machine; the vendee having refused to carry out his contract to purchase. It was held that the contract was so far void as to forbid recovery by the vendor of the purchase price agreed to be paid. That case is clearly distinguishable from the present case. On the other hand, in Re National Cash Register Co., 174 Fed. 579, 98 C. C. A. 425, this court held that the statutory provisions in question were not applicable to the case of a vendor who was seeking to enforce a lien existing at common law, which has not been changed by statute. And see In re Bettman-Johnson Co. (C. C. A. 6), 250 Fed. 657, 666, 163 C. C. A. 3.

We deem it unnecessary to consider the other question, since it is conceded that, if the contract is a Michigan contract, it is valid and when registered in Ohio is enforceable there.

The result is that the case must be reversed and remanded, with direction that the trustee return to the petitioner the adding machine in question, or that he pay to it an amount equal to the reasonable value of the machine at the time it was sold by the trustee, not to exceed the amount of unpaid purchase money, with interest.

VEDIN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919. Rehearing Denied June 2, 1919.)

No. 3211.

1. CONSTITUTIONAL LAW ⟸46(3)—INDICTMENT AND INFORMATION ⟸108—STATUTES—VALIDITY—NECESSITY OF DETERMINATION.
   The statute on which an indictment is found is determinable as a matter of law from the facts charged although the statute is not mentioned and indictment is brought under another statute, and where the facts alleged in the indictment charging the making of false affidavits as to annual assessment work on a placer claim brought the case within Comp. Laws Alaska 1913, § 162, it was immaterial whether Sess. Laws Alaska 1915, c. 10, violation of which was charged, was constitutional.

2. INDICTMENT AND INFORMATION ⟸121(2), 132(1)—ELECTION—BILL OF PARTICULARS.
   While the defendant in a criminal action is entitled to know the statute under which he is being prosecuted, yet where the indictment specifically named the statute, and the record did not show that the prosecution relied on any other, although the facts alleged brought the case within another statute, a motion to elect was properly denied; the proper procedure being to apply for a bill of particulars.

3. PERJURY ⟸36—OFFENSES—INSTRUCTED VERDICT.
   In a prosecution for making false affidavits as to annual assessment work on a placer claim in violation of the Alaska law, *held* that, while the evidence for the prosecution, standing alone, would be insufficient to sustain a conviction, yet, in connection with discrepancies of defendant's own testimony, denial of his motion for instructed verdict was proper.

4. CRIMINAL LAW ⟸1056(1)—APPEAL—EXCEPTIONS TO INSTRUCTIONS—NECESSITY.
   Where no exceptions were taken to the instructions, the appellate court cannot consider assignments of error based on portions of an instruction.

In Error to the District Court of the United States for the Fourth Judicial Division of the District of Alaska; Charles E. Bunnell, Judge.

G. A. Vedin was convicted of making false affidavits of annual assessment work upon several association placer claims, and he brings error. Affirmed.

Leroy Tozier, of Fairbanks, Alaska (De Journel & De Journel, of San Francisco, Cal., of counsel), for plaintiff in error.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., and R. F. Roth, U. S. Atty., and Harry E. Pratt, Asst. U. S. Atty., both of Fairbanks, Alaska.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted on three counts of an indictment which charged him with making three several false affidavits of annual assessment work upon three several association placer mining claims for the year 1916. The indictment in each count charged violation of chapter 10 of the Session Laws of Alaska of the year 1915. A demurrer was interposed to the indictment

on the ground that the Session Laws so referred to are unconstitutional and void. The demurrer was overruled. The plaintiff in error, before the introduction of any evidence, demanded that the prosecution elect, and inform him, under what law it was prosecuting the defendant in the trial of the case, which motion was renewed at the close of the government's case. The motions were denied. These rulings are assigned as error.

[1] We need not inquire into the question of the constitutionality of the Session Laws of 1915, for the facts charged in the indictment were sufficient to constitute an offense under section 162 of the Compiled Laws of Alaska of 1913, for the statute on which an indictment is found is determinable, as a matter of law, from the facts charged, and they may bring the offense charged within an existing statute, although the same is not mentioned, and the indictment is brought under another statute. Williams v. United States, 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509; United States v. Nixon, 235 U. S. 231, 35 Sup. Ct. 49, 59 L. Ed. 207; Wechsler v. United States, 158 Fed. 579, 86 C. C. A. 37; United States v. Sandefuhr (D. C.) 145 Fed. 49; United States v. Wood (D. C.) 168 Fed. 438; Ex parte King (D. C.) 200 Fed. 622; Commonwealth v. Peto, 136 Mass. 155.

[2] Nor do we find error in the denial of the motions to elect. Undoubtedly the defendant in a criminal action is entitled to know the statute under which he is being prosecuted. In this case the indictment specifically named a statute. The record does not advise us that the prosecution at any time relied on any other statute. The question that comes to us is whether or not the rights of the plaintiff in error have been prejudiced by a ruling of the court below. It is clear that it could make no difference to his rights whether he were prosecuted under the one or the other of the laws which make punishable the acts which are charged in the indictment. The record does not show that there was any uncertainty as to the law which the prosecution relied upon; but, if there were, the remedy was not by demanding election, but by applying for a bill of particulars. Morris v. United States, 161 Fed. 672, 681, 88 C. C. A. 532.

[3] The plaintiff in error relies upon his motion, made at the close of the testimony, for an instructed verdict of not guilty, and now contends that there was no evidence to sustain the verdict. The association placer claims were 160 acres each. They were located in a rough and brushy country. The affidavits stated that the work was done by drilling holes on one claim about 100 feet from the northern boundary and about 700 feet from the western boundary; on another claim about 300 feet from the northern boundary and about 200 feet from the eastern boundary; on the third claim about 200 feet from the southern boundary and about 200 feet from the eastern boundary. The direct evidence adduced to show that such work was not done consisted in the testimony of men who for the most part had relocated the land involved and were interested witnesses. They testified that they never saw the plaintiff in error at work on the claims, that in 1917 they went upon the claims and with a tape line measured the distances

from the boundaries as indicated in the affidavits, and at and around the points of intersection they found no sign of work having been done, no dump, and no clearing of brush. These examinations were made at times when the snow was from 10 to 12 inches deep, and the search for the drill holes was made by kicking the snow about.

The evidence for the prosecution, if it stood alone, would clearly be insufficient to sustain a conviction of perjury. It is not disputed that the earth removed by drilling holes by a hand drill, such as the plaintiff in error claimed to have drilled, would amount to but a few panfuls. The plaintiff in error testified that he did not measure the distances from the boundary lines, but only estimated them. It is too obvious to require discussion that the testimony of the witnesses for the government was insufficient to show, beyond a reasonable doubt, that the holes had not been drilled. If the plaintiff in error had stood upon his motion to dismiss, made at the close of the testimony, a different case would now be presented. But he waived his motion by testifying in his own behalf, and in the discrepancies of his own testimony as to the work done, and by whom it was done, and the rebuttal of portions thereof by the witnesses for the government, there is evidence tending to show that the affidavits were false. We are not convinced that the court below erred in denying the motion for an instructed verdict.

[4] No exception was taken to any portion of the instructions to the jury, and therefore this court is powerless to consider assignments directed to portions of the charge.

The judgment is affirmed.

IOWA STATE TRAVELING MEN'S ASS'N v. LEWIS.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1919.)

No. 5234.

1. INSURANCE ⟸455—ACCIDENT INSURANCE—POLICY—CONSTRUCTION—"EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS."

Death of insured from opening a pimple with an infected pin *held* the result of receiving a bodily injury through external, violent, and accidental means within the terms of an accident policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, External, Violent, and Accidental Means.]

2. INSURANCE ⟸456—ACCIDENT INSURANCE—POLICY—CONSTRUCTION—"OPEN WOUND."

Where insured died as the result of opening a pimple with an infected pin, *held*, that the wound was an open one, etc., within the provisions of the policy exempting the insurer from liability for local or general infection, except when such infection results from a visible or open wound caused by external, violent, and accidental means.

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Action by Maude Lewis, as executrix of the last will and testament of John F. Bailey, deceased, against the Iowa State Traveling Men's Association. There was a judgment for plaintiff (248 Fed. 602), and defendant brings error. Affirmed.

John B. Sullivan, of Des Moines, Iowa (Sullivan & Sullivan, of Des Moines, Iowa, on the brief), for plaintiff in error.

Eugene D. Perry, of Des Moines, Iowa (Harley H. Stipp, Robert J. Bannister, and Vincent Starzinger, all of Des Moines, Iowa, and H. B. Bradbury, of New York City, on the brief), for defendant in error.

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

CARLAND, Circuit Judge. This is an action to recover a death indemnity alleged to be due and payable by the plaintiff in error, hereafter defendant, to the estate of John F. Bailey, deceased. The case was heard by the trial court sitting without a jury upon the pleadings and a stipulation of facts. Judgment was rendered in favor of the defendant in error, hereafter plaintiff.

[1] Section 2, of article 6, of the contract sued on reads as follows:

"Whenever a member in good standing shall through external, violent, and accidental means receive bodily injuries which shall, independently of all other causes, result in death within ninety days from said injuries, the beneficiary named in his application for membership, or his heirs, if no beneficiary is named therein, shall be paid the proceeds of one assessment of two dollars upon each member in good standing, but in no case shall such payment exceed the sum of five thousand dollars, which shall be in full satisfaction of all liabilities to the said deceased member, his beneficiaries, heirs or legal representatives."

The facts in this case are the same as those in Interstate Business Men's Accident Association v. Maude Lewis, Executrix, 257 Fed. 241, this day decided. For the reasons given in the case mentioned we decide that the deceased came to his death as the result of receiving a bodily injury through external, violent, and accidental means within 90 days from the said injury. The defendant further pleaded the following section applicable to the contract sued on (article 6, § 6):

"The association shall not be liable to any member or beneficiary for any indemnity or benefit for accidental death * * * resulting wholly or partially, directly or indirectly, from any of the following causes, conditions or acts, or when the member is under the influence of or affected by any such cause, condition, or act, to wit: Disease, bodily infirmity, * * * local or general infection or joint inflammation (except when such infection or inflammation results from a visible or open wound caused by external, violent and accidental means), * * * intentional injuries inflicted by the insured. * * * Each of the foregoing causes, conditions or acts are expressly exempted from all the provisions of these by-laws granting to members or beneficiaries thereof benefits or indemnity."

[2] We are of the opinion that the scarf pin used by deceased made an open wound—that is, a wound unhealed and open to infection—caused by external, violent, and accidental means. The exception contained in the above section 6 contains no limitation as to how the in-

flammation or infection gets into the wound, whether by the deceased's own act or otherwise.

This case is within the exception of section 6, and the judgment below is affirmed.

BALDWIN v. KINGSTON.

(Circuit Court of Appeals, Third Circuit. April 8, 1919.)

No. 2437.

BANKRUPTCY ⊂⊃181—CONVEYANCE FOR WIFE'S SUPPORT—INADEQUATE CONSIDERATION.

Where the value of property transferred by a bankrupt to his wife was not disproportionate to the bankrupt's pecuniary obligation of support to her, in suit by his trustee against the wife to set aside the conveyance as in violation of the Bankruptcy Act, the equitable doctrine that, where the consideration for a conveyance is inadequate, the conveyance will be sustained only to the extent of the consideration actually given, has no application.

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

Suit by J. Wadsworth Baldwin, trustee in bankruptcy of Larue H. Kingston and William H. Burnett, individually and as copartners, against Etta C. Kingston. From a decree dismissing the bill (247 Fed. 163), the trustee appeals. Affirmed.

Andrew Van Blarcom, of Newark, N. J., for appellant.

Robert H. McCarter, of Newark, N. J., for appellee.

Before WOOLLEY, Circuit Judge, and THOMPSON and MORRIS, District Judges.

PER CURIAM. Larue H. Kingston made a conveyance through an intermediary to his wife. Upon a petition filed within four months thereafter, Kingston and his copartner, Burnett, individually and as copartners, were adjudicated bankrupts. The trustee in bankruptcy instituted suit to set aside the conveyance as being in violation of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. §§ 9585–9656]). After hearing upon bill, answer, and proofs taken orally before the District Court, a decree was entered dismissing the bill of complaint. 247 Fed. 163. From this decree the trustee appeals.

The assignments of error allege generally that the court erred in holding that the conveyance was not voluntary and was supported by a consideration; in finding that there was an agreement whereby the conveyance should be in satisfaction, whole or partial, of the wife's right to support; and in finding that the value of the property transferred was not so disproportionate to the bankrupt's pecuniary obligation to his wife as to justify the application of the equitable doctrine that where, under certain circumstances, the consideration for a conveyance is sufficiently inadequate the conveyance will be sustained only to the

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extent of the consideration actually given, and be declared voluntary and void as to the residue.

As our views on the questions presented by the assignments of error are in accord with those of the learned trial judge, we dispose of the case on his opinion, and direct that the decree below be affirmed.

RENSSELAER & S. R. CO. v. DELAWARE & HUDSON CO.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 206.

COURTS ⊂=297—FEDERAL COURT—JURISDICTION OF CASE INVOLVING INCOME TAX ON RAILROAD DIVIDENDS.

The Circuit Court of Appeals has no jurisdiction of a suit by one railroad company against another and the collector of internal revenue, to determine a liability for the income tax on certain dividends as between the two companies, where the controversy depends wholly on the construction of the lease executed by plaintiff railroad to defendant; both being citizens of the state of New York, whose courts may determine the controversy, unless the collector should remove the case under Judicial Code, § 33 (Comp. St. § 1015).

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

Suit in equity by the Rensselaer & Saratoga Railroad Company against the Delaware & Hudson Company, impleaded, and another. From a decree dismissing the bill, complainant appeals. Bill directed to be dismissed without prejudice against the named defendant.

Certiorari denied, 249 U. S. —, 39 Sup. Ct. 492, 63 L. Ed. —.

G. B. Wellington, of Troy, for appellant.

Walter C. Noyes, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. The Rensselaer & Saratoga Railroad Company, a corporation and citizen of the state of New York, filed this bill in equity against the Delaware & Hudson Company, also a corporation and citizen of the state of New York, and Roscoe Irwin, collector of United States internal revenue for the Fourteenth district, praying that the collector defendant might be restrained from attempting to collect a balance of income tax due by the plaintiff for the year 1916, by seizure and sale of any of its property, and that he be required to collect the same of the defendant the Delaware & Hudson Company, and that the Delaware & Hudson Company be directed to pay the balance of said income tax due, and to pay any income tax that shall be levied hereafter against the plaintiff by charging the same pro rata to the plaintiff's stockholders and deducting the amount from the dividends which it has agreed to pay such stockholders. The collector made default, and the Delaware & Hudson Company moved to dismiss the bill on various

grounds not necessary to mention, which motion the District Judge granted.

Our decision in Rensselaer & Saratoga R. R. Co., v. Irwin, 249 Fed. 726, 161 C. C. A. 636, and the decision of the Court of Appeals of the state of New York in Rensselaer & Saratoga R. R. Co. v. Delaware & Hudson Co., 217 N. Y. 692, 112 N. E. 1072, which were the subject of discussion on the argument may be referred to. We see nothing in the latter decision to prevent the courts of the state of New York determining the controversy as to future dividends between the corporations and that with the collector too (if he should not remove the case under section 33 of the Judicial Code [Act March 3, 1911, c. 231, 36 Stat. 1096, Comp. St. § 1015]), as a new question; but as it depends wholly upon the construction of the lease executed by the Rensselaer & Saratoga Railroad Company to the Delaware & Hudson Company May 1, 1871, and both parties are citizens of the state of New York, we have no jurisdiction of the present suit.

The court below is therefore directed to dismiss the bill without prejudice against the defendant Delaware & Hudson Company.

MIAMI CYCLE & MFG. CO. v. ALLEN.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3193.

1. ESTOPPEL ⟸68(4)—EQUITABLE ESTOPPEL—JUDICIAL PROCEEDING.
Where defendant's tender was open to be interpreted as a cancellation of the patent license contract, and in preceding litigation complainant's assignor did so interpret the tender, and acted under that interpretation until selling his interest to complainant, *held*, that defendant was estopped from claiming its tender should have been construed as a rescission.

2. ESTOPPEL ⟸68(4)—JUDICIAL PROCEEDING—CHANGE OF THEORY.
Where, on first trial, decree was rendered for complainant for royalties due under an exclusive patent license contract, on the theory that there had been a mutual cancellation, and that theory was urged by defendant on motion for rehearing on appeal from first decree, *held*, in view of subsequent surrender by assignee of original complainant of right to recover damages and profits from infringement by others, defendant cannot question the acceptance of the offer.

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

Suit by Herbert W. Allen, assignee of William Robinson, against the Miami Cycle & Manufacturing Company. From a decree for complainant, defendant appeals. Affirmed.

Walter B. Grant, of Boston, Mass., for appellant.

Leonard Garver, Jr., of Cincinnati, Ohio, and Cornelius C. Billings, of New York City, for appellee.

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

PER CURIAM. The question remitted to the court below by our per curiam opinion on the former appeal (Miami Co. v. Robinson, 245 Fed. 556, 569, 158 C. C. A. 22), was decided by that court, and is now brought before us by this appeal. A mere statement of our conclusions must suffice. It will be sufficiently intelligible, by reference to the former opinion.

The letter and transfer of September 29, 1914, and the acceptance by Robinson, are now claimed by his assignee to have constituted a cancellation in præsenti of the contract of July, 1908, operating only against royalty thereafter accruing, and are claimed by the Miami Company to have been a rescission ab initio, or else to have been wholly ineffective because tendered as the latter and accepted as the former, without meeting of minds. For convenience, we denominate the first of these two conflicting theories as "cancellation" and the second as "rescission." The documents are not necessarily inconsistent with an intent to tender rescission, but the whole record does not justify that interpretation.

The reasons supporting this conclusion are: (a) There is nothing improbable in supposing that the company would be willing to lose what it had invested and take its chances on being compelled to pay royalty until September 29, if it could escape future royalty and get rid of the relations with Robinson. (b) No grounds for rescission existed or had been claimed; and the letter states no claim of cause for rescission, but only alleges breaches which would justify cancellation. (c) The letter demands no repayment of the consideration paid (except remotely under the name of damages for breach). (d) The company's amended answer did not allege rescission, but only "renouncement," and did not ask relief appropriate to rescission. (e) Upon the trial, both parties and the court treated the transaction as a cancellation, and neither by assigned error or by brief or argument in this court did the company complain; on the contrary, it acquiesced in the theory that, if it was liable at all, its liability ceased on September 29. (f) Even in the company's application for rehearing in this court, upon the former appeal, the theory of cancellation seems to be depended upon, and the theory of rescission is, at best, only suggested. Not until the court below, after remand, was asked to enter final decree, was the defense of rescission ever distinctly and clearly made.

[1] Such circumstances as indicate—and there are some which do—the intent to tender rescission are, we think, overborne by these facts just recited. In any event, it is clear that the tender was—at best for defendant—ambiguous, and was open to be interpreted as a cancellation. Robinson did so interpret it, he accepted it under such interpretation, and he continued to act under that interpretation during the remainder of the litigation, and, apparently still acting thereunder, sold his interest to Allen. During all this time, the company was bound to know that its offer was capable of being considered a cancellation, and that Robinson was so considering it and was acting accordingly thereon. Upon the ordinary principles of estoppel, the company cannot now claim that its offer should receive the other construction.

[2] During the progress of this litigation, each party has assumed positions inconsistent with its former action, and it is impossible to give effect to all these shifts. By its application for rehearing on the former appeal, the company impressed upon us the injustice of compelling it to continue bound by the contract after cancellation; now it wishes us to find that there had been no cancellation and that it is still bound. It calls our attention to the fact that, in opposing this application, Robinson's counsel denied that he had accepted the offer of September 29. Perhaps this denial was not seriously intended; perhaps it can be explained because of some misunderstanding; but, in any event, it was wholly ineffective. When Robinson, at the end of the first trial, claimed a decree upon the theory that his right to royalties continued until September 29, and then ceased because this cancellation had been made, and when he obtained the decree based on that theory, and successfully maintained it on appeal, he thereby accepted the offer as upon that theory, there was a cancellation by mutual consent, and the subject was closed. It became Robinson's duty to retransfer whatever of value, if anything, remained with him and to which he was not entitled. This he (by his assignee) has now done, by surrendering the right to recover damages and profits accruing before September 29 from infringement by others. This was belated, but the statute of limitations has not run, and nothing has been lost.

From these considerations, all of which appear without dispute, it is evident that the decree below was right in its substantial result; and it is affirmed.

FAIR & CARNIVAL SUPPLY CO. v. SHAPIRO et al.

(District Court, E. D. Pennsylvania. May 22, 1919.)

No. 1795.

1. PATENTS ⟸90(2)—ASSERTION OF CLAIM OF RIGHT.
An inventor or first discoverer must assert his claim of right through the patent laws, or not at all.

2. TRADE-MARKS AND TRADE-NAMES ⟸70—UNFAIR COMPETITION.
If no lawful monopoly was possessed by plaintiff through an exclusive right to make and sell its doll babies, given by the patent laws or otherwise, plaintiff could not deny to others the right to make and sell dolls; but if plaintiff, having originated a trade in such dolls, became so associated in the public mind with the doll product that there was a demand for plaintiff's make of dolls, and another manufacturer sought to share in the trade by imposing on the public a second make of dolls as the first, there was a legal wrong to plaintiff, calling for redress.

3. INJUNCTION ⟸129(1)—MOTION TO DISMISS—BILL AND ANSWER—DETERMINATION OF FACTS.
In suit to restrain unfair competition by jobbers in selling doll babies similar in every respect to plaintiff's, where defendants are unwilling to have the case heard on the averments of the bill as on final hearing, and deny the fact of unfair competition, a trial must be had to determine such essential fact, which cannot be determined on motion to dismiss.

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

In Equity. Suit by the Fair & Carnival Supply Company against Max Shapiro and Nathan Karr, trading as Shapiro & Karr. On motion to dismiss bill. Motion denied.

J. Bonsall Taylor, of Philadelphia, Pa., Stephen J. Cox, of New York City, and E. Hayward Fairbanks, of Philadelphia, Pa., for plaintiff.

Alfred Aarons, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. Inasmuch as the conclusion which we have reached to deny this motion involves the trial of the cause, we refrain from any discussion of its merits at this time, and confine ourselves to a statement of the respective contentions of the parties, so far as called for to disclose the ground of the present ruling.

[1] The real basis of the complaint is the feeling of ownership which any one has in a field of commercial exploitation which he has created or has first found. This feeling is universal and deep-rooted. Such a finder regards himself as a pioneer, and resents the intrusion of any one else upon what he regards as his own domain. Sympathetic recognition of this claim of right is the foundation of our patent and copyright laws. The existence of such laws and a knowledge of the legal rights which they confer suggest the thought of the evils of monopolies, and the subsidiary thought that, if such claims of right are recognized otherwise than through the operation of the patent laws, the claimant is accorded a greater right if he is not a patentee than if he is. We are, in consequence, forced to the conclusion that an inventor or first discoverer must assert his claim of right through the patent laws or not at all. If we stop here, however, wrongs which would be recognized by every fair-minded person as wrongs would go unredressed. We are in further consequence driven to the search for some other principle upon which a remedy can be built. The principle at hand is that which is known as the doctrine of unfair competition. This right to protection against unfair competition in trade is the right which the plaintiff in this case invokes. The distinction sought to be made is that which has been expressed for us by Judge Bradford in Unit v. Huskey (D. C.) 241 Fed. 131. This distinction may be brought out by its application to the facts of this case, and thereby the rights of the plaintiff made clear.

[2, 3] Plaintiff claims to have conceived the thought of putting upon the market a doll baby having a certain appearance and characteristics. If we assume (which, of course, is not the case) that the plaintiff had been the first to get the idea of such a thing as a doll baby, the commercial value of the idea would have been at once recognized, and a trade would at once have been built up in dolls. If no lawful monopoly, however, was possessed by the plaintiff through its exclusive right to make and vend such dolls, given by patent laws or otherwise, the plaintiff could not deny to others the right to make and sell dolls. If, however, by reason of the plaintiff having originated a trade in dolls, it became so associated in the mind of the purchasing public with the doll product as that there was a demand

for the plaintiff's make of doll, and another manufacturer sought to share in the trade thus created, through and by imposing upon purchasers the second make of dolls as the first make, there would then be a legal wrong calling for redress. Within the lines thus marking out the legal limitations there are other lines universally recognized as lines which should not be overstepped by any one having a decent respect for the opinion of those who believe in fair dealing.

The manufacturer of the make of doll of which the plaintiff complains has imitated the plaintiff's make of doll. Comparing one of each make, they are as like as twins. This likeness causes to arise in the mind two thoughts: The one is that, whether this second manufacturer has trespassed upon the legal rights of the plaintiff or not, he has, in the ethical sense at least, sought to gain an unfair and an unrighteous advantage by appropriating to himself that to which the plaintiff has a just claim. The other thought is that he at least may have overstepped the line between fair and unfair competition as legally defined.

The plaintiff in this case moved for a preliminary injunction. The injunction was not awarded because the supporting proofs did not enable us to make findings which would justify the interference of the court in limine. It does not follow, however, that the trial proofs will also fall short. We are of opinion that the plaintiff is entitled to the opportunity to prove its case, if it is able to do so. For this reason we deny the present motion. In entering this denial, however, it may be proper to state the practical grounds on which defendants urge the motion. They are not manufacturers, but jobbers. They bought that which was upon the market for sale, and it is fair to assume that they at least may have bought in ignorance of the fact that the rights of any one were involved. Because of the fact that the thing over which this controversy hovers is a doll, it is practically difficult, if not impossible, to distinguish between similitudes which are functional likenesses and similarities which are only such in appearance, for the reason that all the things which enter into the looks of a doll may be said with truth to be functional.

The trial of a case of this kind will probably involve more in expense than the interests of one who is claiming no more than a right to sell a job lot would warrant him in incurring. This affords something of a justification for asking that the question of the right of the plaintiff to that which he asks should be determined upon his own statement of the facts which base his claim of right. If the plaintiff here were asking to have awarded a monopoly of its make of doll simply because it was the first to make the doll possessing these peculiar characteristics, this claim of right might well be determined in advance of the trial. The plaintiff is, however, claiming more, and that is a trespass by the defendants upon the special field which the plaintiff has laid out and occupied by putting upon the market the plaintiff's make of doll. This will require the court to make the finding of fact of whether or not unfair competition exists. If the defendants were willing to have the case heard upon the averments of the bill as upon final hearing, disposition might now be made of

the whole case. This, however, they are unwilling to do, because they deny the fact of unfair competition. This means that this fact must be found, and it can only be found upon trial, and the defendants cannot ask that the law of the case as affecting it be determined in advance of this essential fact finding.

The motion to dismiss is denied.

J. H. DAY CO. v. MOUNTAIN CITY MILL CO. et al.*

(District Court, E. D. Tennessee, S. D. November 7, 1918.)

No. 10.

1. PATENTS ⇐328—VALIDITY—DOUGH-CUTTING MACHINE.
The Ward patent, No. 865,461, for a dough-cutting machine, *held* void for anticipation by a prior patent for a clay-cutting machine, for cutting brick, having equivalent mechanism and mode of operation. Claim 2 also *held* void as an aggregation of old elements not co-operating to produce any new result.

2. PATENTS ⇐328—VALIDITY—CRACKER-CUTTING MACHINE.
The Allison & Pinkney patent, No. 1,112,184, claims 1 and 2, for a cracker-cutting machine, *held* void as covering an invention not made by the patentees, but by a prior inventor, to whom the Green patent, No. 1,180,030, was subsequently issued on interference proceedings.

In Equity. Suit by the J. H. Day Company against the Mountain City Mill Company and others. On final hearing on pleadings and proof. Decree for defendants.

See, also, 225 Fed. 622.

SANFORD, District Judge. After careful consideration of the evidence, including the affidavits and copies of letters patent admitted, pursuant to stipulation, on the reopening of the proof, and the arguments and briefs of counsel, my conclusions, briefly stated, without elaboration are:

[1] 1. *Ward Patent No. 865,461.* This is a patent for an improvement in dough-cutting machines, providing a machine in which crackers and the like may be cut from the dough sheet by a cutter moving in unison with the feed of the sheet through the machine, so that the sheet may be fed continuously through the machine without stopping the machine during the cutting stroke of the dies.

The nine claims of this patent now in suit are, in my opinion, completely anticipated by the prior Hovey patent, No. 129,411, which disclosed a clay-cutting machine in which a plastic sheet of brick clay is carried upon an endless apron to vertically reciprocating cutters, having in addition to their vertical movement, a traveling movement with the belt.

This Hovey patent was not cited in the Patent Office on Ward's application; although seven of his claims were rejected before amendment, upon reference to the Chambers patent, No. 297,671, on a ma-

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Memorandum opinion, published by request.

chine for cutting brick clay; thus indicating the opinion of the office as to the analogy between the dough-cutting and clay-cutting machines.

The mechanism of this Hovey patent is, in my opinion, the mechanical equivalent of that of the Ward patent, operating in substantially the same way to produce substantially the same result; the difference consisting essentially in changing the materials to be operated upon rather than in changing the method of operation. And, upon the whole, I conclude that the substantial transfer of the structure of the Hovey patent from the clay-cutting art to the closely analogous dough-cutting art, both of which relate to the cutting of plastic materials, with only the necessary differences in mechanical detail, did not constitute invention as distinguished from mere mechanical skill, and presents a case of double use merely. Stearns v. Russell (6th Circ.) 85 Fed. 218, 29 C. C. A. 121; Johnson v. Traction Co. (6th Circ.) 119 Fed. 885, 56 C. C. A. 415; Weir Frog Co. v. Porter (6th Circ.) 206 Fed. 670, 124 C. C. A. 470; Ransome Mach. Co. v. United Mach. Co. (2d Circ.) 177 Fed. 413, 101 C. C. A. 217; Webster v. Dunham Co. (8th Circ.) 181 Fed. 836, 104 C. C. A. 346; Warner Instrument Co. v. Mfg. Co. (7th Circ.) 185 Fed. 507, 107 C. C. A. 607; Crown Co. v. Sterling Co. (D. C.) 210 Fed. 26, 34.

The second claim of the Ward patent is not saved as a combination claim by including with the unpatentable cutter-operating mechanism, a scrap remover, itself old in the art; but discloses merely a nonpatentable aggregation of old elements producing no new or different result in their combined force from that given by their separate operation, that is, an aggregation in which each old element accomplishes merely its own distinctive result without co-operation with the other. Overweight Elevator Co. v. Vogt Mach. Co. (6th Circ.) 102 Fed. 957, 43 C. C. A. 80; Johnson v. Foos Mfg. Co. (6th Circ.) 141 Fed. 73, 72 C. C. A. 105; Bullock Elec. Co. v. Gen. Elec. Co. (6th Circ.) 149 Fed. 409, 79 C. C. A. 229; Clisby v. Reese (7th Circ.) 88 Fed. 645, 32 C. C. A. 80; Jacobs Mfg. Co. v. Almond Mfg. Co. (2d Circ.) 177 Fed. 935, 101 C. C. A. 215; Johnson Co. v. Washing Mach. Co. (7th Circ.) 231 Fed. 988, 146 C. C. A. 184.

Hence, without determining the disputed question as to whether the Ward patent disclosed a mechanism which could produce a sufficient unison of motion between the drive of the cutter and the apron, or was practically inoperative and commercially useless until subsequently equipped with the adjustment disclosed by the Tucker patent, No. 909,967, or considering the extent to which the general expedient of moving reciprocating cutters along with a continuously moving apron was then known in the material-cutting arts, as bearing on the range of equivalents to which it would be entitled, if patentable at all, in determining the question of infringement, it results that so much of the plaintiff's bill as relates to the Ward patent must be dismissed.

[2] 2. *Allison & Pinkney Patent, No. 1,112,184.* The proof shows, in my opinion, beyond reasonable doubt, that Allison and Pinkney were not the first and original inventors of the differential pan-skip mechanism disclosed in claims 1 and 2 of the Allison & Pinkney patent

on improvements in cracker-cutting machines; and that the first and original inventor thereof was Thomas L. Green, the president of the defendant Green Company, who, as early as 1909, invented this mechanism, constructed a machine embodying the same and successfully operated it in Cardiff, Wales. On this point I am entirely satisfied as to the truthfulness and substantial accuracy of the testimony given by the defendant's witnesses Green and Morton, the correctness of which I see no substantial ground for questioning. The result thus reached is in accordance with the action of the Patent Office in awarding the claims in suit of the Allison & Pinkney patents to Green in the interference proceeding, and issuing to him the patent No. 1,180,030, and is in harmony with, although not directly involved, under the decree rendered April 25, 1917, by the District Court of the United States for the District of Indiana in the recent case of Thomas L. Green et al. v. Taggart Baking Co., No. 159 in equity.[1]

In this connection I find no error in the admission of the evidence in reference to the construction and operation of the machine embodying Green's prior invention, which was not admitted for the purpose of showing the defense of two years' prior public use under the fifth clause of section 4920, Rev. Stat. (Comp. St. § 9466), which was not relied on, but as a circumstance bearing on an element of the defense relied on under the fourth clause of said section, that Allison and Pinkney were not the original and first inventors of the thing patented, but that Green was the original and first inventor thereof; of which defense sufficient notice was, in my opinion, given under the statute, as ruled at the hearing.

So much of the plaintiff's bill as relates to said Allison & Pinkney patent must accordingly be likewise dismissed.

A decree will hence be entered, in accordance with this opinion, dismissing the plaintiff's bill, with costs.

[1] Decree affirmed 257 Fed. 87, — C. C. A. —.

T. H. SYMINGTON CO. v. NATIONAL MALLEABLE CASTINGS CO. et al.

(District Court, N. D. Illinois, E. D. April 10, 1919.)

No. 871.

1. PATENTS ⇐129—SUIT FOR INFRINGEMENT—ESTOPPEL BY LICENSE.
Where patents cover two distinct types of a device, a licensee to manufacture one type only, when sued for infringement by making the other type, is not estopped to deny the validity of the patents as to such type.
2. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—FRICTION DRAFT GEAR.
The Ritter patents, No. 684,552 and No. 751,943, for friction draft gear for railroad cars, *held* valid, but not infringed, as to the expansion type shown therein, by a gear having a distinctly different mode of operation.

In Equity. Suit by the T. H. Symington Company against the National Malleable Castings Company and William H. Miner. Decree for defendants.

George A. Chritton, of Chicago, Ill., and Melville Church and E. F. Mechlin, both of Washington, D. C., for plaintiff.

Rector, Hibben, Davis & Macauley, of Chicago, Ill., for defendant company.

Haight, Brown, Haight & Harris, of Chicago, Ill., for defendant Miner.

SANBORN, District Judge. Injunction suit, filed April 28, 1917, on patents 684,552, issued October 15, 1901, and 751,943, issued February 9, 1904, on friction draft gear. Defendant corporation is licensee under the patents in suit and two others, but the license covers only one kind of gear, known as the "included" type. So far as the four patents cover other kinds, they are not transferred.

Defendant Miner has been engaged in making and selling draft gear since 1907. He furnishes to the Castings Company drawings of the parts of the gears, also working details, from which the latter furnishes to him some of the parts, and another part from stock furnished it by Miner. Other parts are bought by Miner from other manufacturers. The gears are assembled by Miner at the Grant Locomotive Works in the Castings Company's plant, where a section is reserved for him by the Castings Company for the purpose, for which he pays rent, and where he has also space and machinery for testing the gears. Each pair of gears, suitable for one railroad car, is fully completed for installation by Miner when sold by him.

The questions raised are whether the Castings Company is estopped by the license in respect to the type of gears not covered by it, whether Miner's relation to the corporation is such that he is bound by the estoppel, whether defendants are joint infringers, and whether there is any infringement, either on the assumption that both defendants are bound by the estoppel or the contrary one.

[1] The patents and structures in evidence relate to draft gears for passenger and freight cars, in which the impact is sustained partly by very heavy coiled springs and partly by the friction of steel

surfaces sliding on each other; some of the surfaces being inclined to the line of movement of the drawbar, and so arranged that the wedge elements expand and grip either the center bar or outside shell. The mechanism being confined in a box or cylinder, the force of the impact against a movable wedge riding on the surface of a shoe which is parallel to the inclined wedge surface, sets up forces at right angles to the general line of movement, and is so arranged as to grip either the central drawbar or the inside face of the cylinder or housing, thus creating sliding frictional resistance. Where the drawbar is gripped by the frictional elements, the device is known as belonging to the "included" type; and where the pressure is radial or outward, to the "nonincluded" or expansion type. The first patent in suit relates to the "included" type, and the second to the "excluded" one.

The license referred to is dated June 13, 1913, and recites that—

"Whereas, the National Malleable Castings Company, a corporation duly organized and existing under and by virtue of the laws of the state of Ohio, and having its principal place of business in the city of Cleveland, in said state, is desirous of acquiring the exclusive right under each and all of the letters patent aforesaid to manufacture, use, and sell draft rigging of the included friction type solely, that is to say, draft rigging having an internal friction member or plunger, with other members located exteriorly thereof and adapted to press or to be pressed inwardly to coact with said central member, as contradistinguished from those in which the friction members move or press outwardly or expand radially and coact with the inner face or surface of a shell or casting, or the like." Therefore there was granted to defendant corporation, "under each and all of the letters patent aforesaid, the exclusive right or license to make, use, and sell, for the full term of each and all of said letters patent aforesaid, draft rigging of the included friction type, as above specified."

The corporation was also given the right to sue for infringements occurring after the license. The license raises no estoppel against the licensee in respect to the noninclusive type of gear. It does not convey any property right, but simply exempts the licensee from suit by the assignor so long as the former makes, uses, or sells only the "included" kind of gears. Analogies drawn from the law of real estate or leaseholds may serve to illustrate, but at the risk of false analogy. Chicago & A. R. Co. v. Pressed Steel Car Co., 243 Fed. 883, 156 C. C. A. 395.

The patentee, for $1,500, paid, has agreed that he will not prevent the licensee from making the "included" gears, or bring suit, or in any way call it to account. He has made no agreement as to the "nonincluded" type. In respect to this he stands on his patent rights; the license being silent as to the "nonincluded" gearing, except that it recites that the licensee is desirous of acquiring the exclusive right "to manufacture, use, and sell draft rigging of the included friction type *only*." This implies merely that it does not desire to make, use, or sell the other type, but falls short of an agreement that it will not do so. The granting clause throws no further light on the matter.

It is difficult to see how the licensee can be estopped in respect to the nonincluded type. It took nothing by the license as to this, no immunity from suit, and assumed no obligation respecting it. In Indiana Mfg. Co. v. Nichols & Shepard Co. (C. C.) 190 Fed. 579,

defendant was licensed under 55 patents to make a certain type of machine, and was sued for making another type. Judge Denison said:

"The estoppel must be mutual. The licensee may not deny the patentee's title to the monopoly; the patentee may not deny the licensee's right to act under that monopoly. It is difficult to see how, when the act involved is the manufacture of a certain machine, at a specified place or in a specified way, and both complainant and defendant agree that there is no contract in existence permitting the act in controversy, either party can be estopped by a contract relating to something else.

"We may apply, further, by analogy, the rule of landlord and tenant, which is the basis of estoppel by a patent licensee. If the landlord claims title to lots 1, 2, and 3, and leases to the tenant lots 1 and 2, and the tenant then undertakes to occupy lot 3, the lease would not be a bar to ejectment by the landlord for lot 3, nor would the lessee be estopped to deny the landlord's title to lot 3. It seems to me quite clear that the complaining patentee cannot, at the same time, maintain the position that the act of the defendant licensee, manufacturing what is said to be the patented article, is outside the conditions of the license, and therefore not authorized by the license, and also the position that his title to the monopoly is conceded by the license, and therefore cannot be disputed." Underwood Typewriter Co. v. Stearns, 227 Fed. 74, 141 C. C. A. 622; Auto Spring Repair Co. v. Grinberg (C. C.) 196 Fed. 52; Tate v. B. & O. R. Co., 229 Fed. 141, 143 C. C. A. 417.

The licensee not being estopped, in this suit charging infringement by the making and sale of the "nonincluded" type of gearing, of course Miner cannot be. The prior art is therefore open to both defendants.

In regard to the question whether defendants would be jointly liable for infringement, see Consolidated Rubber Tire Co. v. Goodrich (D. C.) 237 Fed. 893; Tatham v. Le Roy, Fed. Cas. No. 13,762.

Defense of Laches. Laches is also pleaded as a defense. It is shown that Ritter in 1913, and while he still owned the patents, saw an affidavit filed in an interference in the Patent Office showing that Miner was making the alleged infringing gear in September, 1913. Assuming that this would put him on inquiry, yet there is nothing to show that Miner relied on Ritter's failure to give notice of infringement, or was in any way injured by the delay. This suit was brought within four years. The defense is not proved.

[2] *Infringement.* The license having given the Castings Company the right to the included gears, the latter was probably free to make the nonincluded type so far as the first patent is concerned. But as the defendant Miner is not bound by the license, and takes no rights under it, and the second patent relates more specifically to the nonincluded form, this point may be laid one side, and the question of infringement considered at large.

Since there is no estoppel on either defendant, the prior art may be considered. The important question is whether the Miner gear is "gradually applied and withdrawn" (quoting from the first Ritter patent).

Plaintiff's counsel, Mr. Church, clearly describes the general features of draft gear:

"The ideal draft gear would be one which offered the maximum resistance to the movement of the drawbar inwardly or outwardly from its normal position, but which at the same time would tend to return the drawbar to its

normal position with the minimum force necessary to effect this return and to restore adjacent cars to their normal positions with respect to each other. It is obvious that springs alone would not constitute the ideal device because the energy with which they would expand to normal position would be substantially equal to that required to compress them, and therefore much more than would be required to accomplish the results desired in the return or release of an ideal draft gear.

"The addition of friction elements to a spring draft gear, besides serving the purpose of controlling recoil, provides at the same time and in the same manner a means for increasing the total capacity of the entire draft gear, as the friction grip mechanism which tends to retard slightly the movement of the drawbar in its return to normal position operates also to resist the inward movement of the draft gear under buff and its outward movement under pull, thereby making the total capacity of the gear equal to that of the spring and of the frictional load induced by the mechanism.

"It should be borne in mind that the force required to compress a simple spring draft gear is directly proportional to the amount of such compression, or in other words to the distance the spring is compressed. For instance, if it requires 7,500 pounds to compress a certain simple spring one-half inch, it will require 15,000 pounds to compress it one inch, and 30,000 pounds to compress it two inches. Under a two-inch compression, such a spring will be exerting in opposite directions a force of 30,000 pounds, and if it were gradually released or allowed to expand it would exert at each point in its release a force proportional to its compression at that point."

Following this description he states plaintiff's claim of the Ritter invention:

"The Ritter patent covers a means of controlling the recoil of a draft spring by the use of wedges against which the draft spring abuts, so that, the greater the pressure exerted upon this spring directly or indirectly by the drawbar, the greater is the pressure which the spring exerts upon the abutting wedge blocks. The frictional resistance which is developed between these wedges and the surface of the drawbar extension, with which they are in contact, bears a fixed and definite ratio to the pressure applied on the spring, this frictional resistance increasing as the spring pressure increases and decreasing as the spring pressure decreases.

"The increase of frictional resistance as the draft gear is being compressed, and the decrease in this resistance as the draft gear is being released, is gradual in the sense that it is not suddenly brought up to its maximum nor reduced to its minimum. The word 'gradual,' as used in Ritter patent, No. 684,552, does not indicate the length of time which elapses during any draft gear movement, but it serves to describe the building up or reduction of the frictional resistance in proportion to the pressure exerted upon the frictional members by the spring, even though either operation may take place in a very small fraction of a second of time.

"In an efficient draft gear it is essential that the parts shall be quickly restored to normal position after an impact which has closed the gear, in order that the gear may be ready to take a succeeding impact which may follow in a very short interval of time. To illustrate: If, in a heavy train, the drawbars connecting two adjacent cars were fully extended, and their respective draft gears therefore fully compressed by the tractive effort of the locomotive, and if under this condition the brakes were suddenly and fully applied, a very slight difference in the time of effective brake application between these adjacent cars might and does cause a collision between them, so that the drawbar on each of these two cars must change almost instantaneously from its extreme outward to its extreme inward position, each moving a distance equal to twice the travel of a single-ended draft gear.

"During this movement the gear, if efficient, must expand to normal length, and immediately close again, in order to protect the car from the impact resulting from the collision described."

The feature of quick release of defendants' gear is thus described by Mr. O'Connor:

"Naturally the device should be sensitive and capable of following up the release of the pressure on the follower due to the coupler and cars. In a test of compression of this gear, where the speed is perhaps say, six miles per hour, the whole cycle is not one-tenth of a second, and the compression of the device will take place in one-fourth of this tenth; probably one-fourth of the time expended in compression and three-fourths in release.

"Upon release, when the pressure on the coupler is reduced, such as the recoil of the cars or other devices, the release of the coupler, why, the pressure on this wedge, which is at the time of complete compression very high, as it reduces, the elasticity of the shell collapses, follows the rollers, the rollers follow out on the faces of the shoe and force the wedge out a slight amount relative to the shoes, releasing the pressure and the spring acting to release the whole device."

The witness Johnson also describes the two operations:

"On inward movement, all of the stress imposed upon the wedge is transferred through the rolls, which move slightly, since they spread the shoes against the cylinder until the pressure is removed, when immediately, owing to these antifriction rolls, the combination you might say collapses, breaking the friction contact between the cylinder and the shoes and permitting a powerful release. The release is very sensitive—a cycle of action not over one-tenth of a second."

So the whole question of infringement depends on whether defendants' gear falls within the conception of Mr. Ritter as described in his patents. That description and the gist of the invention is the combination of an included and including friction element, relatively movable, one in wedge form, an incline, and a spring, between the load and one element, "whereby the friction grip is gradually applied and withdrawn, and is always proportioned to the load."

Mr. Ritter further says, in description of the first patent, that the wedge-friction elements will exert a—

"friction grip on the drawbar proportionate to the load; the grip, however, being measurably a yielding grip, which will not give rise to any sudden shock, either in its application or release, both of which will be gradual."

In his testimony Mr. Ritter further said:

"When the spring begins to expand, the friction, which is proportional to the amount of pressure delivered on the wedge-shaped elements, prevents the sudden recoil of the spring; the friction being greatest at the time there is the greatest opportunity to recoil, and gradually diminishing as the pressure of the wedges becomes less and less as the spring expands, and being always, however, proportional to the pressure on the springs, so that if there is a great recoil pressure stored up in the springs there is a correspondingly great checking pressure of the friction to resist it, and as the recoil power of the spring diminishes and diminishes so the frictional braking pressure diminishes and diminishes."

The operation of the Ritter and Miner gears may be thus compared: When the buffing action begins, the drawbar is driven inwardly against what may be assumed to be the left-hand end of the spring. The other end is thus pushed to the right, moving the wedge against which it abuts at all times along the incline of the other wedge element, thus

exerting inward pressure against the plunger or central element, which is a continuation of the drawbar, and moves with it to the right. Such movement of the wedge and central element continues to the full limit of its travel, fully compressing the spring and exerting the maximum gripping pressure on the central bar. This friction grip is at all times proportionate to the load. If the spring is compressed one-half, the grip on the central bar is one-half.

On the recoil the action is reversed. The buffing load has been removed, and the recoil of the spring returns the parts to the normal or idle position. At the beginning the grip on the bar is at its maximum. The right-hand end of the spring is still pushing the wedge. When the spring has moved the drawbar and central bar half way back, the grip on the latter is half the maximum. The same proportionate grip remains to the very end of the recoil, when the spring still presses on the wedge on account of its initial compression, so that there is always some friction on the central member. There has thus occurred the gradual application and withdrawal referred to (not quite complete) of the frictional grip.

This description substantially applies to both patents in suit. Claim 13 of the second one counts on "a variable frictional resistance proportionate to the load."

The release action of the defendant's gear is quite different—bearing in mind that the gear is of the expanding type, and not the gripping type, so that, instead of the shoes surrounding a solid central post, they press against an outer, elastic, steel friction shell or cylinder, which is assumed to be an equivalent construction to the other, except the feature of elasticity of the shell. On complete compression the pressure against the inside of the cylinder is very high. On release the load is removed from the wedge, the spring expands, the elasticity of the shell collapses, and the spring continues to force back the shoes, not against a sliding friction, as in Ritter, but through the rollers between wedge and shoe, with the result that the whole structure quickly collapses on removing the load. This is the action of the Miner gear, as clearly shown by all the oral evidence as well as the two gear models. The rollers do actually roll about a sixteenth of an inch.

There is, therefore, a distinct mode of operation which negatives infringement. Snow v. Lake Shore & M. S. R. Co., 121 U. S. 617, 7 Sup. Ct. 1343, 30 L. Ed. 1004; State Bank v. Hillman's, 180 Fed. 732, 104 C. C. A. 98; Burroughs Adding M. C. v. Felt, etc., Co., 243 Fed. 861, 156 C. C. A. 373. This conclusion is reached without considering the prior art.

Decree holding Ritter patents valid, but not infringed. Bill to be dismissed, with costs.

THE MARGARET M.

THE 14–D.

(District Court, E. D. New York. April 19, 1919.)

1. COLLISION ⊂=123—ACTIONS—BURDEN OF PROOF.
In collision cases, the burden of proving negligence is on the libelant.

2. COLLISION ⊂=71(2)—PROCEEDINGS—VESSEL AT FAULT.
Where a barge, after having taken on a load of coal, cast off from the dock, in order to drift across the slip to take her place in a tow to be made up there, and, after drifting across the slip, was not made fast, and drifted back, and collided with another barge, which had moved up and taken her place at the dumper, *held*, that the first barge was solely at fault, though a dredge with a mud scow, apparently moored to her, was moored across the slip from the barge injured.

In Admiralty. Libel by Fred H. Doty against the barge Margaret M., the owner of which appeared and impleaded the Henry Du Bois Sons Company, the owner of the dump scow 14–D. Libel dismissed as to the respondent Henry Du Bois Sons Company, and decree for libelant against the owner and claimant of the Margaret M.

Park & Mattison, of New York City, for libelant.
Alexander & Ash, of New York City, for claimant.
Carter & Carter, of New York City, for respondent.

GARVIN, District Judge. A libel was filed by the owner of the coal barge John B. Fisk against the barge Margaret M., the owner of which appeared and brought in as another party defendant Henry Du Bois Sons Company, the owner of the dump scow 14–D. The John B. Fisk, in June, 1913, was lying at the Delaware, Lackawanna & Western coal docks at Hoboken, N. J., waiting to take on a cargo of coal. The Margaret M. was lying a short distance away, and when she had taken on a load of coal she cast off from the dock, in order to drift across the slip, so that she might take her place in a tow to be made up there.

The John B. Fisk moved up and took her place at the dumper, in order to load, and meanwhile the Margaret M. had drifted across the slip, but had not made fast to any tow there, and presently she drifted back. Across the slip from the John B. Fisk, moored at the wharf, was a dredge with a mud scow lying in the slip alongside, and apparently moored to the dredge. This mud scow was known as dumper No. 14. The Margaret M. drifted back, and finally came in contact with the Fisk, causing the damage which has resulted in this action.

[1, 2] The boat of the libelant was not at fault, and the court is of the opinion that, in view of the testimony of the master of the dredge that he knew nothing of any collision, and that no claim was made against the respondent Du Bois Sons Company for some two years after the accident, the libelant cannot prevail against the latter company. The burden of proof rests upon the libelant to show negligence. The New York (D. C.) 88 Fed. 556, affirmed 92 Fed. 1021,

35 C. C. A. 164. The Margaret M. could have prevented this accident by taking proper precautions when she was cast off and floated back across the slip.

The libel is dismissed as to the respondent Du Bois Company, and the libelant may have a decree against the claimant of the Margaret M.

COY v. TITLE GUARANTEE & TRUST CO. et al.

(District Court, D. Oregon. May 12, 1919.)

No. 3209.

1. TAXATION ⊂⊃641—FORECLOSURE OF LIENS—PARTIES DEFENDANT—RECEIVER.
Under L. O. L. § 3698, in proceedings on behalf of a county to foreclose tax liens, the parties whose names appear on the tax roll in the hands of the sheriff as owners are to be deemed the interested parties, and required to be made codefendants, and the proceedings against such defendants are not void as affecting the true owner, or a receiver of a lienholder on the property, appointed by the federal court, who was not made a party defendant.

2. TAXATION ⊂⊃636—FORECLOSURE OF LIENS—PROCEEDINGS IN REM.
Proceedings in Oregon on behalf of a county for foreclosure of tax liens are largely proceedings in rem under the Oregon statutes, adopted from the state of Washington.

3. STATUTES ⊂⊃226—CONSTRUCTION—ADOPTION OF LAW OF OTHER STATE.
By adopting the law of another state, the adopting state is deemed also to have adopted the interpretation of such law by the courts of the state from which it was adopted.

4. TAXATION ⊂⊃640—PROCEEDINGS TO FORECLOSE LIEN—LIMITATIONS—STATUTES.
Proceedings in behalf of a county to foreclose tax liens *held* not barred, by reason of the property incumbered by the lien not having been sold within 6 years from the date of original delinquency, by L. O. L. § 3721, repealed by Sess. Laws Or. 1917, p. 846.

5. RECEIVERS ⊂⊃173—FORECLOSURE OF TAX LIENS—LEAVE OF COURT TO SUE RECEIVER.
Proceedings on behalf of a county to foreclose tax liens *held* maintainable, without first obtaining leave of the federal court to join as codefendant the receiver of a company which held a lien on the lands involved; the receiver, as virtual mortgagee under a trust, not being entitled to possession of the property.

In Equity. Suit by N. Coy against the Title Guarantee & Trust Company and others. On objections by the receiver of the Title Guarantee & Trust Company to certain tax proceedings on the part of Coos County. Objections dismissed.

W. C. Bristol, of Portland, Or., for receiver.
L. A. Liljeqvist, of Marshfield, Or., for Coos County.

WOLVERTON, District Judge. On October 22, 1918, Coos county and W. W. Gage, sheriff thereof, were permitted, by order of this court, to implead R. S. Howard, Jr., as receiver of the Title Guarantee & Trust Company, in this cause, respecting certain litigation pending in the state court relative to state, county, and municipal taxes as-

sessed for the years 1907 to 1912, inclusive, against certain real property situated in Coos county, in which R. S. Howard, Jr., as such receiver, claims an interest.

On and prior to April 30, 1904, F. B. Waite, L. D. Kinney, and J. N. Shahan were indebted to the Title Guarantee & Trust Company in the sum of $54,091.70, for which they had given their notes. On and prior to said April 30, 1904, John K. Kollock became vested, by deeds duly and regularly executed, with the title to certain lands theretofore included in what was known as the "Rice trust," with power to sell the same to satisfy out of certain of the proceeds the indebtedness due the Title Guarantee & Trust Company. As determined by the Supreme Court of this state, in the case of Kollock v. Bennett, 53 Or. 395, 401, 100 Pac. 940, 942 (133 Am. St. Rep. 840), the deeds to Kollock were intended to transfer a complete title, and, as the court says:

"It was fully understood at the time of the execution thereof that he [Kollock] should have full power to sell the property, execute deeds to purchasers, and apply the proceeds in cancellation of the Title Guarantee & Trust Company's claims, and account to his grantors for any sum remaining. By virtue of these transactions, respondent became, not a mortgagee, but a holder of the legal title, and liable only to account as trustee for the proceeds of sales from the property when made, and entitled to maintain a suit in his own name with reference thereto."

As it respects the real property a brief description of which is set forth in Exhibit A to the petition and report of R. S. Howard, Jr., receiver, filed in the above-entitled matter December 6, 1917, it was assessed by the assessor of Coos county to John K. Kollock for the years 1907 to 1912, inclusive—possibly in some instances to John K. Kollock and F. B. Waite, and in others to Kollock and L. D. Kinney. The taxes levied in pursuance of these assessments became delinquent on the 1st of April of the year following the respective assessments. After the expiration of more than three years after the taxes became delinquent for each year, the sheriff and tax collector for Coos county issued to Coos county certificates of delinquency in the manner provided by law. Subsequently, but within six years after the taxes became delinquent for each year, proceedings were instituted by Coos county to foreclose the liens for such taxes. There were five proceedings in all; the first involving the taxes for the years 1907 and 1908, and the other four involving the taxes, respectively, for the years 1909, 1910, 1911, and 1912.

Three questions are insisted upon by the receiver of the Title Guarantee & Trust Company, and are involved by the present controversy, namely:

First. Whether the proceedings in the state court to foreclose the alleged tax liens are inoperative and void, as it affects the receiver in this court, by reason of the fact that such receiver was not made a party to such foreclosure proceedings.

Second. Whether any of such proceedings are barred by reason of the property incumbered by the tax lien not having been sold within six years from the date of the original delinquency, in pursuance of

section 65 of the act of the Legislative Assembly of 1907 (chapter 267, Session Laws 1907); and

Third. Whether such proceedings could be lawfully maintained without first obtaining leave of this court in the Title Guarantee & Trust Company receivership matter to institute the same.

We will treat of these in their order. The statute, in case of foreclosure of tax liens by the county, declares that all persons interested in any of the property involved in such proceeding may be made codefendants in the action. It then further provides that—

"The names of the person or persons appearing on the tax roll in the hands of the tax collector for collection at the date of the first publication of such notice as the owner or owners of said property shall, for the purpose of this section, be considered and treated as the owner or owners, of said property." Section 3698, Lord's Oregon Laws.

It is further provided that, in all judicial proceedings of the kind, no assessment of property or charge for any of said taxes shall be considered illegal on account, among other things, of the property having been charged or listed in the assessment or tax roll without any name, or with any other name than that of the owner. Section 3701, Lord's Oregon Laws.

The property in the main, at least so far as it pertains to this controversy, was assessed to John K. Kollock individually, but possibly in some instances to John K. Kollock and F. B. Waite, and perhaps in some instances to L. D. Kinney also. In no instance was the property assessed to John K. Kollock, trustee. And we may assume that such was the state of the tax rolls in the hands of the sheriff for collection at the date of the first publication of notice in each of the several tax proceedings.

[1] Construing the first of the above-cited sections, it simply means that when the proceedings are carried on in behalf of the county to foreclose the tax liens, all persons interested in any of the property involved may be made parties codefendant; that is to say, the county (but not an individual), where it is proceeding to foreclose, may join as codefendants all persons interested in any of the property involved. But, in order to determine who those parties codefendant shall be, one must look to the succeeding clause, being the one above quoted. They are to be the persons whose names appear on the tax roll in the hands of the sheriff for collection at the date of the first publication of such notice. Thus the parties to be made codefendants may not necessarily be the parties to whom the property was primarily assessed. The property in the meanwhile—that is, between the time of assessment and the time of the first publication of notice—may have changed hands or ownership, and it is incumbent upon the county to look to the tax roll in the hands of the sheriff at the date of the first publication to determine where the present ownership lies. The information thus gained from such tax roll furnishes the data for determining who are the parties interested, and consequently who are to be made parties codefendant in the proceeding. The parties whose names appear on the tax roll then in the hands of the sheriff as owners are, for the purposes of the proceeding, to be considered

and treated and are to be deemed the owners of the property involved. In other words, they are to be deemed the "interested" parties, and all such should be made codefendants in the proceeding to foreclose. This interpretation, to my mind, defines the obvious intendment of the statute. Section 3701, supra, furnishes a guide or rule for determining whether the original assessment is valid and should be upheld, when the court is called upon to enter its decree in the tax proceeding.

[2, 3] These tax proceedings are largely proceedings in rem. It is so held by the Supreme Court of the state of Washington in construing assessment and taxation statutes there in force, from which those in Oregon are taken. By adopting the law of another state, the state is deemed also to have adopted the interpretation of such law by the courts of the state from which it was adopted. Patterson v. Toler, 71 Wash. 535, 129 Pac. 107.

The statute having prescribed the rule by which interested parties shall be ascertained, the proceeding will not be rendered nugatory, if it should turn out that the tax roll in the hands of the sheriff at the date of the first publication of notice did not give the name of the true owner of the property, resulting in the true owner not having been made a party to the proceeding. Every person is deemed to have knowledge of the taxing laws. He knows that his real property is subject to assessment, and that delinquency will follow nonpayment of taxes, and subject his property to sale. He is bound, therefore, to take heed of what is being done by the taxing officers to subject his property to the payment of taxes lawfully assessed against it. The proceeding being in rem, it is sufficient if the county make those persons parties which the law directs that it shall, and it is not fatal to the proceeding, the dictates of the law having been followed, that a real owner should not have been made a party codefendant. In any event, public notice is given for a reasonable time, and all owners are warned of the proceeding affecting their property. Wilfong v. Ontario Land Co., 171 Fed. 51, 96 C. C. A. 293.

Now, the receiver of the Title Guarantee & Trust Company was not an owner, and the largest interest the trust company had or could have in the property was a lien thereon as security for the payment of money obligations. It was not such a person or concern as the statute requires to be made a party to the tax proceeding, and the proceedings instituted are not void or inoperative because the receiver was not made a party thereto.

[4] As to the second question presented, section 65 of the law of 1907 (page 480, Sess. Laws 1907), and known as section 3721, Lord's Oregon Laws, has relation to the sale of property acquired by the county through tax proceedings provided for by the law. It provides that, if the property is not sold by the county within six years from the date of the original delinquency, it shall be conclusively presumed against the county that it has duly received redemption from the sale and subsequent taxes advanced by the county.

Section 3717, Lord's Oregon Laws, which provides for the sale by the county of lands acquired by it through tax proceedings, was

amended in 1917 (Sess. Laws 1917, c. 408, p. 846), and among other things it was provided that:

"All sales now being made under existing laws shall be completed according to the laws in existence and in force prior to the passage of this act."

By the same act, section 3721, Lord's Oregon Laws, was repealed in toto. The proviso, under the amendment of section 3717, has relation to sales being made by the county of lands acquired by it through tax proceedings, and not to the tax proceedings themselves. The lands involved by the several proceedings in question have never as yet been acquired by the county, and there never has rested upon it any legal obligation or duty to sell them in pursuance of section 3717, either as amended or as it stood prior to amendment; and no doubt the Legislature, seeing the futility of the county's being able to acquire title and then make a resale of the property within six years after the original delinquency, repealed section 3721, and adopted in its stead an amendment to section 3695, Lord's Oregon Laws, which requires that the proceeding to foreclose shall be commenced within six years from the date of the original delinquency. The repeal of section 3721, Lord's Oregon Laws, renders it inoperative, in so far as it applies or ever applied to any of the proceedings here contested.

[5] The third question involves the inquiry whether the proceedings on the part of the county to foreclose the tax liens could be maintained without first obtaining leave of this court to make the receiver of the Title Guarantee & Trust Company a party codefendant. This depends upon whether the tax proceeding affects property in the hands of the receiver, or property in custodia legis. The receiver of the Title Guarantee & Trust Company was authorized and required to take possession of all property belonging to such company, whether real, personal, or mixed, and when he has so taken possession the property cannot be disturbed in his hands, or in the hands of the court, without leave of the court first had and obtained. The duties and functions of a receiver are clearly set forth by Mr. Justice Swayne, in Davis v. Gray, 16 Wall. 203, 217 (21 L. Ed. 447). He says:

"A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed. He is required to take possession of the property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in custodia legis. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits. The court will not allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties."

See, also, Commonwealth Roofing Co. v. North American Trust Co., 135 Fed. 984, 68 C. C. A. 418.

The legal principle advanced by counsel is undoubtedly sound, but it overlooks the underlying fact that the receiver is not in possession of the real property being taxed, or any part of it, and never has been; hence the property is in no sense in the custody of the court. The party who is really in possession is the receiver of the state court, and the county has the leave of the state court to proceed with its tax foreclosures. All that the receiver of this court can claim as to the real property is that he holds a lien thereon by virtue of the Kollock trust, and nothing beyond. It is as though the receiver held a mortgage on the property. As mortgagee, he is not entitled to the possession of the real property; but he is entitled to foreclose his lien and sell the property, and apply the proceeds in payment of his demand. There can be no invasion of his possession by the proceedings to foreclose the tax liens. Indeed, as our discussion of section 3698, Lord's Oregon Laws, supra, goes to show, he was not even an essential party to such proceedings.

It is equally clear that the case of In re Eppstein, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465, is not in point, for the reason that in that case the trustee in bankruptcy had the possession of the res to be affected by the tax.

The objections of the receiver of the Title Guarantee & Trust Company to the tax proceedings on the part of Coos county will therefore be dismissed, but without costs to either party.

NEW YORK LIFE INS. CO. v. ANDERSON, Internal Revenue Collector.

(District Court, S. D. New York. March 11, 1919.)

1. MONEY RECEIVED ⟸1—GROUNDS OF ACTION.
   In an action for money had and received, plaintiff may recover only such money as he is in equity entitled to and as defendant is not entitled to retain.

2. INTERNAL REVENUE ⟸38—ACTION TO RECOVER TAXES PAID—CORRECTION OF ERRORS.
   In an action against a collector to recover internal revenue taxes erroneously assessed and paid, errors in the assessment in plaintiff's favor may also be corrected; the United States, which is the real defendant, not being affected by any estoppel which might affect the officer making the assessment.

At Law. Action by the New York Life Insurance Company against Charles W. Anderson, Collector of Internal Revenue for the Second District of the State of New York. Judgment for plaintiff.

James H. McIntosh, of New York City, for plaintiff.
Addison S. Pratt, of New York City, for defendant.

LEARNED HAND, District Judge. This case comes up for further hearing upon the amount of the verdict to be directed. The plaintiff has succeeded upon the issue that the dividends deducted from premiums are a proper allowance, but has failed in securing

any allowance for the depreciation of its securities. The Commissioner of Internal Revenue was not consistent in his treatment of this second class of deductions, for in re-assessing the tax he allowed some depreciations and rejected others. The defendant claims that the verdict should be for no more than the balance actually due, if the Commissioner had re-assessed the tax consistently in accordance with my decision, and that therefore he should be entitled to a credit against the recovery of any taxes paid upon dividends for those items of depreciation which the Commissioner erroneously allowed. On the defendant's theory the calculation should be made as follows:

The amount sued for was $73,277.54. Certain amounts the defendant concedes to have been erroneously assessed and collected. They amount to:

Clerical error	$ 100.00	
Depreciation for furniture, etc.	594.52	
Addition to income to bring the premium receipts to an accrual basis	4,163.89	
Addition to income to bring interest and rents, etc., to an accrual basis	4,611.27	$ 9,469.68
To this should be added the dividends applied in payment of the renewal premiums, which I have decided to have been erroneous		18,994.87
		$28,464.55

But the Commissioner in his assessment allowed the plaintiff to charge off $928,977.73, which was the amount of amortization necessary to bring down the book value of certain of its bonds to their market value, and a further sum of $86,492.14, a book adjustment for increasing or decreasing the book value of certain bonds, in order to adjust the accruals of discounts and to amortize the premiums at which it had purchased them. The sum of the taxes on these two items is $10,154.70. As the Commissioner added to the plaintiff's gross income an increase on the market value of certain of its bonds to the amount of $250,947.52, the tax upon this should be deducted, and that tax is $2,509.58.

The net result of these errors of the Commissioner shows an underassessment of $7,645.22, and if this sum be deducted from the amount of the plaintiff's recovery, $28,464,55, the resulting verdict would be $20,819.33. The question is whether the defendant may be allowed to disregard the Commissioner's return and to treat this action as though it were to re-assess the tax de novo, and to recover only the balance overpaid upon such a re-assessment.

[1, 2] The case is an action for money had and received, and it is well settled that in that action a plaintiff can recover only such money as he is in equity and good conscience entitled to, and as the defendant is not entitled to retain. Cary v. Curtis, 3 How. 236, 246, 11 L. Ed. 576; Gaines v. Miller, 111 U. S. 395, 397, 4 Sup. Ct. 426, 28 L. Ed. 466. Indeed, it is very old law. Moses v. McFerlan, 2 Burr. 1005. A case somewhat analogous on the facts to the case at bar is Jackson v. McKnight, 17 Hun (N. Y.) 2. The plaintiff is therefore entitled in this case to recover only so much as the Com-

missioner should not have collected in the first place, unless the assessment of the Commissioner constituted a valid estoppel against him or against the United States. If that were so, the matter could not be re-opened and must stand; but if it be not so, it follows that the measure of the plaintiff's recovery is only so much as it would not have had to repay had the Commissioner proceeded correctly from the outset.

Now it is well settled that no assessment of the Commissioner of Internal Revenue is necessary for the collection of a tax, at least in a direct action by the United States. Dollar Savings Bank v. U. S., 19 Wall. 227, 22 L. Ed. 80; U. S. v. Chamberlin, 219 U. S. 250, 31 Sup. Ct. 155, 55 L. Ed. 204; U. S. v. Grand Rapids, etc., R. R. (D. C.) 239 Fed. 153. Nor does it make any difference that an assessment has been made, for in spite of the assessment, and of the expiration of the period within which an amended assessment can be made, the United States may still sue for the amount actually due. U. S. v. Phila. & Reading R. R., 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138; U. S. v. Minneapolis Threshing Machine Co. (D. C.) 229 Fed. 1019; U. S. v. Tilden, 9 Ben. 368, Fed. Cas. No. 16,519.

I do not think it makes any difference that this suit is in form against the collector, because the recovery in the end comes from the United States, so that, even if the collector were personally estopped, that estoppel under the circumstances does not apply against the United States. It therefore follows that the defendant is right, and that the recovery should be upon the basis of a corrected assessment of the tax, regardless of the Commissioner's unwarranted deductions in favor of the plaintiff at the time of his assessment.

A verdict will therefore be directed for the plaintiff in the sum of $20,819.33, with interest from February 3, 1912, except on the sum of $694.52.

THE HOWELL.

(District Court, S. D. New York. March 6, 1919.)

ADMIRALTY ⊂⊃20—INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT—EXCLUSIVE REMEDY—ADMIRALTY JURISDICTION.

Under Judicial Code, § 24 (3), and section 256 (3), as amended by Act Oct. 6, 1917, §§ 1, 2 (Comp. St. 1918, §§ 991, 1233), by addition of the words "saving * * * to claimants the rights and remedies under the Workmen's Compensation Law of any state," which amendments are constitutional, a longshoreman injured on a vessel whose employment is covered by the Workmen's Compensation Law of New York, which makes the remedy thereunder exclusive, is without remedy in admiralty, either in personam or in rem.

In Admiralty. Libel in rem against the steam lighter Howell. Libel dismissed.

This was a libel in rem in the admiralty for personal injuries to the libelant while discharging a lighter in the harbor of New York as a longshoreman. The libelant, being on board the lighter and in the employ of the claimant, was hit by a falling bolt which had worked loose from a shackle used in discharging her. The libelant's theory of recovery was that

the ship was provided with insufficient apparatus, and was or became unseaworthy to that extent. At least it may be taken that the libel alleged facts which were susceptible of that interpretation.

The claimant had taken out the necessary insurance to comply with section 50 of the Workmen's Compensation Law of New York (Consol. Laws, c. 67), under section 11 of which its liability in that event was confined to the compensation fixed by that statute, to the exclusion of any general liability arising from its duty as master to its servants. The question was whether the claimant was equally absolved from any liability arising under the maritime law.

P. J. Dunn, of New York City, for libelant.
B. L. Pettigrew, of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). The case of Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, decided that the New York Workmen's Compensation Law was invalid so far as it affected to impose any liabilities for personal injuries occurring in places over which the admiralty courts of the United States had jurisdiction. While the court recognized that the States might modify certain maritime rights, they thought that the action of Congress alone could change the pre-existing rules of the sea in respect of such matters as were covered by the law in question. Subsequently Congress changed Judicial Code (Act March 3, 1911, c. 231) § 24, par. 3, and section 256, par. 3, 36 Stat. 1091, 1160, as amended by Act Oct. 6, 1917, c. 97, §§ 1, 2, 40 Stat. 395 (Comp. St. 1918, §§ 991, 1233), by amending the phrase "saving to suitors in all cases, the right of a common-law remedy where the common law is competent to give it," by the addition of the phrase, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." Since, therefore, under Southern Pacific Co. v. Jensen, supra, Congress was held to have exclusive power to prescribe the rules governing accidents at sea, the only questions which can remain after those amendments are as to their meaning, and as to whether they were forbidden by some constitutional limitation.

To take up first the second question, it may be asked whether the act of Congress was valid which submitted the rules of the sea, not only to existing state laws, but to possible future changes determined only by the will of the states. So far as this case goes, that question is perhaps not pertinent, because, although the state of New York in 1918, and after they had been declared invalid, re-enacted the section controlling this case—section 2 (Group 10)—there was no change in language, and the case at bar may be regarded as in fact governed by the law of New York as it stood when the amendments were passed. Nevertheless the amendments were probably intended to be prospective, and a question might arise as to their validity for that reason. Since Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, I can hardly think that that question is serious. That case determined that, as to matters over which Congress had jurisdiction, it might permit state legislation even prospectively until such time as in its own pleasure it should choose to assume explicit

legislative control. Hence, even if it be true that the amendments to sections 24 and 256 of the Judicial Code must be interpreted prospectively, there is no ground to suppose that they are invalid.

As to the validity of these amendments to the Judicial Code under the Fifth Amendment to the United States Constitution, I assume that New York Central R. R. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, is a final answer, since the same question was there presented as to the validity of the state law under the Fourteenth Amendment.

There remains, then, only the meaning of the amendments, which by reference necessarily incorporated into themselves the New York Workmen's Compensation Law, along with other such laws. Section 11 of that law makes the remedy of compensation exclusive, and if the liability sued upon in the libel depended upon the state law, that would be an end of the matter, since it was clearly not the purpose of the state statute to allow any general liability whatever to survive. However, Southern Pacific Co. v. Jensen, supra, went precisely upon the point that such liabilities as those now at bar arise from the law of the sea, independently of the law of the state, and the more recent case of Chelentis v. Luckenbach, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, confirms that view. Hence, as the libelant urges, the state law may not be interpreted as attempting to end liabilities over which it had no power, and which did not depend upon the will of the state. The answer is, I think, that, though its act was brutum fulmen, the state certainly did intend by section 11 to abolish all liabilities which had previously existed in favor of the groups mentioned in section 2, because section 11 is general and abolishes all liability "at common law or otherwise." Were it not so, we must suppose that the state law, which confers compensation upon longshoremen by a single sentence, whether at work afloat or ashore, intended to give them an option if injured while afloat, and none if injured while ashore. The words do not suggest such an interpretation, and the result is incredible. The system was, of course, intended to be uniform throughout.

Now, it is true that, when first used, this language did not have the force of law as widely as was expected by the Legislature which used it. But that did not affect the content of the language; i. e., its actual intent. That is a question of fact, which is not in the least affected by whether or not the intent became a binding rule of law. When Congress gave validity to the language, it necessarily adopted the intent with which it was used, and the words which in fact had all the time covered such a liability as this, as a mere expression of intent, thereafter covered it as a law. Therefore Congress abolished such liabilities as those here in suit.

It is finally suggested that the remedy in rem may still exist in the admiralty concurrently with the remedy of the Workmen's Compensation Law, since the state law could not have interfered with a remedy known only to the admiralty. This was undoubtedly the suggestion of the Court of Appeals of the State of New York in Walker v. Clyde S. S. Co., 215 N. Y. 529, 532, 109 N. E. 604, Ann.

Cas. 1916B, 87, a case subsequently reversed by the Supreme Court in Clyde v. Walker, 244 U. S. 255, 37 Sup. Ct. 545, 61 L. Ed. 1116. I submit with deference that in no event can the remedy apply after Congress passed the amendments to the Judicial Code. The remedy in rem must depend upon some obligation created by the negligent act of the ship. As soon as that obligation ceases, the remedy is necessarily in vacuo. As I have said, the state law (section 11) did not confine itself to the abolition of common-law liabilities, but professed to abolish all such anywhere. If it was effective to do this, after Congress had validated its intent, there was thereafter no liability, and the remedy in rem had nothing further on which to operate. While it is true, therefore, that the state law, even when so validated, did not and could not affect any remedy of the admiralty, the underlying obligation having disappeared, the remedy was inoperative. I am not, therefore, troubled by the language of Walker v. Clyde S. S. Co., supra.

The libel is dismissed, with costs.

In re MADDEN.

(District Court, D. New Jersey. May 19, 1919.)

BANKRUPTCY ⊂=391(3)—DISCHARGE—RESTRAINT OF PROCEEDINGS IN STATE COURT.

Where, on a complaint alleging breach of marriage promise without averring seduction, judgment was rendered against the bankrupt, who filed a voluntary petition, was adjudicated a bankrupt, and discharged, and after the estate had been closed the judgment creditor brought supplemental proceedings in the state court, it being her theory that the breach of marriage promise had been accompanied by seduction, *held* that, though the liability of the bankrupt was discharged under Bankruptcy Act, § 17 (Comp. St. § 9601), if the breach of marriage promise was not accompanied by seduction, yet under section 11a (Comp. St. § 9595) the bankruptcy court cannot restrain the supplemental proceedings in the state court, and the question whether the liability was discharged must be adjudicated by that tribunal.

In Bankruptcy. In the matter of the bankruptcy of Albert Franklin Madden. On rule to show cause why an order permanently restraining supplementary proceedings in the state court should not be granted. Rule dismissed.

Nicholas F. Perrotty and David Bobker, both of Newark, N. J., for bankrupt.

Riker & Riker, of Newark, N. J., for Dorothy B. Curten.

DAVIS, District Judge. The bankrupt is before this court seeking an order restraining Dorothy B. Curten from continuing supplementary proceedings in the state court on the ground that his discharge in bankruptcy released him from the liability on which the state court proceedings are based. Suit was instituted against the bankrupt in the state court by the said Dorothy B. Curten for breach of promise

of marriage, on which judgment was secured against him, whereupon he filed on July 5, 1918, a voluntary petition in bankruptcy in this court. He was adjudicated a bankrupt on the same day. The bankrupt was discharged on November 25, 1918. His estate in bankruptcy has been administered, and the trustee was discharged on October 31, 1918. Miss Curten instituted supplementary proceedings in the state court, seeking to discover property of the bankrupt, who has applied to this court for a restraining order as aforesaid.

Section 17 of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. § 9601]) provides that:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * are liabilities for breach of promise of marriage accompanied by seduction."

The complaint alleged simple breach of promise of marriage, without averring seduction. The bankrupt did not defend the case, and judgment was entered by default. On assessment of damages, the plaintiff testified that the breach of promise was accompanied by seduction. This was denied by the bankrupt, and the jury assessed the damages, without finding in terms whether or not there was seduction. Under these facts, the bankrupt contends that his discharge in bankruptcy released him from liability for the said judgment, and that he should not be subjected to supplementary proceedings in the state court.

Section 11a of the Bankruptcy Act (Comp. St. § 9595) provides that:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

The bankrupt in this case having been discharged on November 25, 1918, the question is whether or not an order restraining further action in the supplementary proceedings in the state court should be made by this court. If such order is made before the discharge of the bankrupt, the manifest intention of section 11a of the act, above quoted, is that it shall not be continued after the discharge. In re Flanders (D. C.) 10 Am. Bankr. Rep. 379, 121 Fed. 936. If such order has not been made by the bankruptcy court before the discharge of the bankrupt, it should not be made thereafter. In the case of In re Burke, 19 Am. Bankr. Rep. 51, 155 Fed. 703, cited by counsel for the bankrupt, Judge Chatfield decided that the bankrupt had the "right to have proceedings in a state court action, brought upon a claim provable and dischargeable in bankruptcy, stayed, and to have the matter disposed of in the bankruptcy proceedings," but application was made in that case before the bankrupt's discharge and while his estate in bankruptcy was being administered.

In this case, the estate in bankruptcy has been administered, and the bankrupt discharged. The bankrupt has the right to have determined

whether or not his discharge in bankruptcy released him from the judgment secured against him in the breach of promise proceedings, but that question must now be determined in the state court, in which the judgment was secured and where the supplementary proceedings were instituted. The discharge of the bankrupt terminated the jurisdiction over the bankrupt of this court, which no longer has any right to interfere with proceedings in the state court. If the breach of promise of marriage was accompanied by seduction, the discharge in bankruptcy did not release the bankrupt from liability on said judgment; if it was not accompanied by seduction, his discharge did release him from the liability, and the supplementary proceedings should be dismissed. These, however, are questions for the determination of the state court, to whose attention, by appropriate proceedings, the bankrupt should bring the fact of his discharge in bankruptcy and ask for the relief to which he may feel he is entitled.

Restraint is therefore denied, and the rule dismissed

ROBERTS v. UNDERWOOD TYPEWRITER CO.

(District Court, D. New Jersey. May 13, 1919.)

1. REMOVAL OF CAUSES ⟸57—SEPARABLE CONTROVERSY—DETERMINATION WITHOUT ALL PARTIES.
   For a nonresident defendant to remove a cause from the state to the federal court under Judicial Code, § 28 (Comp. St. § 1010), on the ground that there is a separable controversy, it must appear that there is a separable and distinct controversy between the moving party and its adversary, which can be fully determined and complete relief afforded as to the separate cause of action without the presence of others originally made parties.
2. REMOVAL OF CAUSES ⟸61—RIGHT TO REMOVAL—COMPLAINT.
   In determining whether a separable controversy exists, which is removable by a nonresident defendant from the state to a federal court pursuant to Judicial Code, § 28 (Comp. St. § 1010), the plaintiff's complaint governs.
3. REMOVAL OF CAUSES ⟸61—SEPARABLE CONTROVERSY—COMPLAINT.
   The complaint in an action begun in the New Jersey state court against a New Jersey corporation and a Delaware corporation which had assumed the contracts, etc., of the New Jersey corporation, *held* to show the existence of a separable controversy between plaintiff and the Delaware corporation; it appearing that the rights of the plaintiff against the New Jersey corporation were based on an express contract, while those against the Delaware corporation arose out of other transactions, and were implied by its assumption of the New Jersey corporation's obligations.

At Law. Action by Lyman R. Roberts against the Underwood Typewriter Company, a corporation of Delaware, and others, which was begun in the Supreme Court of New Jersey, but was removed by the named defendant to the federal court on the ground there was a separable controversy. On motion to remand. Motion denied.

Reed & Reynolds, of Newark, N. J., for plaintiff.

Pitney, Hardin & Skinner, of Newark, N. J., for defendant.

RELLSTAB, District Judge. On the application of the Underwood Typewriter Company, a corporation of Delaware (hereinafter called the Delaware company), a suit brought against it and two other defendants by Lyman R. Roberts, in the Supreme Court of New Jersey, to recover the sum of $250,000 damages, was removed into this court on the ground that there was a separable controversy between it and the plaintiff. The plaintiff moves to remand the cause to the state court. He and the Underwood Typewriter Company of New Jersey (hereinafter called the New Jersey company), one of the other defendants, are citizens and residents of New Jersey, and the remaining defendant, Charles L. Davis, is a citizen and resident of the state of Illinois. No relief is prayed against Davis; he being made a party defendant for the reason that he declined to be joined as a coplaintiff.

[1] The plaintiff contends that "the allegations of the complaint show a joint contractual obligation upon both companies and the joint breach by both companies," and the sole question on this motion is whether there is a separable controversy between the plaintiff and the Delaware company, within the meaning of section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [Comp. St. § 1010]). This section, so far as pertinent, provides that—

"When in any suit * * * there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district."

"To ascertain the removability of a cause on the ground of the existence of a separable controversy, these tests are established: (1) There must be a separable and distinct controversy between the removing party and his adversary which can be fully determined as between them; and (2) the whole subject-matter must be capable of being so determined and complete relief afforded as to the separate cause of action without the presence of others originally made parties to the suit." Moloney v. Cressler (C. C. A. 7) 210 F. 104, 126 C. C. A. 618.

[2, 3] The plaintiff's complaint, which on this motion controls (Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514), in substance, and so far as pertinent to the cause of action sued upon, alleges that on or about April 3, 1908, the New Jersey company entered into a written agreement with the plaintiff and the defendant Davis (a copy whereof is annexed to and made a part of the complaint), whereby the New Jersey company agreed to manufacture a certain patented machine on a royalty and to use its best efforts to promote the sales thereof; that subsequently, after the acceptance by the New Jersey company of a model of such machine, plaintiff, at the request of both defendant corporations, made therein certain changes which were accepted by both companies; that on or about March 1, 1910, the Delaware company acquired the entire capital stock and assets of the New Jersey company and assumed all its obligations and liabilities, including the rights and obligations arising out of the written agreement; that both of the corporate defendants failed "to do and perform the things which they and each of them became obligated to do and perform under and by virtue of said agreement," but that on the contrary they had each—

"formed an alliance with a manufacturer of a competing machine under which they have advised prospective purchasers of machines covered by said agreement, to purchase such competing machine, and they and each of them have taken many other steps and have committed many other acts to prevent the marketing and promotion of sales of said machines, thereby depriving plaintiff of the large amounts of royalties which otherwise would have accrued and have been due to him under and by virtue of said agreement."

What liability the Delaware company incurred by reason of its request for changes in the machines and acceptance thereof is not stated, and, as it was not a party to the agreement referred to, any liability arising from such request and acceptance rests solely on its individual action in that behalf. If the Delaware Company incurred any liability to the plaintiff from its alleged assumption of the New Jersey company's obligations arising from the written agreement referred to, that, too, springs out of and rests solely on its individual undertaking.

The allegation that the defendant companies had each entered into an alliance with manufacturers of competing machines, etc., by means of which plaintiff has been deprived of royalties which otherwise would have accrued to him under said agreement, does not charge a joint liability; at best it alleges only that each committed a wrong against the plaintiff, and that each are liable for the damages accruing to the plaintiff by reason of their respective individual acts in that particular. The liability charged against the New Jersey company is based on its failure to perform its written agreement with the plaintiff; that against the Delaware company grows out of its acquisition of the New Jersey company's capital stock and assets, and is based on its assumption of that company's obligations including those arising out of the written agreement. In brief, the complaint charges that both companies are liable to the plaintiff in damages.

As to the New Jersey company, it is the breach of an express contract made by it with the plaintiff; while, as to the Delaware company, it is the breach of an obligation not based upon any express agreement made by it with the plaintiff, but arising by implication in his favor by reason of its assumption of the New Jersey company's obligations and of certain of its acts in relation to the subject-matter of the contract made by the plaintiff with the New Jersey company. The liability of the defendants to respond in damages does not arise out of a "joint contractual obligation" as contended by plaintiff, but out of acts having no common origin and which furnish separate causes of action based on different rights. Breaches of contract or duties, thus founded, present separate and distinct controversies. Neither of these companies is a necessary or indispensable party to the full determination of the controversy between the plaintiff and the other company, or for enforcing any judgment which he might recover against either, and as the other jurisdictional facts necessary to give this court cognizance of the controversy between the plaintiff and the Delaware company are present, that controversy was properly removed here. Geer v. Mathieson Alkali Works, 190 U. S. 428, 432, 23 Sup. Ct. 807, 47 L. Ed. 1122 (and cases cited); Mecke v. Valleytown Mineral Co. (C. C.) 89 Fed. 209, affirmed (C. C. A. 4) 93 Fed. 697, 35 C. C. A. 151; Iowa Lillooet C.

Min. Co. v. Bliss (C. C. N. D. Ia.) 144 Fed. 446; Chase v. Beech Creek R. Co. (C. C. W. D. Pa.) 144 Fed. 571; Manufacturers' Commercial Co. v. Brown Alaska Co. (C. C. S. D. N. Y.) 48 Fed. 308; Stimson v. United Wrapping Co. (C. C. W. D. N. Y.) 156 Fed. 298; Hough v. Societe Electrique Westinghouse de Russie (D. C. S. D. N. Y.) 232 Fed. 635; English v. Supreme Conclave, I. O. of H. (D. C. N. J.) 235 Fed. 630.

The motion to remand is therefore denied.

THE VIGO.

(District Court, S. D. New York. April 5, 1919.)

1. SHIPPING ⊂=47—CHARTERS—CONSTRUCTION—WHARFAGE.
   Under a clause of a charter party requiring the ship to deliver her cargo alongside any wharf or pier designated by charterer, she cannot be required to pay wharfage for use of a designated pier after her cargo has been discharged thereon.
2. SHIPPING ⊂=47—CHARTERS—CONSTRUCTION—"PORT CHARGES."
   Under a charter party requiring the charterer to pay expense of discharging, and the ship to pay all port charges as customary, and to deliver the cargo alongside any wharf or pier designated by charterer, port charges for which the ship is liable include the cost of her berth while discharging, although alongside a private pier, but not the charge for use of the pier for receiving the cargo.

   [Ed. Note.—For other definitions, see Words and Phrases, Port Charges.]

In Admiralty. Libel in rem against the steamship Vigo. Decree for libelant.

This is a suit in rem against the steamer for breach of a provision in the charter party entered into on the 24th day of March, 1917. The charter party was for a voyage from Palamo, Spain, to the port of New York and the libelant, who was the charterer, paid a bill for wharfage at Stapleton Pier, Staten Island, for a period of 6 days, during which the Vigo was discharged and her cargo lay on the pier. The total amount paid by the libelant was $729. The ship occupied only one day in discharging, and the remaining part of the charges were for the use of the pier while the cargo remained there.

The charter party contained the following clauses: The ship shall "deliver the same [cargo] alongside any craft, steamer, floating depot, wharf or pier as ordered by the charterer." Again: "Expenses for loading and unloading shall be at charterer's expense." Again: "Steamer to pay all port charges and pilotage on ship at ports of loading and discharge as customary." The libelant contended that the ship should pay the whole bill for wharfage.

Haight, Sandford & Smith, of New York City, for libelant.
Kirlin, Woolsey & Hickox, of New York City, for claimant.

LEARNED HAND, District Judge. [1] Under the clause which requires the ship to deliver the cargo alongside any wharf or pier, the ship's obligation terminated as soon as the cargo was landed upon the wharf. In no aspect can any wharfage charged thereafter be on the ship's account and the maximum which the libelant can recover

would therefore be one day's wharfage, $115, together with the lighting charges, $20, for the night in question.

[2] The only question which remains is whether these are proper charges against the charterer or the ship. Both parties agree that without any other stipulation in the charter party wharfage is a proper charge against the ship, and the undisputed testimony here is that such is the universal custom of the port. Two clauses alone control the liability. The first is, "Expenses for loading and unloading ship at charterer's expense;" and the second, "Steamer to pay all port charges and pilotage on ship at ports of loading and discharge as is customary." If this be a "port charge," it would be on the ship's account, in spite of the first clause, because to give both clauses complete effect the first ought to be interpreted as meaning expenses for loading and unloading other than "port charges." Now, that phrase appears to me to cover such dues as are imposed upon the ship for the privilege of entering the port and remaining at those berths, to which the charterer may lawfully direct her to repair, till the completion of the charter party. Obviously, it would include any charges for entering the limits of the port, and if the charterer elected to discharge by lighters it would include all charges for a berth upon a public anchorage, if there were any such. Similarly, if the charterer ordered her to a public wharf, for lying at which there was a charge, she must bear that, too. If, however, as in this case, he lawfully orders her to a private wharf, the cost of her berth appears to me to be the same thing. It is the cost of her presence in the port, collected, it is true, not by public authorities, but by those who have the right from those authorities to offer such berths to vessels in the port. In so far, therefore, as the change represents only the cost of the berth, as distinct from the use of the wharf to discharge the cargo, I am clear that it is a "port charge."

The "expenses for loading and unloading" are distinguishable. Normally, the ship under a charter like this must discharge over her rail, and the charterer must accept delivery from the ship's tackles, for that is a delivery "alongside" which the ship undertakes, and all that she undertakes. In this charter party these rights are varied, in that the charterer agreed to pay for the discharge, using the ship's tackles and winches; but that clause only covers, I think, the actual movement of the cargo from the holds to the wharf. Whatever that cost, the charterer must pay it, just as he must pay for the reception of the cargo and its storage on the wharf. The expenses of discharge do not, however, cover the cost of the ship's berth, because her berth is not necessarily connected with her discharge. For example, it might be necessary to secure a berth before she could discharge at all.

In principle the ship should bear only so much of the wharfage during her discharge as is attributable to her berth; the charterer, the balance. This is by no means a fictitious distinction, for there are different charges actually made in the port of New York for these privileges. It appears to me that under a charter such as this the difference should be observed when the custom of the port makes such a distinction. I hold, therefore, that the ship is chargeable only with

the customary berthing charge for one day, but not with so much more, though included in one sum, as is charged for berthing, together with the use of the wharf to receive the cargo for the same time. This second element is certainly no more chargeable to the ship than the hire of lighters, were the discharge by lighters. It also follows that the charge for lights is on charterer's account.

The only case in point to which I have been referred is a judgment of Lord Sumner (while Hamilton, J.), in Societa Anonima, etc., v. Hamburg, etc., Gesellschafft, 17 Com. Cas. 216, with which my decision accords, though it must be conceded that the case is not strictly in point here. There the charter contained the following clause:

"The charterer paying all dues and duties on the cargo, and the steamer all port charges, pilotage, etc., as is customary."

Hamilton, J., thought that these two alternatives were exhaustive, and that the charges in question must be either dues and duties on the cargo or port charges. The charterer wished to throw upon the ship the dues at the port of discharge for the use of the quays and for dredging and clearing away obstructions from the port. Apparently these charges were of a semiofficial character, and I own that it is hard to see how they could in any event have been held to be "dues and duties on the cargo." The force of the case for this purpose is therefore much broken by the exhaustive character of alternatives in the charter, yet I think it none the less has some force here, especially in view of the very high authority of all judgments by Lord Sumner.

The libelant may therefore take a decree as indicated above, but without costs.

UNITED STATES v. BRAGG.

(District Court, E. D. Pennsylvania. May 28, 1919.)

No. 5336.

ALIENS ⇐62—NATURALIZATION—INTERRUPTION OF RESIDENCE.

A British subject, who emigrated to the United States in 1879, and in 1908 took up his residence in Pennsylvania, where he lived until July, 1911, when he went abroad to England on business, intending to return, but was delayed, and did not return until October 22, 1916, from which date he was physically resident in Pennsylvania until hearing, on June 15, 1917, of petition by the United States to cancel his certificate of citizenship, had not complied with General Naturalization Act June 29, 1906, § 4, par. 4 (Comp. St. § 4352), requiring continuous residence within the country at least five years and within the state at least one year immediately preceding date of application.

Petition by the United States for cancellation of the certificate of citizenship issued to George James Bragg. Certificate ordered canceled without prejudice.

Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa.

Robert S. Shaw, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The respondent on March 9, 1917, made and filed his petition for naturalization under the provisions of section 3 of the Act of June 25, 1910 (c. 401, 36 St. at 830 [Comp. St. § 4352]) and on June 15, 1917, after hearing the applicant and his vouchers in open court, it was ordered that he be admitted, and upon taking the required oath a certificate of citizenship was issued to him.

A petition on behalf of the United States was presented and filed December 21, 1917, praying for cancellation of the certificate of citizenship, upon the ground that it was illegally procured, in that, inter alia, the respondent had not resided continuously within the United States five years, nor within the state of Pennsylvania one year at least, immediately preceding the date of his application. The facts appearing on the record, from the petition to cancel and answer thereto, and from the testimony taken at the hearing are as follows:

The respondent was born in London, England, November 22, 1859, and was a British subject. He emigrated to the United States, and arrived at Detroit, Mich., on October 16, 1879. He was informed that, on account of his having arrived while a minor, he thereby after five years' residence became a citizen of the United States. On January 30, 1908, he took up his residence in the state of Pennsylvania. He continued to believe himself a citizen until October, 1909, when he was first apprised that his impression was erroneous. Up until that date, by reason of such belief, he had always acted as and exercised the rights and duties of a citizen. He thereafter continued to maintain a residence and place of abode for himself and family in the state of Pennsylvania, and, until July, 1911, was physically resident in the city of Philadelphia with his family. During July, 1911, he went abroad on business in connection with promoting and organizing a corporation in England. After his arrival in England, he had a bona fide intention of returning in a few months to his home in Philadelphia, and that intention continued throughout his sojourn abroad, but there were delays in the accomplishment of the purpose for which he went abroad, and, as a result, he did not return to Philadelphia until October 22, 1916. From October 22, 1916, he was physically resident in the state of Pennsylvania. At the time of the hearing on June 15, 1917, he was employed in the Frankford Arsenal in expert inspection of munitions of war for the United States.

In his petition for admission he averred that he had resided within the United States since October 16, 1879, and in the state of Pennsylvania continuously next preceding the date of his petition since the 30th day of January, 1908, except from July, 1911, to October 22, 1916, being abroad on business. The verifying affidavits of his two witnesses were similar in effect.

It is not denied on behalf of the United States that the respondent belonged "to the class of persons authorized and qualified under existing law to become a citizen of the United States," nor that he "resided constantly in the United States during a period of five years next preceding May 1, 1910."

It is not necessary to decide whether the respondent met the requirements of the act in making a showing satisfactory to the court of the things to be done which may be accepted in lieu of a declaration of intention, unless the requirement that he had "been for a period of more than five years entitled upon proper proceedings to be naturalized" has been met. That language refers to the five years prior to the hearing, as was held by Judge Dickinson in Re Ross (D. C.) 223 Fed. 366. To be entitled to be naturalized, "such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens." In view of his physical absence from the United States from July, 1911, to October 22, 1916, it must be determined whether he is barred by failure to comply with the provisions of the law as to residence.

The fourth paragraph of section 4 of the General Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596 (Comp. St. § 4352) requires that the alien must have resided continuously within the United States at least five years, and within the state at least one year, immediately preceding the date of his application. It is clear that the law as to residence contained in the act of 1906 applies to the admission of aliens under the amendment of section 2 of that act by section 3 of the act of June 25, 1910, for it is a "law relative to the issuance of final papers to aliens," so that the continuity of the residence must be measured by the same rules in one case as in the other. No hard and fast rule has been laid down by which to measure the length of time during which an applicant may be absent either on business, pleasure, or family affairs without interrupting the continuity of residence intended. It has never been held, so far as I am aware, that the word "continuously" is used as requiring the applicant to remain at all times physically within the jurisdiction; but the circumstances in each case must be taken into consideration to determine whether the continuity of residence is so substantially interrupted as to altogether negative the idea conveyed by the language of the act. The respondent without doubt in good faith intended, within such period of time after going abroad as would probably have been held not to break the continuity of his residence, to return and continue his domicile in the state of Pennsylvania and city of Philadelphia, where his family resided and his home was established. He was, however, a free agent, and if he intended to predicate an application for naturalization upon a residence for five years prior thereto, the choice was open to him, when he realized that the time was lengthening, of either abandoning the business which took him abroad and returning to the United States, or abandoning his claim of continuous residence in the United States during the five-year period and remaining abroad for the transaction of his business. He chose the latter alternative, and, whatever his intention of returning was, he was physically absent for four years and seven months of the five-year period required for residence in the United States, and for seven months of the one-year period required for residence in Pennsylvania.

I am unable to see, therefore, that it can be held, without doing violence to the requirements of the act as to residence prior to application, that he did not lose his right to naturalization upon the application under consideration.

It is concluded, therefore, that the petition for citizenship should not have been granted, and it is ordered that the certificate be canceled without prejudice.

COLEMAN et al. v. SHORTSVILLE WHEEL CO.

(District Court, W. D. New York. February 21, 1919.)

No. 121.

1. BANKS AND BANKING ⟸116(4)—REPRESENTATION OF BANK BY OFFICERS—NOTICE TO OFFICERS.
   Knowledge obtained by an officer of a bank as an individual, and not as an officer of the bank, cannot be imputed to the bank, or permitted to operate to its prejudice.
2. BILLS AND NOTES ⟸369—DISCOUNT OF NOTE—RIGHTS AGAINST MAKER AND INDORSER.
   A bank, holding the note of a customer for valuable consideration, is not bound by an arrangement between the maker and indorser as to its payment, of which the bank had no knowledge.
3. BILLS AND NOTES ⟸360—DISCOUNT OF NOTE—EFFECT OF RENEWAL.
   The rights of a bank upon a renewal note cannot be affected by knowledge which it obtained after it acquired the original note for value and prior to the renewal.

In Equity. Suit by Richard H. Coleman and Joseph S. Coleman, copartners as the Columbia Singletree Company, against the Shortsville Wheel Company. On motion to confirm report of special master.

James McCall, of Bath, N. Y., for Bank of Avoca.
Willis C. Ellis, of Shortsville, N. Y., for receivers.

HAZEL, District Judge. On June 2, 1913, the Bank of Avoca discounted a promissory note for $3,500, payable three months after date, given by the Shortsville Wheel Company to the Avoca Wheel Company. At maturity a partial payment was made and a renewal note given. On September 2, 1914, there was due on the indebtedness $3,045.74, and the Shortsville Wheel Company then gave a renewal note, payable in three months and indorsed by the Avoca Wheel Company, to secure the debt. Meanwhile receivers were appointed for the Shortsville Wheel Company, with whom claims were thereafter filed on the indebtedness in question. Payment of a dividend on the debt was refused by the receivers, because of the existence of an agreement between the Avoca Wheel Company, the indorser of the original and renewal notes, and the Shortsville Wheel Company, the maker, that each should pay one-half of the original indebtedness when it became due, of which the Bank of Avoca was aware, and in consequence of which it could not legally collect a dividend on the

full amount unpaid. The special master found that the bank had no knowledge of the existence of the agreement in question at the time the original note was discounted, but that its cashier afterwards acquired such knowledge just before the last renewal note was made and delivered.

[1] The question of liability of the receivers for dividends on the full amount of the note is presented as a matter of law. In my opinion, in order to make the bank a party to the existing arrangement between the maker and indorser of the note, the bank must have had actual notice thereof and have given the discount pursuant thereto. Although the evidence shows that at the time of discounting the original note several directors of the Avoca Wheel Company were also directors of the Bank of Avoca, it is well settled by decisions of the highest courts of this state that knowledge derived by an officer of a bank as an individual, and not as an officer of the bank, cannot be imputed to the bank or permitted to operate to its prejudice. C. N. Bank v. Clark et al., 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705.

[2, 3] It has never been supposed that a bank holding the note of a customer for valuable consideration would be bound by an arrangement between the maker and indorser of the note regarding the method of payment. Where that is the intention, it is necessary to include the arrangement as to liability and method of payment in the note, or, at least, unequivocally to apprise the officers of the bank of it. See 8 Corpus Juris, 508, 742. And in my opinion it makes no difference that the cashier of the bank had information regarding the existing arrangement between maker and indorser at the time of the renewal of the original note, which was in no sense an extinguishment of the original indebtedness, but merely a postponement of payment. I think, in the circumstances, that the bank was entitled to the same rights and remedies that it had on the original note. Jagger Iron Co. v. Walker, 76 N. Y. 521. Aside from this, the liability of the Shortsville Wheel Company would seem to be determinable under the Negotiable Instrument Law of the state of New York (Consol. Laws, c. 38), regardless of the agreement in question, since under section 55 of that law a person lending his name as an accommodation indorser of a note becomes liable to a holder thereof for value, even though the latter knew the person to be an accommodation signer. By analogy this principle is not inapposite to the present situation.

Whatever rights eventuated to the receivers from the agreement are believed to be enforceable by action against the Avoca Wheel Company for contribution. It follows that the receivers are required to pay full dividends to the Bank of Avoca, with interest on dividends withheld, together with the fees of the special master.

So ordered.

FIRST NAT. BANK OF FAIRBANKS v. NOYES.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3142.

1. ESTOPPEL ⇐88(2)—EQUITABLE ESTOPPEL—WHAT CONSTITUTES.
That a director of a national bank signed his name to reports to the Comptroller of the Currency, representing branches maintained by the bank to be separate institutions, *held*, as the bank knew all the facts in relation thereto, and did not act to its detriment in reliance on the reports, not to estop the director from asserting, in a suit by the bank to recover against him because of excessive loans to a branch, that such branches were part of the bank itself.

2. BANKS AND BANKING ⇐253—BRANCH BANKS—WHAT ARE.
In an action by a national bank against a former director to recover on account of excessive loans to alleged separate institutions, etc., *held*, that such institutions were branches maintained by the bank to purchase gold dust, so statements to the Comptroller showing the condition of accounts between the bank and branches were not notice to the director of loans to the branches, or of loans made to borrowers under authority of the bank.

3. BANKS AND BANKING ⇐253—DIRECTORS—LIABILITY.
A director of a national bank, who was not familiar with banking business, *held* not negligent because he did not examine into advances made by the bank to branches which it maintained, and no recovery can be had on ground of excessive loans by the branches, where the president and majority stockholder of the bank represented all sums sent to the branches were for purchase of gold dust.

4. BANKS AND BANKING ⇐253—DIRECTORS—LIABILITY—DIVIDENDS.
In an action by a national bank against a former director to recover, on the theory that a dividend had improperly been declared, *held*, that the declaration of the dividend, which was at the suggestion of the Comptroller of the Currency to wind up branches of the bank, was not improper, and no liability could be predicated thereon, as practically the whole of the dividend was immediately transferred to the bank by the stockholders.

5. BANKS AND BANKING ⇐253—DIRECTORS—LIABILITY.
Where a national bank seeks to recover against a director for a loss resulting from the director's violation of a duty imposed by the National Banking Act, proof of something more than negligence is required, and there must be proof that the violation was in effect intentional.

6. BANKS AND BANKING ⇐253—DIRECTORS—LIABILITY.
Directors of a national bank owe a common-law duty to exercise ordinary care and prudence in the administration of the affairs of the bank, and they should not be shielded from liability for want of knowledge of wrongdoing, if that ignorance is the result of gross inattention; but they cannot be held responsible for the wrongful act of other directors, nor to intimately know to whom credits are given.

7. BANKS AND BANKING ⇐254—DIRECTORS—LIABILITY.
In an action by a national bank against a director to recover for various losses, including improper extension of credits, claimed to have resulted from the director's neglect, evidence *held* insufficient to show that the director was liable, either at common law or under the National Banking Act.

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

Suit by the First National Bank of Fairbanks against F. G. Noyes. From a decree for defendant, complainant appeals. Affirmed.

The appellant, a national banking association of Fairbanks, Alaska, brought suit against the appellee, who had been one of the directors of the bank during the period between September 9, 1907, and March 5, 1909, on five causes of action, the first of which was to recover the sum of $25,722.27 as damages sustained by the appellant on account of an excessive loan made in violation of the provisions of the National Banking Act by the directors of the bank to what was then known as the "S. A. Bonnifield Bank." The second was to recover from the appellee $5,627.93 damages sustained by the appellant by the act of the appellee and other directors in declaring a dividend in violation of the provisions of said act, and thereby appropriating the same to their own use. The third was to recover the sum of $7,168.22 as damages on account of an excessive loan, made in violation of the provisions of the act, to what was known as the "Bank of Cleary." The fourth and fifth were to recover the sums of $5,100 and $7,800 damages sustained on account of excessive loans made in violation of the provisions of the act to John W. Corson and Theo. Witte, respectively. The appellee in his answer denied any violation on his part of any of the provisions of the act respecting excessive loans or illegal dividends, and alleged that the S. A. Bonnifield Bank and the Bank of Cleary were not separate and distinct banks, but were only branches of the appellant, belonging to and a part of it.

On the pleadings and the evidence the court made substantially the following findings of fact:

That the capital stock of the bank is $50,000, consisting of 500 shares, of which the appellee, during the period while he was a director, owned 10 shares, and that at that time Samuel A. Bonnifield, the president, and F. G. Manley, a director, owned practically all of the stock of the corporation. That from April 29, 1907, to October 15, 1909, the said Bonnifield maintained and carried on a banking business on Dome Creek, Alaska, under the name of the S. A. Bonnifield Bank, and from April 5, 1906, until February 13, 1909, he maintained and carried on, on Cleary Creek, Alaska, another banking business under the name of the Bank of Cleary. That these banking institutions were separate institutions from the First National Bank, and were established before the appellee became a director. That the appellee was not a banker, and he believed that the Bank of Cleary and S. A. Bonnifield Bank were part of the First National Bank, and was not guilty of negligence, or of any culpable intent, in believing that these so-called banks were not borrowers of the funds of the appellant, but held those funds subject to the control and disposal of the appellant, as if said funds had been held at the place of business of the appellant. That loans were made to Manley in excess of the amount permitted by law, to the knowledge of said Bonnifield and Manley, but without the knowledge, consent, or acquiescence of the appellee, and no loss resulted to the appellant from said loans.

That the so-called S. A. Bonnifield Bank and the so-called Bank of Cleary were established by Bonnifield for the purpose mainly of purchasing and collecting gold dust from the miners in the vicinity thereof, and for the use and benefit solely of the appellant, and Bonnifield thereafter caused to be transferred and kept on the books of the Dome Creek and Cleary offices doubtful debts and excessive loans of the appellant, and drew checks upon his account in those offices without having any funds to his credit, all of which was done without the knowledge, participation, or assent of the appellant, who believed that those two offices were used only for purchasing and collecting gold dust, and for the accommodation of the miners. That in the latter part of August, 1908, the appellee learned that these offices were irregular, and not permitted by law, and thereafter he and Hurley, the cashier, did all in their power to close said offices, until they were finally closed. That the loan register of the appellant shows no entry of loans or discounts for those offices, nor does the interest account of the appellant show that any interest was ever charged to those offices for moneys sent thereto. That the accounts between said offices and the appellant were open accounts, changed from day to day, by reason of entries of credits and debits

caused by accounts transferred, and cash sent by the appellant to those institutions, and gold dust sent back therefrom to the appellant, and the same accounts retransferred from said offices to the appellant, and by the cashing of checks by the three offices, one for the other.

That the credit given by the appellant on its books to the so-called Bonnifield Bank on August 18, 1908, for $39,563.12, being the amount of the Tanana Commercial Company account, was given without the knowledge, participation, or assent of the appellee, and was given by Hurley, the cashier of appellant, for the purpose of winding up and closing the affairs of the Bonnifield Bank, in consequence of directions received from the Comptroller of the Currency. That said account belonged to and was the property of the appellant, and the purpose of the cashier in making said credit entries was to show on the books the true condition of the appellant and its accounts. That of the loans and advances made by the appellant to the Tanana Commercial Company, $14,500 was advanced by Bonnifield prior to the time when the appellee became a director, $632.91 was usurious interest, $5,158.61 was for an overdraft permitted to the Tanana Commercial Company without the knowledge, participation, or assent of the appellee, and $19,271.60 was the balance of a loan made between September 27 and December 2, 1907, to the Tanana Commercial Company by Bonnifield, as president of the appellant, and in pursuance of an agreement between him and the Commercial Company prior to the time when the appellee became a director, and was made on the security of certain goods and chattels, but without the knowledge or assent or participation of the appellee.

That the appellee did not on August 18, 1908, or at any time, knowingly or at all cause to be made, or participate or assent to the making of, any credit upon the books of the appellant from the Bonnifield Bank of the sum of $39,563.12, or any sum, nor did he assent to the making of any charge by the Bonnifield Bank against the appellant of said sum, nor did he at any time have any knowledge of the value of the goods or stock of merchandise or book accounts of the Tanana Commercial Company. That the moneys drawn out of the funds of the appellant and of the so-called Bonnifield and Cleary Banks by Bonnifield, during the time that he was president and manager, were the moneys and property of the appellant, and the securities taken by him in his own name through either of said banks were the securities and property of the appellant, and the assets of the so-called Bonnifield and Cleary offices were the accounts and securities of the appellant. That in 1907, Bonnifield drew from the funds of the Bonnifield Bank, May 1, $20,000, June 3, $6,056, June 7, $14,000, and credits were made to his account, so that the Bonnifield Bank showed a balance debit of $20,595.15 on its books. That between the dates of Bonnifield's overdraft and the closing up of the Bonnifield Bank, profits had been made by the latter and remitted to the appellant, resulting in a debit balance of only $6,103.01. That the Bonnifield and Cleary Banks had no source of income, and the general expenses of operating the same were borne by the appellant in funds furnished by it. That no loss has been caused to the appellant in consequence of establishing and maintaining either the Bonnifield or the Cleary Bank, or in consequence of money sent to said banks. That said banks have purchased large amounts of gold dust for the benefit of the appellant, and delivered the same at cost purchase price, so that the appellant has realized out of the gold dust so purchased by said banks more than sufficient to equal the amount of the balances claimed in the complaint to have been lost by reason of the operations in the Bonnifield and Cleary Banks.

That upon February 13, 1909, the directors of the appellee caused a dividend of $40,000 to be declared upon the shares of the capital stock of the appellant, and on the same day they credited the Bank of Cleary with $39,840 of the dividend so declared. That at that time the capital stock, surplus, accrued interest, undivided profits, and other assets belonging to the appellant were in excess of $150,000, and the amount out of which a dividend could be declared lawfully was in excess of $40,000, and the appellee and the other directors did not know that there were bad debts amounting to $48,450, but believed that the net profits then on hand and available for

dividends, deducting losses and bad debts, was in excess of $40,000, and that the capital stock of the appellant was not impaired by declaring the dividend. That the declaration of that dividend was made solely for the purpose of closing up the affairs and office of the Bank of Cleary, in pursuance of directions from the Comptroller of the Currency, and upon declaring the same certificates of deposit were made to the order of the stockholders for their respective shares, which certificates were immediately indorsed by them and not cashed, but turned over to the appellant, save and except the dividend on 2 shares, amounting to $160; but the appellee contributed the entire amount of his dividend for the purpose indicated. That in declaring the dividend the appellee did not assent to or participate in any withdrawal of any portion of the appellant's capital, and that in fact by the dividend the capital of the appellant has not been impaired, nor has it sustained any damage.

That the loan to Carlson was made by the appellant upon his note for $5,700 of date October 29, 1906, of which $700 was usurious interest, and further usurious interest was added thereto, amounting to $583.68, and said note, with the usurious interest, was transferred a year later to the Bank of Cleary, where Carlson had also an overdrawn account. That on September 15, 1907, Carlson's account at Cleary was $26,760.57, which by October 29, 1907, was reduced to $22,690.01, and on that day it was further charged with the amount of the note, making the total $28,973.69, and on October 30, 1907, the total amount was transferred to the appellant, and $20,000 thereof was charged to the personal account of Bonnifield, and subsequently paid by him. That the unpaid balance of Carlson's account, amounting to $8,973.69, included $1,283.68 of usurious interest, to which further usurious interest amounting to $1,184.53 was added, making the sum total $10,158.22, for which he gave his note to Bonnifield, which was subsequently indorsed to the appellant. That $2,990 has been collected on account of the note, and after deducting that sum and usurious interest Carlson's account was shown by the evidence to have been decreased down to $4,700.01, which was less than Carlson owed to the appellant at the time when the appellee became a director. That no loss suffered by the appellant by reason of the transactions with Carlson was caused by the act or omission of the appellee, and the loans to Carlson were made by Bonnifield, and without the knowledge or participation of the appellee. That he never knew or consented to any of the credit entries or transactions between the Cleary Bank and the appellant in the matter of the Carlson account. That in fact the Carlson account was neither imaginary nor worthless, or fictitious or uncollectible.

That between July 17, 1908, and August 18, 1908, the cashier of the appellant, without the appellee's knowledge or consent, discounted bills drawn by J. W. Corson to the amount of $11,450, and bills of exchange drawn by one McDonald, amounting to $2,750. That Manley, then a director of the appellant, represented to the cashier that said bills of exchange were drawn in good faith against existing values. That the appellee never acquired knowledge of the said transactions until more than a month after they had been consummated. That the appellant has not been damaged by any act of the appellee in discounting and cashing said drafts. That between January 14, 1909, and March 5, 1909, the appellant loaned to Theodore Witte, without the knowledge or consent of the appellee, $10,500, and without his knowledge or consent permitted Witte to overdraw to the sum of $1,203.43. That on March 8, 1909, the overdraft was paid by Witte, and the appellant was not damaged in consequence of any participation or assent of the appellee to said loan or overdraft.

That the appellant, through its directors and officers, knew on September 5, 1907, and its stockholders knew on January 7, 1908, that the appellee was not a banker, and had no experience in the banking business, and was not able to understand any complicated system of bookkeeping, such as bank books, nor any of the transactions therein recorded, and they at no time informed him of the true condition of the appellant or of its affairs with the Cleary and Bonnifield Banks, and that the appellee was not then and has not since been lacking in diligence in not being informed of the true state of the affairs of the appellant or of the other so-called banks. That he

never, during the time while he was director, knowingly permitted to be made or assented to the making of any loans or advances or overdrafts to any person or persons in excess of the amount permitted by the National Banking Act (Act June 3, 1864, c. 106, 13 Stat. 99). That the amount which the appellant could lawfully loan between July 17, and August 13, 1908, to any one person, firm, or corporation, was $11,500. That on May 8, 1909, all the capital stock of the appellant was sold to E. T. Barnett and W. H. Parsons, who thereafter sold the same to R. C. Wood and John L. McGinn, who now own each 230 shares thereof. That at the time when Barnett and Parsons purchased the capital stock they did so with full knowledge of the affairs and conditions of the bank, and the price paid by them therefor did not contemplate any liability attached to and existing against the appellee for any act of his during his directorate. That when Wood and McGinn took an option from Barnett and Parsons to purchase the stock, they had full knowledge of the affairs and conditions of the appellant.

As a conclusion of law the court found that the appellee was not liable to the appellant in any sum upon any of the causes of action set forth, and a judgment was entered dismissing the action.

John L. McGinn, McGowan & Clark, and A. R. Heilig, all of Fairbanks, Alaska, and W. H. Metson, F. C. Drew, J. A. MacKenzie, and Miss E. H. Ryan, all of San Francisco, Cal. (Curtis Hillyer, of San Francisco, Cal., of counsel), for appellant.

Roy V. Nye, of Monrovia, Cal., and De Journel & De Journel, of San Francisco, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant assigns error to the findings of the court as contrary to the evidence, to the refusal of the court to make findings as requested by the appellant, and to the conclusions of law because unsupported by the findings. The five causes of action are grouped in two classes. The second is for damages for the declaration of an illegal dividend. The others are based on loans made in excess of the amount permitted by the National Banking Law. As to the first and third causes of action for damages for the so-called loans to the Bonnifield and Cleary branches, the appellant relies upon reports to the Comptroller of the Currency, which were signed by the appellee, to show that the appellee had knowledge of the excessive amount of the loans. This contention is based on the theory that those branches were in fact banks separate and distinct from the appellant bank, and it is said that this is conclusively established by the finding of fact of the court below from which finding no appeal has been taken. It is also contended that the appellee is estopped to deny that the Bonnifield and Cleary branches were separate entities, for the reason that he, together with five other directors, signed his name to reports to the Comptroller of the Currency, representing them to be separate institutions, and because the appellant, relying thereon, brought the present suit. The question of estoppel may be disposed of in few words. The appellant knew all the facts in regard to the so-called branches, and it knew the exact nature of its own dealings therewith, and it has not been injured by the appellee's signature to the reports to the Comptroller, nor has it acted thereon to its own detriment.

[2, 3] It is true that the court below made a finding that the Bonnifield and Cleary institutions "were separate institutions from the First National Bank." That is not a finding of fact, however, but a conclusion of law. This is shown, first, by the opinion of the court below, in which it was said of these branches:

"They have every indication of being a part of the First National Bank. No characteristic is lacking."

But the court proceeded to say that, owing to the provision of law that a national bank cannot establish branch banks except in the manner provided by statute, "we must conclude that these banks must be held to be separate from the First National Bank."

It is shown, second, by the facts in regard to the relation of the appellant to the two branches as set forth in the findings of the court below, which prove beyond question that the Bonnifield and Cleary offices were part and parcel of the appellant bank, and that it was so generally understood by the public. Those offices were established by the appellant. They had no organization as banks and no capital stock. They acted under the directions of the appellant. They made loans out of funds furnished by the appellant, and only as authorized by the appellant. Their principal business was to purchase gold dust with the appellant's funds and forward the same to the appellant, and to receive for transmission to the appellant gold dust to be deposited to the credit of depositors who had accounts with the appellant. Each office was in charge of a manager or agent appointed by the appellant. The branch offices reserved no profits to themselves. All that they did was for the benefit and profit of the appellant. The appellant authorized a bank in Seattle and a bank in New York to cash drafts drawn by the appellant's agent at Bonnifield, and to charge the same to the appellant. It gave like authority to the Seattle bank and to a bank of San Francisco to cash drafts drawn by the agent at Cleary. The appellant conducted these gold dust purchasing agencies in competition with two other banks of Fairbanks, which had offices at the same places and for the same purposes. The Dome and Cleary Creek agencies sent statements to the appellant of their condition and their transactions, and the latter took and retained possession of all their books and records when the agencies were closed, and it still retains the same. In brief, the so-called Bonnifield and Cleary Banks were but agencies belonging to and operated by the appellant, and were not separate banking institutions.

The statements, therefore, found in the reports to the Comptroller, showing the condition of the accounts between the appellant and its respective agencies, and charging the agencies with moneys appearing in the form of indebtedness from those branches to the appellant, were not evidence of loans to the agencies, and were not notice to the appellee of loans to borrowers made under the authority of the appellant. There is no ground for charging the appellee with negligence in not discovering that excessive loans were being made at the local branches on Dome Creek and Cleary Creek. There was nothing on the books of the appellant at its place of business in Fairbanks to show

that loans were made to borrowers at either of those branches. It is true that Bonnifield and Manley borrowed from those branch offices sums of money in excess of the amount which the bank was permitted to loan. The appellee did not know this, however, and he was informed by Bonnifield and Manley that all money sent out to the branch offices was for the purpose of purchasing gold dust. The appellee had no reason to doubt this, and he should not be charged with negligence for his failure to go out to Dome Creek and Cleary Creek to examine the local books. A complete answer to the whole contention is that the appellee is not charged in the complaint with participation in excessive loans made by the local branch offices. The charge is that as director he participated in making loans to the branch offices. As we have seen, no such loans were made.

[4] The declaration of the dividend which is the basis of the second cause of action was but a transaction on the books of the appellant for the purpose of closing up the Cleary agency and transferring to the appellant at its bank at Fairbanks the assets of the agency. It was a dividend in form only, for the whole amount of the dividend declared, except $160, was immediately transferred by the stockholders to the bank. Again, the condition of the business of the appellant at that time, as the court below has found, was such as to justify the declaration and payment of the dividend, when account is taken of certain assets of the Cleary agency, then in control of the president of the bank, and subsequently turned over to the bank. We find no merit in the technical objection that those assets could form no basis for the declaration of the dividend, for the reason that they were not then collected, or that they had been assets of the Cleary agency.

The fourth and fifth causes of action require but brief consideration. The appellant admits that the only question arising upon these two causes of action is whether the appellee was chargeable with knowledge of the loans. There is nothing in the record to show that the appellee had or was chargeable with such knowledge. The loan to Witte resulted from cashing Witte's drafts. This was the act of the president and cashier of the bank, and the appellee had no notice of it or participation in it. The loan to Corson was likewise made without the knowledge or consent of the appellee, and in fact, as the court below found, it was not a loan in excess of the amount which the bank was permitted to loan when the usurious interest reckoned therein is eliminated.

[5-7] We are led to the inquiry: What is the measure of the appellee's legal liability to the bank of which he was director in causes of action such as are here brought before us? The appellee contends that the only rule of liability is that which is defined in Yates v. Jones National Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002, where the court held that the National Banking Act itself affords the exclusive rule by which to measure the right to recover damages from directors based upon loss resulting solely from their violation of the duty expressly imposed upon them by a provision of the act, and that under that act proof of something more than negligence is required, and that there must be proof that the violation was in effect

intentional. In that case the charge against the directors was that they had made false reports of the condition of the bank, and the decision was controlled by the consideration that in making and publishing the official reports of the condition of the bank the directors were acting in obedience to the National Banking Act, and that, where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed in the statute is the exclusive test of liability. That decision was followed and its doctrine was applied in Williams v. Spensley, 251 Fed. 58, 163 C. C. A. 308, where the suit was against directors on their liability for declaring dividends voted out of the capital stock, and where the court said:

"Appellant contends that the liability of a national bank director for voting and declaring dividends out of the capital is an absolute liability, and no question of good faith, diligence, or knowledge on the part of a director that such dividends may impair the bank's capital is involved. This contention must be rejected, both on principle and authority. See Yates v. Jones National Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002."

The appellant in its brief admits that this is not an action founded upon the common-law liability of the appellee, but observes that under the facts developed at the trial the appellee was liable for willful neglect of his duty as director, within the doctrine of the decision of this court in McCormick v. King, 241 Fed. 737, 154 C. C. A. 439, where we held that the statutory liability of directors of a national bank, as prescribed in section 5239, Rev. St. (Comp. St. § 9831), is the measure of the right of recovery against them for loss resulting solely from their violation of the express provisions of the statute, but that that does not exclude their common-law liability for negligence in the management of business of the bank in violation of their oath of office which results in loss to its creditors and stockholders.

In the present case, in the first, third, fourth, and fifth causes of action, the appellant expressly counts upon violations of that provision of the National Banking Act which prohibits loans in excess of the amount permitted by the act. As to those causes of action we think it clear that the rule of liability is that which is defined in Yates v. Jones National Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002. But if we were to apply to all of these causes of action the common-law rule of liability recognized by this court in McCormick v. King, there is still nothing in the evidence to show that the appellee has been guilty of negligence in the management of the bank which has resulted in loss to its creditors or stockholders. In Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, the court announced the rule of liability of directors, saying that directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of the bank, but that they shall not be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention, and that they cannot be held responsible for losses resulting from the wrongful acts of other directors, unless the loss is the consequence of their own neglect of duty. In the McCormick Case this court said:

"No one would contend that a director must look into details of management, or keep closely in touch with routine matters, or know intimately to whom credits are given."

The appellee became a director of the bank in consequence of the insistence of the other directors. He was not a banking man. He knew nothing of the banking business, and when he discovered evidences of irregularity in the management of the bank's business he resigned his office. At times he protested against the method in which the business was done. He urged that the branch agencies be closed. In declaring the dividend which gives rise to the second cause of action, the directors acted under the advice of McGinn, the regularly retained attorney for the bank, who is now a director and one of the principal stockholders of the corporation which brings this suit.

We find no error. The judgment is affirmed.

HERMAN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3234.

1. WAR ⟸4—ESPIONAGE ACT—PUBLICATION OF FALSE CIRCULAR—INTERFERENCE WITH SUCCESS OF MILITARY FORCES.
In a prosecution for publishing a false circular to interfere with the operation and success of the military and naval forces of the United States, certain correspondence between defendant and other Socialists, appearing after declaration of a state of war with Germany, *held* admissible as showing defendant's state of mind and his intent in making public his circular.

2. WAR ⟸4—ESPIONAGE ACT—PUBLICATION OF FALSE CIRCULAR—EVIDENCE.
In a prosecution for publishing a false circular with intent to interfere with the operation of the military forces of the United States, certain correspondence between defendant and another before the declaration of a state of war between the United States and Germany *held* admissible, as showing defendant's mental attitude at a time not too remote from the time he committed the act charged.

3. WAR ⟸4—ESPIONAGE ACT—FALSE CIRCULAR—EVIDENCE.
In a prosecution for publishing a false circular with intent to interfere with the operation of the military forces of the United States, certain pamphlets found in defendant's possession, referring to the alleged plutocratic origin of the war with Germany, etc., *held* admissible to show defendant's state of mind and intention, as were copies of receipts found in defendant's office for money sent by correspondents to pay for copies of the pamphlets.

4. WAR ⟸4—ESPIONAGE ACT—FALSE CIRCULAR—EVIDENCE.
In a prosecution for publishing a false circular with intent to hinder the operation of the military forces of the United States, testimony of two persons to a conversation with defendant after the declaration of a state of war between the United States and Germany *held* admissible to show defendant's mental attitude, though he was not on trial for his opinions or for being a pacifist or a Socialist.

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

5. CRIMINAL LAW ⊂⊃763, 764(17)—INSTRUCTION—COMMENT ON EVIDENCE.
In a prosecution for publishing a false circular with intent to hinder the operation of the military forces of the United States, instruction that evidence of the purchase and circulation of other literature by defendant, and of his statements and correspondence to show his condition of mind, had been permitted only to indicate the trend of his thought with relation to the particular act charged, *held* not improper as a comment on the evidence or as tending to confuse the jury.

6. WAR ⊂⊃4—ESPIONAGE ACT—FALSE CIRCULAR —INSTRUCTION.
In prosecution for publishing a false circular with intent to hinder the operation of the military forces of the United States, an instruction that it was immaterial what Lloyd George said during the Boer War, what William Pitt said during the Rebellion, what George Washington said with relation to pending legislation, or what Roosevelt had said prior to the time involved, *held* proper.

7. WAR ⊂⊃4—ESPIONAGE ACT—FALSE CIRCULAR—SUFFICIENCY OF EVIDENCE.
Evidence *held* sufficient to sustain a conviction of the state secretary of the Socialist party of a state for having published a false circular with intent to interfere with the operation of the military forces of the United States.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Emil Herman was convicted of interfering with the operation and success of the military and naval forces of the United States, and he brings error. Affirmed.

The plaintiff in error was found guilty upon two counts of an indictment, each of which charged: That continuously between April 6, 1917, and April 19, 1918, he published and exhibited in a described room or office in Everett, Wash., a printed circular in the following words: "The Military Ideal. Young Man: The lowest aim in your life is to be a good soldier. The 'good soldier' never tries to distinguish right from wrong. He never thinks, never reasons; he only obeys. If he is ordered to fire on his fellow citizens, on his friends, on his neighbors, on his relatives, he obeys without hesitation. If he is ordered to fire down a crowded street when the poor are clamoring for bread, he obeys and sees the gray hairs of age stained with red and the life tide gushing from the breast of women, feels neither remorse nor sympathy. If he is ordered off as one of a firing squad to execute a hero or a benefactor, he fires without hesitation, though he knows the bullet will pierce the noblest heart that ever beat in human breast. A good soldier is a blind, heartless, murderous machine. He is not a man, he is not even a brute, for brutes only kill in self-defense. All that is human in him, all that is divine in him, all that constitutes a man, has been sworn away when he took the enlistment oath. His mind, his conscience, aye his very soul, are in the keeping of his officer. No man can fall lower than a soldier—it is a depth beneath which we cannot go. Young Man Don't Be a Soldier—Be a Man!!" That said office during said period was visited by a large number of men, their names being unknown to the grand jury, who were between the ages of 21 and 45 years, fit and qualified for military services, and who were citizens of the United States. That every statement in said circular was false and untrue, as the defendant well knew. The intent charged in one count was that the acts so charged were done with the intent to interfere with the operation and success of the military and naval forces of the United States, and in the other count the intent was alleged to be to promote the success of the enemies of the United States. On the conviction on these two counts the defendant was sentenced.

Austin Lewis, of Oakland, Cal., for plaintiff in error.

Robert C. Saunders, U. S. Atty., and Clarence L. Reames, Sp. Asst. Atty. Gen., and Hinman D. Folsom, Jr., all of Seattle, Wash., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] Error is assigned to the admission in evidence of certain correspondence which was found in the defendant's office. The correspondence was in substance the following:

Schmidt wrote on April 6, 1918, to the defendant, sending his resignation as a member of the Socialist organization, expressing patriotic sentiments and disapproval of the attitude of the Socialist party, to which, on April 12, 1918, the defendant answered, stating that Schmidt was wrong in his attitude toward the Socialist party program and principles.

Maurer wrote to the defendant on May 9, 1917, referring scornfully to a patriotic parade which he had witnessed, and saying:

"They have the audacity to ask us to take a gun and defend this land of the free and the brave."

To that letter the defendant replied on May 10, 1917, expressing similar sentiments in regard to patriotic parades.

On April 11, 1918, Salmon wrote to the defendant, stating that he had been sentenced to nine months in jail for refusing to answer the questionnaire, stating that he had appealed the case, and saying:

"The questionnaire is the first step in an extensive program to militarize America. If we oppose militarism in its inception, it cannot grow."

On April 17, 1918, the defendant answered, stating that Salmon's cause was a worthy one.

All this correspondence was introduced for the purpose of showing the state of mind of the defendant and the intention with which he posted the printed circular which is set forth in the indictment. For that purpose they were clearly admissible.

The correspondence with Gast differs from the other correspondence, in that it occurred in February, 1917, before the declaration of war between the United States and Germany. Gast wished to have a circular printed and distributed to prevent enlistment in the army of the United States, which the government was then soliciting, and the defendant approved the scheme. We are unable to see that the admission of this evidence was error for which the judgment should be reversed. It also had its value as showing the mental attitude of the defendant at a time not too remote from the time when he committed the act which is the subject of the indictment.

[3] Error is assigned to the admission in evidence of certain pamphlets found in the defendant's possession, copies of which he was shown to have distributed. One of them, entitled "The Menace of Militarism," refers to the mighty ones, the masters in the land, as having turned militaristic and developed a jingoism of their own, more vicious, because more unjustifiable, than that of the Germans, and

speaks of "the plutocratic oligarchy which controls the United States to militarism." Another was entitled "Mental Dynamite." On the front page it shows a picture of the hands of a soldier striking a bayonet through the hands of labor. It contains this sentence:

"The bayonet is a stinger made by the working class, sharpened by the working class, nicely polished by the working class, and then patriotically thrust into the working class by the working class, all for the employer class."

Another pamphlet was entitled "The Great Madness." It contains many statements similar to the following:

"The entrance of the United States into the world's war on April 6, 1917, was the greatest victory that the American plutocracy has won over the American democracy since the declaration of the war with Spain in 1898."

These pamphlets, like the correspondence above referred to, were admitted for the purpose of showing the state of mind and the intention of the defendant, and for that purpose they were admissible. The same may be said of the copies of receipts found in the defendant's office, receipts for money sent by various correspondents to pay for copies of the pamphlets above referred to.

[4] Nor do we find error in the admission of the testimony of Black and Swale, each of whom testified to a conversation with the defendant after the entry of the United States into the war. These conversations were admitted expressly for the purpose of showing the intent of the defendant, and in instructing the jury the court carefully limited the testimony to the question of intent. It is true, as counsel for defendant urges, that the defendant was not being tried for his opinions or for being a pacifist, or for being a Socialist, but for publishing the circular described in the indictment with the criminal intent therein alleged. But the evidence to which exception was taken all tended to show the mental attitude of the defendant and had its bearing upon the question of his intent and was admissible for that purpose. Kettenbach v. United States, 202 Fed. 377, 120 C. C. A. 505, and cases there cited. In Kirchner v. United States (Bulletin No. 174) 255 Fed. 301, — C. C. A. —, the court, in answering a similar contention to that which is here made said:

"In admitting this evidence the trial court distinctly and more than once advised the jury that this testimony was admitted only as bearing on the intent of the defendant in making the statements set out in the indictment. The evidence in question does have a tendency to prove that the defendant, if he made the statements charged, made them with the intent charged."

[5, 6] The defendant assigns error to the instruction of the court to the jury that the evidence of the purchase and circulation of other literature by the defendant, and his conversations and statements and correspondence, to show his condition of mind, had been permitted only for the purpose of indicating the trend of his thought with relation to the particular act charged in the indictment. This instruction is not open to the objection, which is now advanced, that it was a comment upon the evidence and tended to confuse the jury. Also without merit is the assignment of error to that portion of the charge in which the court said to the jury:

"It is immaterial what Lloyd George said during the Boer War, what William Pitt said during the Rebellion, what George Washington said with relation to legislation then pending, or what Jack London said, * * * or what Theodore Roosevelt has said prior to this time."

It appears elsewhere that what was thus said by the court was in answer to an argument made on behalf of the defendant that the persons so named had been permitted to criticize their government. It cannot be seen that the defendant was in any way prejudiced by the instruction. What the court said was true, and was not improperly said.

[7] The contention that the judgment is not supported by evidence cannot be sustained. There was no request for an instructed verdict for the defendant. Notwithstanding that fact, we have examined the evidence, and we find that, in addition to the contents of the posted circular which speak for themselves, the defendant, as state secretary of the Socialist party of the state of Washington, had charge of the office in which the circular was posted, and that during all the time between June 15, 1917, and May 6, 1918, the circular was posted upon a bookcase in the office, and that daily during that period the office was visited by a number of men between the ages of 18 and 45, many of them between the ages of 21 and 31 years, who were qualified and subject to duty in the military and naval forces of the United States. These facts, together with the evidence showing the intent of the defendant, were amply sufficient.

The judgment is affirmed.

WELLS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3186.

1. CRIMINAL LAW ⟸1032(6), 1044—APPEAL—INDICTMENT—WAIVER.
The objection that an indictment is bad for duplicity is waived, where defendant does not test the same by demurrer, motion to quash, or motion that an election be required, and the appellate court will not consider such objection.

2. CONSPIRACY ⟸34—TO HINDER EXECUTION OF "LAW."
In view of Const. art. 1, § 7, a joint resolution of Congress made and approved on April 6, 1917, declaring a state of war to exist between the United States and Germany, is a "law," within the scope of Criminal Code, § 6 (Comp. St. § 10170), denouncing the offense of conspiracy to oppose by force the authority of the United States, or by force to hinder and delay the execution of any law thereof.

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

3. INDICTMENT AND INFORMATION ⟸71—CERTAINTY.
The true test of an indictment is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged and sufficiently informs the defendant of what he must be prepared to meet and, in case other proceedings are taken

against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

4. CONSPIRACY ⟸43(11)—INDICTMENT.
An indictment charging that defendants, in violation of Criminal Code, § 6 (Comp. St. § 10170), conspired together to oppose by force the authority of the United States, and by force to prevent, hinder, and delay the execution of the joint resolution of Congress of April 6, 1917, declaring a state of war to exist with Germany, which in the second count specifically enumerated various acts, the execution of which defendants conspired to prevent, hinder, and delay, *held* to state with sufficient definiteness the manner in which the offense was to be committed.

5. CRIMINAL LAW ⟸1158(1)—REVIEW—QUESTION FOR JURY.
It is for the trial court to say whether the evidence is sufficient to carry case to the jury.

6. CONSPIRACY ⟸48—TO HINDER EXECUTION OF LAW—JURY QUESTION.
In view of National Defense Act, §§ 57, 79 (Comp. St. §§ 3041, 3044q), as well as Act Jan. 21, 1903, as amended by Act May 27, 1908, *held*, in a prosecution wherein defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), by force to prevent, hinder, and delay the execution of the joint resolution of Congress declaring a state of war to exist with Germany, etc., that the evidence was sufficient to take the case to the jury.

7. CONSPIRACY ⟸45—EVIDENCE—ADMISSIBILITY.
Where defendants were charged with conspiring in violation of Criminal Code, § 6 (Comp. St. § 10170), to prevent, hinder, and delay the execution by force of the joint resolution declaring a state of war to exist with Germany, etc., by issuing circulars against conscription, the admission of a resolution introduced by one of the defendants at a meeting where organized workers demanded of the government exemption from military service of those who had conscientious objections to the war was proper, having a tendency at least to show defendant's attitude of mind toward conscription.

8. CONSPIRACY ⟸45—EVIDENCE—ADMISSIBILITY.
Where defendants were charged with violation of Criminal Code, § 6 (Comp. St. § 10170), for conspiring by force to hinder, delay, and obstruct the execution of the joint resolution declaring a state of war with Germany, etc., evidence that one of the circulars they issued was found on the front porch of the witness' home, which was within a block of the boundary lines of the military reservation, *held* admissible to show distribution of the circulars.

9. CRIMINAL LAW ⟸1170(1)—HARMLESS ERROR—EVIDENCE—EXCLUSION.
Where defendants were charged with violation of Criminal Code, § 6 (Comp. St. § 10170), for conspiring by force to hinder, delay, and obstruct the execution of the joint resolution declaring a state of war to exist with Germany, etc., and a defendant was permitted to testify fully concerning an organization against militarism of which he was a member, *held*, that the exclusion of what was done at local branches of the organization regarding conscription could not have harmed him or the other defendants.

10. CONSPIRACY ⟸45—EVIDENCE—ADMISSIBILITY.
Where defendants were charged with violating Criminal Code, § 6 (Comp. St. § 10170), for conspiring by force to obstruct, hinder, and delay the joint resolution declaring a state of war to exist with Germany, and the prosecution relied on circulars advocating resistance to conscription, a letter written in reply to one written by defendant by a congressman, showing that he was opposed to conscription and offered to show defendants' good faith, was incompetent.

11. CRIMINAL LAW ⊂⊃1043(2)—APPEAL—OBJECTION—OFFER OF PROOF.
An exception to the sustaining of an objection to a question to a witness cannot be considered, where it was not stated what the answer would be; the court not being advised as to the relevancy of the matter sought to be elicited.

12. WITNESSES ⊂⊃259—TESTIMONY FROM STENOGRAPHIC TRANSCRIPT.
A transcript of stenographic notes of an interview may be used by the one who took the notes only to refresh his memory.

13. CRIMINAL LAW ⊂⊃1169(1)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.
Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), to hinder, delay, and obstruct by force laws of the United States, including the joint resolution declaring a state of war to exist with Germany, the admission of a transcript of stenographic notes of an interview with one of the defendants *held* harmless; the matter being fully covered by other witnesses.

14. CRIMINAL LAW ⊂⊃829(1)—INSTRUCTIONS—REFUSAL.
The refusal of requested instructions covered by the charge given is not error.

15. CRIMINAL LAW ⊂⊃1038(1), 1056(1)—APPEAL—OBJECTIONS AND EXCEPTIONS TO CHARGE.
The appellate court will not ordinarily look into any objections to the charge, unless they are timely made, and exceptions are regularly saved to the rulings thereon.

16. CRIMINAL LAW ⊂⊃822(11)—INSTRUCTIONS AS A WHOLE—PRESUMPTION.
Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), to hinder, delay, and prevent by force the execution of the joint resolution of Congress declaring a state of war to exist with Germany, etc., and it appeared that they issued a circular against conscription, an instruction that defendants were presumed to know the law, and cannot shield themselves behind ignorance of the law, when considered with the charge as a whole, *held* not erroneous.

17. CRIMINAL LAW ⊂⊃822(11)—CONSPIRACY—INSTRUCTIONS AS A WHOLE—PRESUMPTION.
In a prosecution for conspiracy in violation of Criminal Code, § 6 (Comp. St. § 10170), to hinder, delay, and prevent by force the execution of laws of the United States, such as the joint resolution of Congress declaring a state of war to exist with Germany, etc., a charge that every person is presumed to intend the natural consequences of his own act *held* correct, when considered with the charge as a whole; the criminality of the act not depending on a particular intent, etc.

18. CRIMINAL LAW ⊂⊃822(7)—CONSPIRACY—INSTRUCTIONS AS A WHOLE.
Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), to prevent by force the execution, etc., of laws of the United States, as the joint resolution declaring a state of war with Germany, and it appeared that they issued a circular against conscription, an excerpt from the charge, that the effect of the circular could not be neutralized or limited by any motive or intent not connected therewith, when considered with the charge as a whole, *held* correct.

19. CRIMINAL LAW ⊂⊃814(1)—SEDITION—CONSPIRACY—INSTRUCTIONS.
Where defendants were charged with conspiring, in violation of Criminal Code, § 6 (Comp. St. § 10170), by force to prevent, hinder, and delay the execution of the joint resolution declaring a state of war to exist with Germany, etc., and they issued circulars against conscription, a charge on freedom of speech, referring to riots, *held* not open to attack, as being inapplicable; the court stating therein that it referred to riots merely for illustration.

20. CRIMINAL LAW ⊂=1137(3)—APPEAL—INVITED ERROR—INSTRUCTION.
Where defendants requested a charge dealing with freedom of speech, they cannot attack a charge thereon as irrelevant; the giving of the same being invited.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Hulet M. Wells and others were convicted of conspiracy in violation of Criminal Code, § 6, and they bring error. Affirmed.

The plaintiffs in error, defendants below, were indicted by two counts, charged with conspiracy under section 6 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1089 [Comp. St. § 10170]). The first count charges that the defendants, on April 25, 1917, conspired together and with sundry other persons "to oppose by force the authority of the United States, and by force to prevent, hinder, and delay the execution of a law of the United States; that is to say," the defendants, naming them, did "conspire, confederate, and agree together, and with divers and sundry other persons to the grand jurors unknown, by force to prevent, hinder, and delay the execution of the joint resolution of Congress of the United States made and approved on the 6th day of April, A. D. 1917 [40 Stat. 1, c. 1], then and there declaring a state of war to exist between the United States and the Imperial German government, and directing and authorizing the President of the United States to employ the entire military and naval forces of the United States and the resources of the government to carry on war against the Imperial German government, and to then and there oppose by force the authority of the United States and the authority of the President of the United States in carrying into force and effect the provisions of the law then existing which related to the armed military and naval forces of the United States, and to then and there by force prevent, hinder, and delay the execution of such acts of Congress enacted after the adoption of said resolution declaring war between the United States and the Imperial German government, hereinabove referred to, for the purpose of carrying into execution the plan and purpose of said resolution; it then and there being the purpose and intention of the said defendants, and each of them, together with such other persons as they might, or could, induce, incite, and encourage to cooperate with them in their plan, and to join their said conspiracy to oppose by force the authority of the United States, and to prevent, hinder, and delay the execution of the said joint resolution of Congress declaring war hereinabove referred to, together with such other laws as then existed or as might thereafter be enacted in pursuance of said joint resolution of Congress declaring war, and it then and there was the further purpose, plan, and object of the said defendants, and each of them, to prevent by force the proper organization of armed military and naval forces of the United States, and the proper disposition of said force under and by virtue of the authorities of the United States in conducting said war so declared and resolved for by the said Congress of the United States."

The allegations of the second count are of similar import, except that they are more specific as to the laws, the execution of which it is alleged the defendants conspired by force to prevent, hinder, and delay. These laws, as specified, are: First, the joint resolution of the Senate and House of Representatives declaring war between this country and Germany; second, the act of Congress approved June 3, 1916 (39 Stat. 166, c. 134), entitled "An act for making further and more effectual provision for the national defense, and for other purposes," special reference being had to sections 57, 59, and 111 of said act (Comp. St. §§ 3041, 3043, 3045); and, third, section 4 of the act of Congress approved January 21, 1903, entitled "An act to promote the efficiency of the military and for other purposes" (32 Stat. 775, c. 196), as amended by section 3 of the act of Congress approved May 27, 1908, entitled "An act to further amend the act entitled 'An act to promote the efficiency of

the militia and for other purposes,' approved January 21, 1903" (35 Stat. 399, c. 204). And in relation to these laws it is further alleged: "It then and there being the purpose and intention of the said defendants, and each of them, together with such other persons as they might or could induce, incite, and encourage to co-operate with them in their plan, and to join their said conspiracy, by force to prevent, hinder, and delay the duly authorized officers, agents, and representatives of the United States from putting into effect and executing the said laws hereinabove mentioned, and from calling forth and bringing into the military service of the United States persons subject and liable to service thereunder under the provisions of said laws, and to prevent, hinder, and delay by force the mobilization, organization, control, direction, and disposition of the armed military and naval forces of the United States in conducting said war against the Imperial German government."

The cause went to trial upon a plea of not guilty, resulting in a conviction of all the defendants. Prior to trial there was no demurrer or other plea or motion interposed to the sufficiency or regularity in form or otherwise of the indictment. The defendants prosecute a writ of error from the judgment entered upon their conviction.

Winter S. Martin and Wilson R. Gay, both of Seattle, Wash., for plaintiffs in error.

Robert C. Saunders, U. S. Atty., Clarence L. Reames, Sp. Asst. Atty. Gen., and Ben L. Moore,. Asst. U. S. Atty., all of Seattle, Wash.

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

WOLVERTON, District Judge (after stating the facts as above). The first question presented here is whether the indictment by each count charges two or more distinct offenses. It is unnecessary at this time to analyze the indictment, read in connection with the statute under which it is drawn (section 6, Criminal Code), to determine whether or not it contains the statement of two or more separate and distinct offenses. It is sufficient to say that the objection was only raised by a motion to dismiss at the close of the government's case, on the ground that the indictment does not state facts sufficient to constitute an offense against the defendants, and a further motion at the close of the case for a directed verdict discharging the defendants, for the same reason.

[1] The objection that an indictment is bad for duplicity is waived by going to trial, unless previously tested by demurrer, motion to quash, or motion that the prosecution be required to elect between the offenses charged. The rule is thus stated in 12 Cyc. 762:

"The objection that an indictment is bad for duplicity should be made by demurrer, by motion to quash, or by motion that the prosecution be required to elect between the offenses, and a failure to do so waives the objection and it cannot be raised by motion in arrest of judgment."

See, also, United States v. Bayaud (C. C.) 16 Fed. 376.

The waiver intercepts any later objection made to the form of the indictment that it is bad for duplicity, and the defendants were precluded from interposing it at the time they sought to do so. For this reason, the court will not now further consider it.

[2] It is next contended that the indictment is not sufficient, for reasons following: First, that the joint resolution of Congress declaring

war against the Imperial German government is not a law, within the purview of section 6 of the Criminal Code; and, second, that both counts are bad, because lacking in specific and definite allegations showing in what manner the offenses were to be committed.

Article 1, § 7, of the Constitution, prescribes the requisites to be observed by which a bill introduced in either house of Congress shall become a law. It must pass both houses and be presented to the President. If he approves it, it becomes a law. If he returns it with his veto, it must be to the house in which it originated. The section then proceeds as follows:

"If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

"Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill."

While not passing upon the question directly, the Supreme Court has considered and treated joint resolutions as having the effect of law. For instance, the court, in considering a joint resolution suspending the operation of an act of Congress, says, in United States ex rel. Levey v. Stockslager, 129 U. S. 470, 475, 9 Sup. Ct. 382, 384 (32 L. Ed. 785):

"It [the joint resolution] had all the characteristics and effects of the act of March 2, 1867 [the act which the resolution suspended], which became a law by the approval of the President. Until Congress should further order, the operation of the act of March 2, 1867, was by the joint resolution effectually suspended."

So in Fourteen Diamond Rings v. United States, 183 U. S. 176, 184, 22 Sup. Ct. 59, 62 (46 L. Ed. 138), Mr. Justice Brown, in a concurring opinion with the Chief Justice who rendered the opinion of the court, speaking of the function of a joint resolution, says:

"While a joint resolution, when approved by the President, or, being disapproved, is passed by two-thirds of each house, has the effect of a law (Const. art. 1, § 7), no such effect can be given to a resolution of either house acting independently of the other."

The eminent Justice cites with approval 6 Op. Atty. Gen. 680, wherein Attorney General Cushing holds that:

While "joint resolutions of Congress are not distinguishable from bills, and * * * have all the effect of law, * * * separate resolutions of either house of Congress, except in matters appertaining to their own parliamentary rights, have no legal effect to constrain the action of the President or heads of departments."

The purpose of the resolution in question was weighty; it was designed to proclaim that a state of war existed between this government and Germany. It was designed to have, and by the intendment of Congress without question did have, the same effect and potency as if war had been declared by a regular act of Congress; otherwise, that body would, we may reasonably assume, have made the declaration by a regularly adopted act. We think that the resolution having the effect of law must be considered a law, within the meaning of section 6 of the Criminal Code.

[3, 4] Referring to the objection that the indictment fails to state definitely in what manner the offenses were to be committed, it is our opinion that the indictment itself, in both counts, completely answers it. We need not here repeat the language. It will be sufficient to call attention to the allegations of the purpose and intention of the alleged conspirators, which were to oppose by force the authority of the United States, to prevent, hinder, and delay the execution of the joint resolution of Congress declaring war, and to prevent by force the proper organization of armed military and naval forces of the United States, etc. This as to the first count. The second is equally explicit. The word "force" has a well-defined meaning, and it was not essential to the protection of the defendants, in their right to be so informed of what they were accused of doing as to enable them to concert their defense, that the pleader go further and state the particular manner in which the force was designed to be applied.

The true test of an indictment, says the Supreme Court, is, "not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." Cochran and Sayre v. United States, 157 U. S. 286, 290, 15 Sup. Ct. 628, 630 (39 L. Ed. 704). The principle has been applied by this court in Sheridan v. United States, 236 Fed. 305, 310, 149 C. C. A. 437.

The rule is especially applicable at the stage of the proceedings in which the question of the sufficiency of the indictment was raised here for the first time. Applying the rule, it is clear that the present indictment reasonably conforms to the requirement of the law. It serves to warn the defendants of what they are called upon to meet at the trial, and puts them into adequate possession of the facts charged to enable them properly to concert their defense. The indictment is therefore sufficient.

[5, 6] The next question presented for consideration is whether the trial court committed error in refusing to grant defendants' motion for a directed verdict, on the ground that the testimony does not show the commission of the offense charged. The testimony is all in the record, and it is for the court to say whether it is sufficient to carry the case to the jury for their determination.

In the trial court's charge to the jury, the two counts of the indictment were consolidated and treated as one offense. To this manner of

treating the case there seems to have been no objection, by either the government or the defendants. Proceeding upon this theory, the particular charge against defendants is that they conspired to oppose by force, and to prevent, hinder, and delay, the execution of the joint resolution of Congress of April 6, 1917, declaring that a state of war existed between the United States and the Imperial German government, authorizing the President to employ the entire naval and military forces of the United States and the resources of the government, and pledging the resources of the country for bringing the conflict to a successful termination; also the National Defense Act of June 3, 1916, section 57 of which provides that:

"The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or who shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age, and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the naval militia, and the unorganized militia." Comp. St. § 3041.

And section 79:

"If for any reason there shall not be enough voluntary enlistments to keep the reserve battalions at the prescribed strength, a sufficient number of unorganized militia shall be drafted into the service of the United States to maintain each of such battalions at the proper strength." Comp. St. § 3044q.

And also the act of January 21, 1903, as amended by the act of May 27, 1908, which authorizes the President, whenever the United States is in danger of being invaded by a foreign nation, to call forth the state militia to repel such invasion.

Keeping this statement in mind as a premise, we will give attention to the evidence. Let us emphasize, before proceeding, that force is an essential element of the offense, and likewise in the charge, and that mere solicitation or entreaty, without a purpose of applying or using force to accomplish the ends sought to be attained, is without the intendment of section 6 of the Penal Code, under which the indictment is drawn.

In the latter part of April and early in May, 1917, meetings were assembled in Seattle, Wash., under the auspices of an association of persons known as the "No Conscription League." At these meetings there was prepared and adopted by the league a circular entitled "No Conscription, No Involuntary Servitude, No Slavery." Twenty thousand of these circulars were printed, and persons attending the meetings circulated them in certain parts of the city, going from house to house and leaving them as they passed along. The circular reads as follows:

" 'Neither Slavery, nor INVOLUNTARY SERVITUDE, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.'

"The above is a part of the organic Constitution of the United States. The President and Congress have no authority to set it aside. That can only be done by a majority vote of the Legislatures of three-fourths of the separate states. For the President and Congress to do it is to usurp the powers of autocrats and if unresisted means the abandonment of democracy and the destruction of the republic.

"We, signing this, are native-born citizens, within the age limit set for the first compulsory draft. They will make an army of us and send us to

compel you to enter the second draft, and some more of you to enter the third draft and so on until freedom is dead. 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! Just so it is expected that we will shoot and kill our brothers in other lands and that we will die to restore the rapidly vanishing values to the investments of Wall Street bankers escaping service themselves—a plutocracy whose good fortunes we do not share, but for which we have suffered enough.

"Resist! Refuse! Don't yield the first step toward conscription. Better to 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!'

"We are less concerned with the autocracy that is abroad and remote than that which is immediate, imminent and at home. If we are to fight autocracy, the place to begin is where we first encounter it. If we are to break anybody's chains, we must first break our own, in the forging. If we must fight and die, it is better that we do it upon soil that is dear to us, against our masters, than for them where foreign shores will drink our blood. Better mutiny, defiance and death of brave men with the light of the morning upon our brows, than the ignominy of slaves and death with the mark of Cain, and our hands spattered with the blood of those we have no reason to hate.

"SEATTLE BRANCH NO CONSCRIPTION LEAGUE, P. O. Box 225.

"Where is it written in the Constitution—that you may take the children from their parents—and compel them to fight the battles of any war in which the folly or the wickedness of the government may engage?"

The testimony tends to show that the defendant Wells was present at two or more of these meetings, and took part in discussions pertaining to the circular. He took the copy to the printer and had it printed, corrected the proof, and paid for the printing, part of it from his own funds, and part through collections made at one of the meetings. He also directed the delivery of the printed circulars at the hall where a later meeting was held, and himself distributed some of the circulars. Sadler was present at at least one of the meetings, that of May 11, 1917, and took part in the discussions along with Wells. The "No Conscription" circulars were on the table in the assembly room at the time, and a number of persons took them away for distribution, but that Sadler took any of them away with him does not seem to be confirmed. Morris Pass attended two or more of the meetings, and at one acted as secretary, collected part of the money to pay for printing the circulars, and turned what he collected and that which came into his hands for that purpose over to Wells. He also distributed some of the circulars. Joe Pass was present at one or two of the meetings, took part in the discussion respecting the circular, and tacitly assented to its distribution. We have not attempted a survey of all the testimony adduced at the trial.

The defendants contend that the purpose of the circular was to oppose the passage of the conscription act, then pending in Congress, peaceably and without the use of force in any way, and the testimony for defendants seems to support the view that the discussions at these meetings took that turn. If force was to be employed, the fact must be deduced from the wording of the circular and the activities of the

defendants in procuring its adoption and distribution among the people in Seattle. What was said in the discussions that took place pertaining to the nature and character of the document to be adopted has not been shown, except in a general way, and no other language of a seditious nature has been shown to have been uttered by the defendants, or any of them, unless the resolution that was introduced by Wells at the Labor Temple in Seattle, and adopted, demanding exemption from military service on the ground of conscientious scruples, can be so construed. We consider the inquiry, however, aside from the effect and purpose of this resolution.

Attention should be directed more particularly to the wording of the latter clauses of the circular beginning with "Resist! Refuse!" It will thus be seen that the language urging resistance to conscription is very strong, breathing defiance to the constituted authorities, and, considering along with it the energy displayed in procuring the adoption and wide distribution of the circular, there would seem to be scope for reasonable men to draw the inference that it was intended, by those who were instrumental in its preparation and distribution, that force should be employed, if requisite, against the carrying into effect of the declaration of war by Congress, in pursuance of which Congress was proceeding to put the Selective Draft Act upon the statute, and to oppose by force the authority of the President in putting into execution the law respecting the militia, as referred to in the indictment, and the laws themselves carrying such authorization. We think, therefore, the evidence was sufficient upon which to submit the cause to the jury. It was not necessary to show that force was actually employed, but only that there was a conspiracy entered into that contemplated the employment of force, as a means to the accomplishment of a common purpose to oppose the execution of a law of the United States, or the authority of the government to prosecute the war.

[7] Objection was interposed to the admission of a resolution that was introduced by Wells, on May 23, 1917, at a meeting of the Central Labor Council in the city of Seattle, wherein organized workers, among other things, demanded of the government exemption from military service of all those who had conscientious objections to the war, as prejudicial. It had a tendency to show Wells' attitude of mind towards the Conscription Act, at least, and was admissible for that, if for no other purpose.

[8] Another objection was interposed to the admission of the testimony of one Fraser, to the effect that he found one of the circulars on the front porch of his home, within a block of the boundary line of the Ft. Lawton military reservation, and that he showed it to a Mrs. Knight, also as prejudicial to defendants. It was proper to show the extent to which the circulars had been distributed, and this evidence was pertinent to that purpose.

[9] While the defendant Wells was on the witness stand, he was asked:

"What steps were taken by the local branches, by yourself and other members, with reference to opposing the Conscription Act?"

The government having objected, witness was not permitted to answer, and this is assigned as error. The local branches referred to were branches of a national organization of Socialists known as the "American Union against Militarism." Wells had testified that he had taken part in the movement, and had attended meetings of the local branch at different places in Seattle. The meetings were held before the declaration of war. The witness continued:

"The whole purpose of the society and of the defendant was to get before the people the opinions offered by those who were favorably disposed in their point of view to this movement to place it before Congress. This society continued its agitation up to the time it was seen that the country was about to get into the war. From that time until the declaration of war they confined their efforts to trying to bring about an honorable avoidance of the war. After war was declared by the United States, the society ceased all opposition to the war itself. After the war was declared, the organization kept together, because it was thought there would be many occasions which would arise from time to time which would require the liberty of the people to be safeguarded. It was thought that conscription would quite likely become one of the issues, and that the society and its members should endeavor to prevent the enactment of such a law."

Wells having testified fully touching the organization known as the "American Union against Militarism," it was not essential to inquire in detail as to what was done at the local branches and by the members thereof touching the Conscription Act. He was permitted to explain fully what part he took in opposing that act, and the inquiry sought to be made could not appreciably help him or the other defendants. Otherwise, the issue sought to be injected into the trial was collateral in its scope, and irrelevant.

[10] It further developed that the defendant Wells, in his opposition to the adoption of the Conscription Act, wrote letters to members of Congress, and especially to Congressman Dill, who wrote defendant in reply. Counsel sought to introduce the letter from Dill, but was not permitted by the court to do so. The declared purpose in introducing the letter was to show that Dill agreed with Wells in his views on conscription, and that Wells was acting in good faith in opposing the measure. If it was relevant for him to show that others agreed with him, it should have been done by the sworn testimony of other witnesses. It was wholly incompetent to prove the fact by unsworn ex parte statements of the kind.

[11] Anna Louise Strong, a witness for defendants, was asked as to the purpose of the local branch of the general organization of the Union against Militarism. She was not permitted to answer, over the objections of the government, and error is assigned. It was explained by defendants' counsel that the question was preliminary, for the purpose of leading up to other questions. The exception is without merit, for the reason that it is not stated what the witness would have testified in answer to the question, and the court is not advised as to the relevancy of the matter sought to be elicited.

[12, 13] Frank B. Greene, who was a stenographer and engaged in the Secret Service department of the United States, being called as a witness for the government, testified that he, with others, interviewed defendants Joe and Morris Pass in New York, and that at the time he

took what was said at the interview in shorthand, and subsequently transcribed it. He related what the Pass brothers said to him, which testimony was admitted in evidence without objection. Joe and Morris Pass were witnesses in their own behalf, and while on the stand (and especially Joe Pass) disputed the correctness of Greene's testimony touching parts of the interview in New York. Greene was recalled in rebuttal, and interrogated as to Joe Pass' rendition of the interview, and the government was thereupon permitted, over objection, to introduce the transcript of the notes of the interview in evidence. The action of the court in this respect is also assigned as error. Technically the transcript should not have gone in, because the notes of the interview could be used by Greene only for one purpose, namely, that of refreshing his memory in case he was unable to testify from his independent recollection, and not as substantive testimony of what was said there. But the field of the interview seems to have been quite fully covered by Greene and the Pass brothers, and for this reason it is not apparent wherein the defendants have been injured by the introduction of the notes themselves. The error was therefore harmless. The exception saved to the refusal of the court to permit Greene to testify as to what the notes contained was without merit, as the notes showed for themselves what they contained.

We come now to the instructions of the court. The defendants, through their counsel, requested the court to give certain instructions, which were prepared and requested to be given in a former case. In that case two of the defendants here were indicted by five counts. Count 1 charged a conspiracy to violate section 211 of the Penal Code (Comp. St. § 10381); count 2 the same; count 3 to violate section 6 of the Penal Code, by conspiring to prevent, hinder, and delay the execution of the joint resolution of Congress of April 6, 1917; count 4 substantially the same; and count 5 charged seditious conspiracy, under section 6 of the Penal Code, to prevent, hinder, and delay the execution of the Selective Draft Act of May 18, 1917 (40 Stat. 76, c. 15 [Comp. St. 1918, §§ 2044a–2044k]). Some of such requested instructions were applicable in the present trial, but some were not.

[14] The first alleged error insisted upon is the court's refusal to give requested instructions 1 to 6, inclusive. Some of these are inapplicable here for any purpose. Those that are applicable have been disposed of by what has previously been said in this opinion. They relate to the sufficiency of the evidence to make a case for the jury.

The refusal to give a number of other requested instructions is assigned as error. Those insisted upon in the brief of counsel relate to requested instructions 8, 11, 13, 15, 16, 19, 20, and 21. As it relates to requested instructions 8, 11, 13, 15, and 16, we are persuaded that they are, so far as they state the law, adequately covered by the general instructions of the court. As to requested instruction 11, we shall have more to say when we reach the exceptions to parts of the general instructions. Requested instructions 19, 20, and 21 relate to the presumption of innocence, and the legal necessity of proving the defendants guilty beyond a reasonable doubt. They might properly have been given, and we think ought to have been. They are covered in

their essential features by the general instructions, but not so specifically or incisively. Yet, upon a careful reading of the entire instructions of the court, it is obvious that defendants have sustained no substantial injury by the court's refusal to give them.

We will notice now such assignments of error pertaining to the general charge as are properly predicated upon exceptions regularly and adequately saved thereto. Reference to the bill of exceptions will show that but three exceptions were even attempted to be saved to parts of the general instructions. These relate to what the court said, first, with reference to the use of force; second, with respect to the presumption of knowledge of existing laws; and, third, pertaining to freedom of speech.

[15, 16] The court will not ordinarily look into any objections to the charge, unless they are timely made and exceptions regularly saved to the rulings of the court respecting them. This eliminates consideration of all defendants' assignments of error relative to the general instructions, except such as are based upon the three exceptions above noted. The first two of the exceptions saved are directed to the following portions of the charge:

"If you believe or if you have reasonable doubt as to whether the 'No Conscription' circular set out in the indictment and admitted in evidence did not purpose to oppose by force or incite others to oppose by force and hinder and delay the President in the execution of the joint resolution of Congress, then, of course, you will not consider it in that connection. But if you believe beyond a reasonable doubt that the purpose and effect of the circular was to incite others by force to oppose, hinder, and delay the execution of such resolution, then such defendants who entered into such conspiracy would be guilty. In this connection I think I should say that the defendants are presumed to know the law, and cannot shield themselves behind ignorance of the law. The law requires that all persons know what the law is. You are also instructed that every person is presumed to intend the natural consequences or results of his acts deliberately or knowingly done.

"As stated, the indictment charges the defendants with conspiring to oppose by force the authority of the United States, and to hinder and delay the execution of its laws. You are instructed that this is an element which must be established by the testimony on the part of the government by the same degree of proof.

"Force need not be actual physical force manifested by the defendants, but must be such conduct, either acts, statements, invitations, or solicitations, the evident purpose of which is to incite others to the use of forcible resistance in hindering or delaying the government of the United States in the execution of its laws. It is not essential that the object of the conspiracy should actually have been accomplished, or that force should actually have been used. Nor is it essential that the conspirators should have agreed upon the precise method of employing force or the weapons or instruments of such force. If a conspiracy was formed, and the use of force was the natural or necessary means of accomplishing the object of the conspiracy, and if its use was necessarily incident to the carrying out of the plan of the conspiracy, whether that force should be used by the defendants, or only by those persons who should be induced to co-operate with them, then the defendants would be guilty of the offense charged. Nor can the effect of the circular be neutralized or limited by any motive or purpose or intent not communicated with the circular. Nor could what Webster or any one else said enter into this issue, or limit the effect of the circular, if the natural and reasonable conclusion to be deduced from the circular in evidence and what was done with it was to incite by force opposition to the law of the United States as charged.

"I think I should say in this connection, in view of the suggestions during the trial and argument, that you are not concerned in this case whether the war is right or not. We are at war now. There are only two sides to the war. One side is in favor of this country; the other side is against it. The policy of the government has been declared and established, and no person can by force do anything that will hinder or delay the government in carrying out that policy set out and defined in the resolution referred to in the indictment. The defendants are not charged with being against or in favor of the war, but with conspiracy by force to oppose, hinder, or delay the government of the United States in the execution of the resolution passed by the Congress with relation to the war and in carrying it to a successful termination."

The criticism directed to the first of these instructions is to that portion whereby the court told the jury that the defendants were "presumed to know the law and cannot shield themselves behind the ignorance of the law. The law requires that all persons know what the law is." It is urged that the publication of the circular in question could not be construed as inherently felonious per se, and that in criminal law every person is not presumed to know the law to such a degree as to impose upon him a felonious purpose when in fact he might have been ignorant of the law and have had no such purpose. Counsel discusses the publication of the circular as if it were directed against the Conscription Act, which had not then been adopted by Congress. Such was not the case, and such was not the theory of the prosecution, or the court. Indeed, the court elsewhere plainly told the jury that the conspiracy, if any were formed, could not be made to offend against the Conscription Act of May 18, 1917. The court gave no such intimation as that the publication of the circular was felonious per se. What the court said to the effect that defendants were presumed to know the law is common knowledge, and, when construed in connection with the entire charge, is not susceptible of the construction that counsel are disposed to place upon it.

[17] Further criticism is directed to the expression of the court that "every person is presumed to intend the natural consequences of his own act." This is a common instruction given in cases where the deliberate act of the defendant, by natural consequence, is to do an injury to another or to the government, and, as applied to this case, it has relation to the deliberate publication of a seditious circular. It is urged that the instruction was prejudicial, and that, while it is correct as an abstract legal proposition, it should not have been given in this case, citing Hibbard v. United States, 172 Fed. 66, 96 C. C. A. 554, 18 Ann. Cas. 1040, in support of the argument. That case, however, is one for devising a scheme with intent to defraud, and is clearly distinguishable from one like this. To show this, we need only quote from the opinion of the court on rehearing:

"The error consists in applying it [the instruction] to a case wherein, apart from the intent, the act is colorless; color being thereby imparted, not to the intent by the color of the act, as the law implies, but to the act itself by the color borrowed from the intent. In cases like this where the act itself is, apart from the intent, colorless, the color of the intent must be proven as any other element of criminality is proven."

The present case is not one of that nature. It should be said that here the court elsewhere told the jury that this presumption was not conclusive, but probatory in character, and should be considered with all the other elements disclosed by the testimony in the cause. There was no error in giving the instruction.

[18] As it relates to the second part of the instructions above quoted, the criticism is directed to that particular clause where the court said:

"Nor can the effect of the circular be neutralized or limited by any motive or purpose or intent not communicated with the circular."

Standing alone, of course, this excerpt does not express the full or explicit meaning which the court designed to convey; but when read in connection with the clause following, and especially with what the court said on the subject of intent, the criticism loses its potency. Nor is the criticism of the court's instruction relative to the force essential to be manifested by defendants entitled to greater weight. The instruction on that subject is, in our opinion, a clear exposition of the law as applicable.

[19] The third reserved exception relates to the court's instruction respecting the subject of freedom of speech. It is covered by the fifteenth assignment of error. The objection goes to the incorporation into the court's instruction of what was said by the writer of this opinion, in instructing a jury in another case, in explaining the constitutional right of freedom of speech, and especially to the part of the instruction running as follows:

"But a citizen may not use his tongue or his pen in such a way as to inflict legal injury upon his neighbor or another. Nor has any person the right, under the guaranty of freedom of speech, to shape his language in such a way as to incite discord, riot, or rebellion, because such action leads to a breach of the peace, and disturbs good order and quietude in the community.

"But when his criticism extends, or leads by willful intent, to the incitement of disorder and riot, or to the infraction of the laws of the land or the Constitution of this country, or with willful purpose, to the resistance and obstruction of the due execution of the laws by the proper authorities, it overleaps the bounds of all reasonable liberty accorded to him by the guarantee of the freedom of speech, and this because the very means adopted is an unlawful exercise of his privilege."

It is urged that, while what was repeated from the writer's instruction was applicable in the case of riot, rebellion, or breach of the peace, it could not be applied so broadly as to be suited to the case at bar. The court's attention was called to this feature of the instructions, when it had concluded, and it took occasion to say that—

"Any reference in the instructions with relation to inciting to riot was simply given as a general definition of the term (freedom of speech), so that you will understand it, and you will understand that the reference should only apply to the charge in the indictment; that is, the conspiracy to, by force, hinder and delay the government as charged."

As thus explained, the criticism is untenable.

[20] Another objection to the entire instruction is that the question of freedom of speech is not involved in the issues of the case. Counsel,

however, cannot complain of this, if otherwise irrelevant, as they invited the instruction by their requested instruction No. 11.

Finding no error in the record, the judgment of the trial court will be affirmed.

SHIDLER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3272.

1. WAR ⟸4—ESPIONAGE ACT—OFFENSES.
   Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), *held* to denounce three offenses: First, the willful making or conveying of false reports while the United States is at war, with the intent to interfere with the operation or success of military and naval forces, etc.; second, the attempt to cause insubordination, disloyalty, or mutiny in the military and naval forces of the United States; and, third, the willful obstruction of the enlistment service of the United States, to the injury of the service or the United States—it being unnecessary to the consummation of the first two offenses that the United States be injured.
2. ARMY AND NAVY ⟸40—ESPIONAGE ACT.
   Assuming that defendant might be loyal, though he characterized the Draft Act as unjust, and stated that he would fight conscription, yet, if he made the statement with evil mind, intending to bring about insubordination, disloyalty, and refusal of duty in the military service, he was guilty of a violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), and in a prosecution based on such statement, defendant's acts, speech, and state of mind are matters for consideration in determining whether he was guilty.
3. WAR ⟸4—ESPIONAGE ACT—EVIDENCE.
   In a prosecution under the Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), for the making of false statements to the effect that the war was nothing but a capitalists' war, etc., with intent to promote the success of Germany, with which the United States was at war, a copy of the address of the President of the United States to Congress, made a few days before that body declared war, setting forth the causes for the declaration of war, *held* admissible in evidence.
4. CRIMINAL LAW ⟸371(1)—EVIDENCE—OTHER OFFENSES—STATE OF MIND—ESPIONAGE ACT.
   In a prosecution under Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), for making false statements with the intention of promoting the success of Germany, with which the United States was at war, evidence of statements made by defendant prior to the declaration of war was admissible, where limited to the question of the defendant's state of mind at the time he uttered the statements charged.
5. ARMY AND NAVY ⟸40—ESPIONAGE ACT—OFFENSE.
   The mere utterance of seditious words in the presence of a person subject to military duty under the Selective Service Law (Comp. St. 1918, §§ 2044a–2044k), if intended to induce insubordination, disloyalty, or refusal of duty, is sufficient to constitute an offense under Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c); so in a prosecution under such section, based on such utterances, an instruction that to constitute an attempt to commit a crime there must be specific intent to commit it, followed by an overt act, was confusing and properly refused.
6. CRIMINAL LAW ⟸829(3)—REQUEST COVERED BY INSTRUCTIONS GIVEN.
   In a prosecution for violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), where the court instructed that it was necessary for

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

the government to prove that, while the United States was engaged in war, defendant made false statements with intent to promote the success of the enemy, the refusal of a requested instruction that, unless the jury was satisfied the words spoken were of the character, and of adequate and sufficient magnitude and proximity to the thing intended, to bear out the intent charged, defendant should be acquitted, was properly refused, being covered.

7. CRIMINAL LAW ⟸262—ARRAIGNMENT—WAIVER.

In view of U. S. Comp. St. § 1698, defendant waived arraignment where, after the indictment was read to the jury, the clerk stated defendant had entered a plea of not guilty, and defendant proceeded to trial without objection, the date of which had been fixed by stipulation.

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

Al Shidler was convicted of violation of Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), and brings error. Affirmed.

M. J. Scanlan and James Glynn, both of Reno, Nev., for plaintiff in error.

William Woodburn, U. S. Atty., of Reno, Nev., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Shidler was convicted under four counts of an indictment drawn under section 3 of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 218 (Comp. St. 1918, § 10212c). The first count alleged in substance that he willfully and unlawfully made certain false statements with intent to promote the success of the Imperial German government, the enemy of the United States, by stating in substance before certain named individuals "that the war between the United States and the Imperial German government was nothing but a capitalistic war, and if it was not for the graft and money to be made by the capitalists the United States would never have gone into war"; that the statements made were then and there false, as the defendant then and there well knew. The second count charged that defendant willfully and unlawfully made certain false statements with the intent to promote the success of Germany, and that in the presence of certain persons named he said, in substance, "that the war between Germany and the United States was started solely for the interest of the capitalists, who would reap a harvest and make immense profits from the sale of munitions and war material"; that these statements were false, and known by the defendant to be false. The third count alleged that, during the war between the United States and Germany, defendant willfully made certain false statements with the intent then and there to promote the success of Germany, in that, in the presence of an individual named, he said, in substance, as follows: "That the said war between the United States and the Imperial German government was started in the United States by the money power and grafters; that the government of the United States is controlled by Wall Street steel, iron, munitions factories, and shipbuilding interests; that the only reason that the war was being prolonged was for the

purpose of enriching the munition and supply corporations, Wall street, senators, congressmen, and other grafters, all of which were influencing the government to continue the war between the United States and the Imperial German government;" that the statements were false and defendant knew them to be false. In the fourth count it is alleged that defendant willfully, unlawfully, and feloniously did attempt to cause insubordination, disloyalty, and refusal of duty in the military forces of the United States, in that in the presence of certain persons, he said, in substance, as follows: "The draft law is the rottenest piece of injustice that was ever railroaded upon the American people; I will fight conscription as long as I have breath left in my body;" that said persons in whose presence these remarks were made were then and there male citizens of the United States between the ages of 21 and 30 years, and who had registered under the Draft Act of Congress approved May 18, 1917, entitled "An act to authorize the President to increase temporarily the military establishment of the United States." Act May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, §§ 2044a–2044k).

The plaintiff in error contends that: (1) It is not charged that the statements alleged were made to the injury of the United States, nor that any of the statements alleged resulted in the injury to the recruiting or enlistment service of the United States or to the United States; (2) that it does not appear from the alleged false statements of the defendant alleged in the first count of the indictment that any of such statements were or are calculated to, or were capable of being construed as in any way made to promote the success of the German government; (3) that it does not appear from the alleged false statements in the second and third counts that they were calculated or intended to promote in any manner the success of the German government; (4) that in the fourth count no fact or overt act constituting an attempt is set forth.

[1] It is accepted by counsel on both sides that three separate offenses are created by section 3 of the statute and plaintiff in error argues that the phrase "to the injury of the service of the United States" relates back to and is an essential element of all three, and must be alleged and proved. The section, as we understand it, defines these offenses: First, 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; second, whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval service of the United States; third, whoever shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or the United States. The clause "to the injury of the service or of the United States" qualifies only its immediate antecedent; that is, the third subdivision of the section, which reads, "or shall willfully obstruct the recruiting or enlistment service of the United States." This would be the general rule of construction, which may be well invoked in this instance, when it is also

considered that the acts denounced and made criminal in the first two subdivisions, if consummated, obviously do injure the United States, while it would not necessarily follow that the acts done under the third subdivision would produce such results. The Hoquiam, 253 Fed. 627, — C. C. A. —. As pointed out by Judge Ray in United States v. Pierce (D. C.) 245 Fed. 878, the earnest urgings by a mother to her son not to enlist could hardly be held to be a willful obstruction of the service of the United States. It is to be observed that section 3 was amended by Act May 16, 1918, c. 75, § 1, 40 Stat. 553 (Comp. St. 1918, § 10212c), by omitting the words "to the injury of the service or of the United States."

[2] With respect to the fourth count, it is argued that the statements alleged could be construed as the honest expression of an individual citizen, or a reckless statement of opinion. Assuming, for the purposes of argument, that a man might express such opinions and still be loyal to his country, still, if willfully and with evil mind he uttered the language with the intention of bringing about insubordination, disloyalty, and refusal of duty in the military forces of the land, he has violated the law and is subject to punishment and should be brought to trial. His acts, his speech, and the state of his mind become matters for the consideration by a jury under proper instructions upon the law of attempt to commit crime. 2 Bishop, New Criminal Law, § 741; People v. Grubb, 24 Cal. App. 604, 141 Pac. 1051.

[3] It is next said that the court erred in admitting in evidence a copy of the address of the President of the United States to Congress under date of April 2, 1917, wherein the President stated the causes which brought the United States into the war. Rules of evidence must be construed with due regard to practical convenience. How more directly could evidence be adduced that the statements charged to have been false were false than to introduce an official public statement made in the course of official duty by the head of the government to Congress, which body, within a few days after hearing the statement, formally declared the existence of the state of war? Certainly the recommendations of the President were in no wise binding upon the members of Congress, but nevertheless the message was relevant, as bearing upon the whole question of the truth or falsity of the statements alleged to have been made by the defendant.

[4] Certain statements made by the defendant prior to the declaration of war were admitted over the objection of defendant's counsel. The court, however, in admitting such statements, expressly ruled that they were before the jury solely to enable it to determine what the defendant's state of mind was at the time he uttered the statements charged in the indictment. We find no error in the ruling; United States v. Schulze (D. C.) 253 Fed. 377; article II, Stephen's Digest on the Law of Evidence.

[5] It is said that the court erred in refusing the following request for instruction:

"You are instructed that, to constitute an attempt to commit a crime, there must be a specific intent to commit it, followed by an overt act or acts tending to the commission of such crime. There must be something more than

mere preparation remote from the time and place of the intended crime, and if such overt act is not thus remote, and is done with the specific intent to commit the crime, and directly tends in some substantial degree to accomplish it, such specific intent and overt act, taken together, are sufficient to warrant a conviction."

The court held that the mere utterance of seditious words in the presence of a person liable to military duty under the Selective Service Law, if intended to induce insubordination, disloyalty, or refusal of duty in the military forces, was sufficient to constitute an offense under the statute. We believe the court was correct in its statement of the law, and in the charge given, and that the requested instruction was confusing.

[6] The court also refused to charge that, unless the jury was satisfied that the words spoken were of a character adequate and of sufficient magnitude and proximity to the thing intended to bear out the intent charged, the defendant should be acquitted. In view of the fact that the court instructed the jury that it was necessary for the government to prove that the United States was engaged in war, and that the defendant made a false report or a false statement, and that he made it with the intent to promote the success of the enemy, and that each of these elements must be proved beyond a reasonable doubt, we believe that the essentials of the offense were sufficiently and clearly stated.

[7] It is said that the court erred in denying motion in arrest of judgment. This assignment rests upon the contention that defendant never was arraigned and never was called upon to plead. The transcript shows that, when the bill of exceptions was presented to the District Court for allowance and settlement, the words "and no issue of not guilty has ever been joined in said cause" were stricken out, and the following inserted:

"The indictment was presented May 25, 1918. May 29th it was ordered that defendant appear for arraignment June 3d. A demurrer to the indictment was filed and argued June 8th, and on the 11th the demurrer was overruled. June 12th, both Mr. Woodburn, the District Attorney, and Mr. Scanlan, attorney for the defendant, were present in court. At that time this arrangement and colloquy occurred: Mr. Woodburn: 'Both counsel for the government and for Shidler have received notice that the demurrer was overruled, and I would like to fix a date for trial; and I am willing to stipulate with counsel that he may enter his plea on the day of the trial so as to save a trip here. That is the understanding?' Mr. Scanlan replied, 'Yes:' and at that time the trial was set for July 8th. Prior to the trial, and on June 24th, the defendant filed an affidavit to procure the attendance of witnesses in his behalf at the expense of the government. An order was made in accordance with the prayer of his petition, and the witnesses were subsequently produced on the day of the trial. At that time both parties appeared, and both announced they were ready for trial. After the jury was impaneled and sworn, the clerk of this court read the indictment to the jury, and in the presence of the defendant and his counsel stated that defendant had entered a plea thereto of not guilty. No objection was made to proceeding with the case because the arraignment had not been had, and no plea of not guilty was entered. The objection was not raised until the conclusion of the trial, and after verdict was rendered."

Under section 1698, United States Compiled Statutes 1916, it is provided in effect that when a person indicted for an offense, upon his arraignment, stands mute or refuses to plead, it shall be the duty of the

court to enter a plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto, and when a person pleads not guilty, and such plea is entered as aforesaid, the cause shall be deemed to be at issue, and shall proceed without further formal ceremony and be tried by a jury. In Garland v. State of Washington, 232 U. S. 642, 34 Sup. Ct. 456, 58 L. Ed. 772, the court adopted the view which had been expressed by Justice Peckham in his dissenting opinion written in Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, wherein Justice Peckham said that a waiver should " 'be conclusively implied, where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until * * * the record was brought to the appellate court for review.' It would be inconsistent with the due administration of justice to permit a defendant, under such circumstances, to lie by, say nothing as to such an objection, and then for the first time urge it in this court." The court expressly overruled the Crain Case in so far as it was not in accord with the views expressed in the Garland Case. See, also, State v. Klasner, 19 N. M. 474, 145 Pac. 679, Ann. Cas. 1917D, 824, where it was held, upon the authority of the Garland Case, that appellant could not raise in the appellate court the question that she was not arraigned, where she had proceeded with the trial as if she had been duly arraigned, and failed to object or in any manner call to the attention of the trial court the fact she had not been arraigned.

We find no error in the record, and affirm the judgment.

WALLACE v. WEINSTEIN.

In re WALLACE AUTOMOBILE CO.

(Circuit Court of Appeals, Third Circuit. April 30, 1919.)

No. 2410.

1. CORPORATIONS ⊂=228—ASSESSMENT OF STOCKHOLDERS—UNPAID STOCK.
Capital stock issued as full paid by a Delaware corporation on a contract for purchase of real estate, which was never carried out by full payment or conveyance of the property, was not issued on a conditional subscription, and was not only not full paid, but wholly without consideration, and assessable in the hands of the holder under the law of Delaware for the benefit of creditors.

2. CORPORATIONS ⊂=232(3)—CAPITAL STOCK—PROSPECTIVE PROFITS.
Under the law of Delaware, a corporation cannot lawfully capitalize prospective profits.

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

In the matter of the Wallace Automobile Company, bankrupt. Jacob J. Weinstein, trustee in bankruptcy, petitioned for leave to assess

its corporate stock in the amount same was not fully paid. From an order of the District Court, Robert Wallace appeals. Affirmed.

John Arthur Brown and Henry P. Brown, both of Philadelphia, Pa., for appellant.

Joseph Sternberger and Fox & Rothschild, all of Philadelphia, Pa., (George P. Rich, of Philadelphia, Pa., of counsel), for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and HAIGHT, District Judge.

WOOLLEY, Circuit Judge. The Trustee of the bankrupt corporation petitioned the Referee for leave to assess the stock of the corporation in the amount it had not been paid for, or in such lesser amount as would meet the obligations of the estate. Allowance of this petition turned primarily on the question whether the stock was full paid. It was ultimately decided by the Referee on a finding that the stock had been issued upon a conditional subscription, that the condition had not been performed by the corporation, and that, in consequence, the stock was not assessable. On review before McPherson, Circuit Judge, sitting in the District Court, the Referee's order was reversed and an assessment was directed to be made on certain shares held by Robert Wallace, the appellant, at a rate to be determined during the case. This appeal is from the order of the District Court.

The relevant facts are these: Wallace engaged in the automobile business through the medium of a Delaware corporation. He obtained a charter in July, 1912, and complied with the formalities of corporate organization by paying $1,000 in cash for the initial issue of 100 shares of stock. He named the directors and had himself elected treasurer and general manager.

Wallace owned two properties in Philadelphia in which he proposed the corporation should conduct its business. On August 8, 1912, he caused a contract to be made between himself and the corporation, in which he agreed to sell and the corporation agreed to purchase these properties for the consideration of $130,000—$30,000 in cash and $100,000 in the common stock of the corporation. No time was named for the issue and delivery of the stock; October 1, 1913, was the date set for the payment of the cash. It was agreed further, that the corporation should pay taxes, water rent, insurance, and interest on a mortgage, as rent until payment in full of the purchase price; repairs and improvements to be made and paid for by the corporation. Thereupon the corporation, in part performance of its undertaking of purchase, issued to Wallace 10,000 shares of its stock at the par value of $10 a share, as full paid stock. It then embarked in business, in the prosecution of which it obtained credits and incurred debts.

The contract of purchase and the stock issue were characterized by informalities not unusual in transactions of this kind. The minutes of the corporation record little of what was done or of what was intended to be done, and are silent with respect to any exercise of judgment by the directors as to the value of the property for which the corporation proposed to issue its stock and pay money. Both

Wallace and the corporation, however, regarded the properties so purchased as the consideration for the stock, and treated the stock as full paid when issued by the corporation and accepted by Wallace, though Wallace gave nothing for it and the corporation received nothing in return. On January 1, 1913, being a date many months after the corporation had issued its $100,000 of stock and had delivered it to Wallace in payment of the stock consideration for the properties, and being a date also many months prior to that named for the payment of the cash consideration of $30,000, Wallace and the corporation made another contract dealing with one of the two properties covered by the first contract. Whether it was intended that the second contract should abrogate the first, in whole or in part, does not appear, for it contained no reference to the first contract or to the previously proposed use of the same property as part consideration for the $100,000 stock issue.

By the second contract, Wallace leased one of his two properties to the corporation for a short term, in consideration of a nominal rent, and of the payment by the corporation of taxes, water rent and interest, and the making of improvements and repairs. Wallace then promised to sell to the corporation the one property named in the contract for $30,000 in cash, on a future date, notwithstanding he had already promised in the first contract to sell this and the other property for the same cash consideration, plus $100,000 of stock.

Just what Wallace intended by this transaction, we can not imagine. What is its legal effect, considered with reference to the proposed use of the same property as part consideration for the stock issue under the first contract, and its apparent withdrawal from that use under the second, we are not informed.

It appears that in his plan of corporate organization, Wallace intended to have 5,000 shares (or $50,000) of the stock issued directly to the corporation as full paid stock to be used as bonus to induce purchases of preferred stock, which was to be issued and sold later. This plan miscarried when the whole $100,000 of stock was issued to him. To carry out his original purpose, Wallace handed back to the corporation 5,000 shares and received in return a certificate for the same number of shares, made in his name as Trustee. His holding of treasury stock was thereafter reduced from time to time, as it was drawn on for use as bonus stock, until, at the last, he held but 3,925 shares.

On October 10, 1913, Wallace and the corporation entered into a third contract, whereby they expressly undertook to abrogate the first and second contracts for the sale of the properties, and to annul the transactions performed under them in so far as they related to the issue by the corporation and the acceptance by Wallace of the $100,000 of stock; being careful, however, to preserve to Wallace all benefits of taxes and interest paid and improvements made on the properties. The abrogation of the stock transactions was intended to be effected by Wallace surrendering to the corporation the 5,000 shares of stock retained by him personally, less the 100 shares paid for in cash, and so much of the treasury stock which then remained in his name as Trustee, amounting to 3,925 shares. The 5,000 shares

which Wallace thus surrenderd were cancelled, but the 3,925 shares, intended likewise to be surrendered, remained uncancelled and on the books.

At the time of this transaction, the corporation was insolvent, and a month later, that is, on November 6, 1913, it filed a voluntary petition in bankruptcy. The complete insolvency of the corporation at that time was shown later by the administration of the bankrupt estate, wherein the moneys realized from assets amounted to $2,900 and the scheduled debts and costs of administration exceeded $25,000.

Prior to bankruptcy, the corporation had paid $492.00 in taxes and water rents; $1,750.00 interest on the mortgage; and had expended upwards of $12,000 in improvements upon the property.

The two important facts occurring before bankruptcy are these: Wallace never conveyed the property to the corporation; the corporation made part payment on its contract of purchase by issuing and delivering to Wallace $100,000 of its stock as full paid. Wallace held both the property and the stock.

The two facts outstanding at the time of bankruptcy are these: The corporation had not paid Wallace the $30,000 cash part of the purchase price for the properties; Wallace still held his properties and so much of the stock as he had not succeeded in getting cancelled.

Wallace justifies holding the properties because the corporation did not make its cash payment of $30,000, and avoids liability for assessment on his stockholding upon the ground that the stock was issued to him under a conditional subscription and that the condition (the payment of the $30,000 cash consideration) had not been performed.

Preliminarily to deciding the question of assessment, we dispose of the contract of cancellation as void. In doing this, no comment is necessary, except to say, that the parties seem to regard the 5,000 shares which Wallace held as his own, and the 1,075 shares otherwise held and in part distributed as bonus, to be wholly out of the case, leaving in dispute only the 3,925 shares which stood in Wallace's name as Trustee at the time of bankruptcy. As all parties, both in the court below and in this court, restricted the controversy to this aspect of the case, as also did the trial court whose order is now under review, we are not disposed to go beyond it on this appeal. The question, therefore, is, whether the 3,925 shares of stock standing in the name of Wallace as Trustee at the time of bankruptcy are liable to assessment in his hands, as holder.

[1] We find this stock assessable under any aspect of the case.

We agree with the learned trial judge that "Wallace's subscription was not conditional." Wallace made a contract for the outright sale of his properties to the corporation, to be paid for by stock and money. Payment by the corporation of stock and money for the properties was not a "condition" of the subscription, as that term is used in the law of conditional subscriptions. Cook on Corporations, section 77–89. The corporation's promise to pay Wallace for his properties was the "consideration" for Wallace's promise to convey the properties to the corporation. Each promise was absolute; neither was affected by

conditions. Of course, as between the parties, neither promise was enforceable by one against the other without performance or a tender of performance by the moving party of his own undertaking. But we have here no contest between parties to enforce a contract; we have rather a situation where the corporation performed a part of its undertaking by issuing its stock and making part payment of the consideration, and where Wallace, by performing no part of his undertaking, made the issue of the stock as full paid impossible. While Wallace was not bound to convey the property to the corporation until the corporation had paid him the full consideration, and while the corporation was not required to make the stock payment to Wallace until it was ready to make the cash payment also, thereby making possible the issue of stock as full paid in return for property received, the facts are, the corporation made the stock payment and Wallace accepted it, and the transaction, instead of being a mistake or an inadvertence, was part of the plan for financing the corporation, which Wallace had carefully thought out. This is shown by Wallace's testimony, that, under the plan, $50,000 was intended to be issued as full paid stock—somehow or other—directly to the corporation to be used later as treasury stock in promoting the sale of preferred stock, and it is shown also by the fact, that, when Wallace discovered that a "mistake" in the plan had been made by delivering all of the stock to him, he split the stock, had one half put in his name as trustee and thereafter held and used it in promoting the sale of preferred stock, and retained the other half for himself. This was Wallace's way of rectifying the mistake. With the stock thus issued, held out and used, we are concerned not with the rights of Wallace and the corporation as parties to the stock transaction, but with the rights of creditors which have intervened. As Wallace retained both properties for which the stock was represented to be issued as full paid, and as the corporation on issuing the stock received nothing in return, it is very certain that the stock, though described as full paid, was not paid for at all. The effect of this transaction on the capital resources of the corporation is obvious. The effect upon the corporation's creditors is equally obvious.

All doubts as to the character and basis of liability to creditors of one who has thus acquired and thus holds stock of a corporation, are, under the law of Delaware, settled beyond dispute by the case of John W. Cooney Company v. Arlington Hotel Company (Del. Ch.) 101 Atl. 879, decided by the Chancellor and affirmed by the Supreme Court of that state, Du Pont v. Ball, 106 Atl. 39; following like decisions on a similar law by the courts of New Jersey in See v. Heppenheimer, Untermeyer et al., 69 N. J. Eq. 36, 61 Atl. 843; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618, affirmed by the Court of Errors and Appeals, 82 N. J. Eq. 364, 91 Atl. 1069. In these cases, corporate stock issued, outstanding and not paid for is regarded as a trust fund for the benefit of creditors. The courts of these jurisdictions treat this doctrine as a hard and fast rule imbedded in its law, never to be relaxed. But they go further and hold that stockholders' liability to creditors in such case no longer depends on the trust fund theory, but is a statutory liability.

In the case of John W. Cooney Company v. Arlington Hotel Company, supra, Chancellor Curtis, sitting in the trial court, and Chief Justice Pennewill, speaking for the Supreme Court on appeal, have so elaborately discussed the assessment of corporate stock and the liability of stockholders for assessment under the constitution and statute of the State of Delaware, that repetition of that discussion would add nothing to the decision there made. There is, however, one statement of the Chief Justice, which is peculiarly applicable to the question in this case. It is as follows:

"And even though stock issued without consideration could be held to be void under our constitutional provision, and could be cancelled by the corporation or upon the application of bona fide stockholders, it does not follow that the acceptor of such stock could claim immunity from assessment. Certainly a stockholder cannot escape such assessment if he has held himself out, or permitted himself to be held out, as the owner of the stock; and much less could he escape if he participated in the unlawful issue or acquiesced therein."

We see nothing in the case that avoids assessment of the stock of the bankrupt corporation or that absolves Wallace from his liability to meet an assessment on stock standing in his name at the time of bankruptcy to an amount equal to its face or such lesser amount as will discharge the obligations of the bankrupt estate.

Having reached this decision, we would not discuss the other aspects of the case except for the attention given them in the testimony and at the arguments, and for the insistence with which they were urged. The first had to do with the value of the properties intended for use as the basis of the stock issue. Wallace contends that the properties were in truth equal in value to the face of the stock, and that, in consequence, the stock when issued for the properties was in fact full paid. As the properties were never conveyed to the corporation and as stock could not be issued against property which the corporation had not acquired, we are at a loss to know the pertinency of this contention. But, assuming there is in the case a basis for this contention, Wallace proved by his own testimony that the stock is not full paid. While he proposed by his first contract to sell the properties to the corporation for the total consideration of $130,000, the highest value he put upon them was $75,000, which, after deducting encumbrances, left an equity of but $12,000. As to the real value of the property and its value for the purpose of capitalization, Wallace made this naive admission:

"*There was a certain amount of stock given to you that you don't always pay for.* Take $30,000 from $75,000 and it leaves $45,000, and deducting your mortgages of $33,000 leaves $12,000 *for which the stock was given.*"

On this testimony, it is quite impossible to hold that the $100,000 of stock was full paid.

[2] The next contention is, that the $100,000 of stock was paid for—in part, at least—by Wallace's transfer to the corporation of certain contracts of agency with automobile manufacturers, alleged to be worth $50,000. If such contracts were transferred to the corporation for its stock—even at the value subsequently placed upon them—then the stock at the best was only half paid for. But there

is nothing contemporaneous with the stock transaction which indicates, that the agency contracts were assigned to the corporation in part consideration for the stock. But if they were so assigned, the contracts—which later proved valueless—if property in any sense—were not property of a kind for which stock can be issued. They contained nothing more substantial than a promise of profits. Contemplated profits cannot be a basis of capitalization of a corporation under the Delaware law, for neither stockholders nor directors have any right to make a present capitalization of prospective profits. See v. Heppenheimer, Untermeyer et al., supra; Holcombe v. Trenton White City Co., supra; John W. Cooney Company v. Arlington Hotel Company, supra. The agency contracts cannot be regarded as consideration for the stock in any amount.

Any question of Wallace's liability as a stockholder for assessment on unpaid stock, though standing in his name as Trustee, and any question of the right of the Trustee in bankruptcy to enforce his liability for the benefit of creditors, by analogy to a like right of a receiver of an insolvent corporation, are set at rest under the laws of Delaware by the decisions in John W. Cooney Company v. Arlington Hotel Company, supra. The case cited is distinguished from Courtney v. Georger, 228 Fed. 859, 143 C. C. A. 257, by the interpretation which the courts of Delaware have given the Delaware statute. See also Alling v. Wenzel, 133 Ill. 264, 24 N. E. 551; Allibone v. Hager, 46 Pa. 48; 1 Cyc. 714.

The order of the District Court is affirmed.

GOOCH v. STONE.

In re SMITH et al.

(Circuit Court of Appeals, Sixth Circuit. March 12, 1919.)

No. 3194.

1. BANKRUPTCY ⟸166(3)—PREFERENCE—KNOWLEDGE OF INSOLVENCY.
A creditor of one member of bankrupt partnership, which was hopelessly insolvent, who received from his debtor in partial payment of notes not due merchandise bought to his knowledge entirely on credit of the firm, and who also had intimate knowledge of its affairs, *held* to have such knowledge of its insolvency as rendered the payment a voidable preference.

2. BANKRUPTCY ⟸293(2)—SUIT BY TRUSTEE—EQUITY JURISDICTION.
With defendant's consent a bill in equity by a trustee to recover a preference may be entertained by a District Court.

Appeal from the District Court of the United States for the Western District of Tennessee.

Suit in equity by W. H. Stone, trustee in bankruptcy of I. C. Crow and O. W. Smith or Crow & Smith, against J. R. Gooch. Decree for complainant, and defendant appeals. Affirmed.

Frank S. Elgin, of Memphis, Tenn., for appellant.

T. B. Whitehurst, of Selmer, Tenn., for appellee.

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

KILLITS, District Judge. In October, 1912, the appellant, J. R. Gooch, sold to parties in Birmingham, Ala., a general store owned by him for some time at Gravel Hill, Tenn. At that time, and for nearly two years theretofore, one of the bankrupts (Smith) had clerked for Gooch in this store at a salary from $25 to $35 per month. Smith continued in the employ of the purchaser of Gooch's store until the merchandise was moved to Birmingham in the early summer of 1913. Soon thereafter Smith began business for himself at Gravel Hill, at the same time buying from Gooch 38 acres of land with a frame store building thereon and other improvements. He bought this land altogether on credit, executing long-time notes for the payment, involving him in an indebtedness of over $3,000 for the purchase; Gooch retaining title to the property until the consideration was paid. Shortly after the Gooch stock had been removed to Birmingham, a portion of it was returned to Gravel Hill by one Dunker, who bought the old Gooch brick store building from Gooch's vendee. This real estate was bought by Dunker entirely on credit, a trust deed upon the goods and store real estate being given as security. The trust was foreclosed in the summer of 1914 and bought at public sale by Gooch. At this time, Smith, in addition to his debts to many other parties, owed Gooch about $600, unsecured, besides the debt on the land, and $800 to a bank on which Gooch was security.

In July, 1914, Crow, the other bankrupt, went into partnership with Smith at the suggestion of Gooch. Crow seems to have contributed no money, but expected to put in $1,000 in the fall. His connection with Smith lasted but a month, during which time the firm of Crow & Smith bought of Gooch the Dunker store and brick building on credit for $6,746.47. The Dunker stock of goods, which had been bought by Gooch at the sum of $250, to which had been added about $200 of new goods, was figured into this trade for more than $1,600. The circumstances show that the valuation of $6,715.41 for the Dunker assets, real and personal, even figured on what the parties called a credit basis (that is, adding to the assumed present value the interest on the deferred payments), was very much exaggerated. Gooch retained title to the property sold by him to Crow & Smith, pending the payment of the consideration notes, and, in addition, required and received personal security on the note first due which was in the sum of $1,646. This note he sold before maturity to a relative. Crow retiring in August, 1914, Smith struggled along with the business until September, when he made an assignment which was followed by involuntary bankruptcy, the adjudication occurring October 24, 1914. His liabilities were about $18,000; the unsecured claims amounting to $8,711. His assets consisted of the two parcels of real estate, bought from Gooch, the title to each of which still remained in Gooch to secure the purchase money, and upon which Gooch's claims were for a greater amount than their real values, and personal property scheduled at $6,509.33, which includes the matter involved in this con-

troversy as having been received by Gooch as a preference. Gooch proved an unsecured claim of $2,250, in which was included the item of $1,650 for the Dunker stock of goods, and two secured claims of $5,068.74 and $2,500.88, being the aggregate amounts of the several sale notes held by Gooch for the purchase by contract of the two parcels of real estate, respectively. The second secured claim was reached in its amount ($2,500.88) by crediting the alleged preference which is the subject of this action. Gooch's claim for $5,068.74 was made up from the notes of the Dunker purchase left in his hands after the sale of that first due. The personal property scheduled consisted of the merchandise at a great overvaluation.

Two or three days after the partnership was formed, Smith met Gooch in Memphis. Together they went to the Memphis Furniture Manufacturing Company's place of business, where, upon a property statement, Smith bought a bill of furniture aggregating $964 on the credit of the partnership, all without the knowledge or authority of Crow. Of this bill of furniture, Smith permitted Gooch to take items amounting to $623.32, shipping these goods to Birmingham, to which place Gooch had removed. The consideration for this transaction was the liquidation of the first note due from Smith to Gooch, given for the purchase of the 38 acres of land and a credit of $127 on the second note of that series; neither of said notes having matured. Later in 1914 proceedings in bankruptcy were begun against the partnership.

The trustee in bankruptcy began an action in the District Court to recover $623.32 from Gooch, being the value of the furniture so purchased, on the ground of preference, and from the decree of that court against Gooch, the latter appeals.

[1] Appellant first contends that the record does not disclose his knowledge, or reasonable notice to him, of the insolvency either of Smith or of Crow & Smith at the time he received the furniture. There is no possible question but that the transaction resulting in the acquisition of the furniture by Gooch was a preference to him to the amount of $623. It is equally clear—there is no room for dispute—that Smith and the partnership were each hopelessly insolvent at the time of this transaction. What is there to show notice to Gooch of the fact of insolvency? In the first place, the largest elements contributing to either insolvency—and these alone were enough to compel such a result—were the transactions whereby Gooch became creditor to Smith and to the firm in amounts greatly in excess of the values of the assets acquired by the bankrupts in consideration for the respective items of indebtedness. Secondly, Gooch is shown to have been not only the intimate of Smith, but his close adviser in business matters. In this capacity, and in the relationship which they had theretofore sustained to each other as employer and employé, and then as surety and principal on the bank note, and as creditor and debtor for money loaned without security and on open account, to assume that Gooch did not have somewhat intimate acquaintance with Smith's affairs is to classify the appellant as an abnormally trusting, credulous, and disinquisitive individual. Again, the proof shows that it was a

matter of notoriety in the little community that Smith and the firm each were beyond their depth financially. In addition, testimony exists in the record, in some particulars sought to be impeached, of statements by Gooch to the effect that he knew that Smith was insolvent, that Crow contributed nothing which assisted the partnership to solvency, and that Smith was a careless and impossible business man.

The court below heard and apparently credited this direct testimony. These matters alone seem to compel the conclusion that Gooch knew or had reason to know at the time of the furniture deal that he was receiving a preference from an insolvent. If anything else were necessary to make the decision of the fact certain against appellant, it would be the nature of the transaction itself. It taxes credulity to be asked to believe that Gooch took two-thirds of the bill of furniture, purchased entirely on credit and charged to the partnership, and applied it to the liquidation, pro tanto, of a debt owing him by a partner before the debt matured, all in good faith with the creditors either of Smith or of the firm of Crow & Smith. Having done this while in possession of all the facts concerning the business of either of the bankrupts, which Gooch in his testimony is willing to admit he possesses, and as we are advised by the whole record, we find no difficulty in resolving the question of the fact of notice against appellant. We may do this without reference, even, to the general rule that when, as here, findings of a master, concurred in by the court below, are in review, they are presumed to have been correct in the absence of error or mistake appearing on the record. Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764.

[2] At the time of the beginning of the suit the defendant appellant lived beyond the jurisdiction of the court. The petition was filed May 25, 1915. June 15 the defendant answered, "waiving all right to object to the petition or declaration or bill or whatever the pleading may be termed by which he is called upon to defend and going to the merits at once." The issues being made up, the court referred the matter to a master to take proof and report findings. To reference there was no objection. Upon the coming in of the master's report adverse to appellant, counsel for the parties joined in a stipulation for the hearing of exceptions at Memphis. The exceptions raised no issue of jurisdiction whatever. Hearing them, the court sua sponte dismissed the case on the theory, among others, that this was an action at law, not cognizable in equity, upon the authority of Warmath v. O'Daniel (C. C. A. 6th Cir.) 159 Fed. 87, 86 C. C. A. 277, 16 L. R. A. (N. S.) 414. On rehearing, it was suggested to the court that the objection to the jurisdiction, on the ground that the action lay on the law side of the court, came too late after submission, whereupon the court reheard the matter upon the merits. In this there was no error. The exact question was raised by this court on certificate to the Supreme Court where it was held that, by defendant's consent, a bill in equity by trustee in bankruptcy to recover property conveyed in fraud

of the bankruptcy act might be entertained by the District Court. Hicks v. Knost, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183. Recently we held in Golden Hill Distilling Co. v. Logue, 243 Fed. 342, 156 C. C. A. 122, that, since the amendment of 1910 (Act June 25, 1910, c. 412, 36 Stat. 838) the bankruptcy court has jurisdiction of a suit to recover a preference, regardless of the amount involved or the citizenship of the parties. These authorities dispose of all the appellant's objections respecting the jurisdiction of the court below.

There remains but one other question: On the motion of the trustee there were brought into the record, on the hearing of the exceptions, the two bankruptcy records. There was proof satisfactory to the court below that the parties used these records before the master and that it was orally stipulated that the same might be used for all pertinent purposes in the hearing upon the exceptions. We find no prejudicial error in the disposition of this matter below. These considerations dispose of this case.

The decree and order of the court below, that the trustee have and recover of the defendant, J. R. Gooch, the sum of $735.14, with all costs of the case, with execution, were proper, and are affirmed.

UNION LAND & STOCK CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3154.

1. WATERS AND WATER COURSES ⊂⊃33—SUIT TO DECLARE FORFEITURE—PUBLIC INTEREST.
   The District Court of the United States will entertain a suit by the United States to declare a right of way and easement for the storage of water, applied for under Act March 3, 1891, forfeited for failure to construct or complete the reservoir described in the application.

2. WATERS AND WATER COURSES ⊂⊃33—LAND GRANT FOR RESERVOIR—AUTHORITY OF ATTORNEY GENERAL.
   The Attorney General had authority to bring suit in the name of the United States to declare forfeiture of a right of way and easement for the storage of water, applied for pursuant to Act March 3, 1891; the applicant having failed to construct the reservoir, as shown by his application as approved by the Secretary of the Interior.

3. WATERS AND WATER COURSES ⊂⊃27—GRANT FOR WATER STORAGE—STATUTES.
   Act March 3, 1891, § 18 (Comp. St. § 4934), as to rights of way granted to ditch companies for the storage of water, does not confer a right independently of section 19 (section 4935), providing how any canal or ditch company may secure the benefits of the act, as the two sections are to be construed together.

4. WATERS AND WATER COURSES ⊂⊃33—FORFEITURE OF RIGHT OF WAY AND EASEMENT FOR WATER STORAGE—BURDEN OF PROOF.
   In suit by the United States to declare forfeited a right of way and easement for the storage of water, applied for pursuant to Act March 3, 1891, for failure to construct the reservoir as shown by the application as approved by the Secretary of the Interior, to declare the forfeiture, it was not necessary to prove that a dam higher than the one constructed

by defendant applicant could have been practically used, or that there was sufficient water to have filled a larger reservoir; the contrary being for applicant to show, if true.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Suit by the United States against the Union Land & Stock Company, a corporation. From a decree for the United States, defendant appeals. Affirmed.

The appellee brought a suit in equity to declare forfeited a right of way and easement for the storage of water. It was alleged in the bill that on February 23, 1895, the appellant, under the provisions of an act of Congress of March 3, 1891 (26 Stat. 1101, c. 561), filed in the Land Office at Susanville, Cal., its application for an easement for a reservoir for irrigation purposes, describing the same, in the map which was attached to the application, as reservoir No. 1, or Lake Luckett, and which covered and affected certain described portions of the public lands of the United States, of which the appellee then and for a long time prior thereto had been the owner in fee simple. The bill alleged that on November 18, 1895, the application was duly approved by the Secretary of the Interior; that no part of said reservoir or section thereof has been constructed or completed by the appellant since the approval of said right of way by the Secretary of the Interior. The prayer of the bill was that the easement be declared forfeited and canceled, and that the appellant and all claiming under it be forever estopped from asserting any right, title, or interest in or to said lands, and that all title, rights, etc., to the property described in the application be reinvested in the appellee, and that the grant be declared null and void.

The appellant moved to dismiss the bill for want of equity. The motion was overruled, and the appellant answered, denying that the appellee was the owner of the lands covered by the easement, and alleging that the appellant was the owner thereof, and denying that the reservoir had not been constructed or completed, and alleging the construction and use of the reservoir for the storage of water and irrigation. It was stipulated in open court that in the years 1894 and 1895 the appellant went on the ground at the point A, indicated on the map attached to the bill of complaint, and after November, 1895, constructed a dam which at that time was 35 feet high; that said dam remained at that height until the winter of 1897-98, when a portion of it was washed away; that in the fall of 1898 the dam was reconstructed to a height of 26 feet, but settled down to a height, at its lowest, of 23 feet, at which point it now remains; that said dam has 300 feet of 30-inch steel pipe through the bottom, with a patent gate in shape to store and withdraw water. The stipulation further recites:

"It was also shown by competent evidence that the dam as constructed would not store water over more than 100 acres of the land in said reservoir, and that it did not have a capacity of more than 600 acre feet of water; that the dam was in a bad state of repair, but that it was strong enough to store water in the reservoir to a depth of 20 feet; that the base was not of sufficient width to build the dam to a height of 50 feet; that the said reservoir is one of a series of reservoirs, the others being known as dams Nos. 2 and 3, and that they are all used in connection with each other; that reservoir No. 1, being the one in suit, has been mainly used for the irrigation of what is known as the 'Moulton Ranch,' under a verbal agreement with the owners of said ranch; that the defendant company had been properly notified, and cited to relinquish said reservoir site or show cause why judicial proceedings should not be instituted to cancel the grant, for the reason that the dam had not been built in accordance with the application, as shown on Exhibit A, attached to the complaint; that the defendant had had 20 years in which to complete said dam in accordance with said plans; that said reservoir has been used to store water each year since its construction, with the exception of dry years, when there was no water to store."

R. L. Shinn and A. L. Hart, both of Sacramento, Cal., for appellant.

Annette Abbott Adams, U. S. Atty., and Frank M. Silva, Asst. U. S. Atty., both of San Francisco, Cal. (H. P. Dechant, of San Francisco, Cal., of counsel), for the United States.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant contends that the bill should have been dismissed for want of equity, for the reason that it is brought to declare a forfeiture, and cites Horsburg v. Baker, 1 Pet. 232, 236, 7 L. Ed. 125, and Marshall v. Vicksburg, 15 Wall. 146, 149, 21 L. Ed. 121. In the latter case it was said:

"Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either."

But the rule thus stated has not always been adhered to in the absolute form in which it is expressed. Thus in Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332, Mr. Justice Brewer said:

"Forfeitures are never favored. Equity always leans against them, and only decrees in their favor when there is full, clear, and strict proof of a legal right thereto."

The reason for the rule is that forfeitures are regarded as harsh and oppressive, and the rule has been held not to apply to cases in which forfeiture is imposed by statute and where public interests are to be subserved thereby. In Farnsworth v. Minn. & Pac. R. R. Co., 92 U. S. 49, 68 (23 L. Ed. 530), it was said:

"But there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by positive law."

It is to be added that the Supreme Court has entertained jurisdiction of suits in equity to forfeit land grants in numerous cases, among which may be mentioned United States v. California, etc., Land Co., 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354; United States v. Oregon, etc., Railroad, 164 U. S. 526, 17 Sup. Ct. 165, 41 L. Ed. 541; United States v. Tennessee & Coosa Railroad, 176 U. S. 242, 20 Sup. Ct. 370, 44 L. Ed. 452; Oregon & Cal. R. R. v. United States, 238 U. S. 393, 35 Sup. Ct. 908, 59 L. Ed. 1360. It is true that in those cases forfeiture was not the only relief sought. One of them was a suit to quiet title. In others, the aid of equity was sought to declare forfeiture, and to cancel patents or certificates or to obtain injunctive relief. The present case is in its essential features a suit to quiet title. The relief sought, in addition to forfeiture, is that the appellant be estopped from asserting any right, title, or interest in the lands, and that all title rights therein be reinvested in the appellee. We think the motion to dismiss was properly denied.

[2] It is contended that there is no authority for the prosecution of the suit, and United States v. Washington Improvement & D. Co. (C.

C.) 189 Fed. 674, is cited. In that case, in construing a congressional grant for a railway, telegraph, and telephone line through the Colville Indian reservation, with a proviso that the rights therein granted should be forfeited by the grantee unless 25 miles of the railroad should be constructed within two years after the passage of the act, and a further reservation to Congress of power to alter, amend, or repeal the act in whole or in part, Judge Rudkin held that a court of equity had no inherent power to decree a forfeiture of the land grant and that the United States could not maintain a suit to recover the land for breach of a condition subsequent, unless Congress had declared a forfeiture or had given express authority for the institution of the suit.

There are some grounds of distinction between that case and this. That was a case of a special grant to a specific grantee, with a reservation of power in Congress to alter, amend, or repeal the same. Here the grant of rights is a general one. It opens the lands of the United States to the occupation of various and numerous applicants. By a general and permanent statute it provides the steps which they must take to acquire the rights contemplated by the grant. The forfeiture clause is as follows:

"Provided that if any section of said canal or ditch shall not be completed within five years after the location of said section the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture."

It is not to be supposed, we think, that Congress intended that the United States should have no remedy for the failure of an applicant to complete his canal, ditch, or reservoir within the time limited, unless Congress intervened and by a special act either declared the right forfeited or gave express authority to institute a suit to recover the land.

In United States v. Whitney (C. C.) 176 Fed. 593, Judge Dietrich, in construing the law which is involved here, held that a failure to comply with the requirements of the statute of itself operated to divest the grantee of title and revest it in the government, and that a declaration of forfeiture might be either by act of Congress or by an appropriate judicial proceeding. With that view we agree, and although, aside from the two cases cited, we find no decision directly involving the question here presented, we think the decisions of the Supreme Court, as reviewed in Spokane, etc., Ry. v. Wash. & Gt. Nor. Ry., 219 U. S. 166, 174, 31 Sup. Ct. 182, 184 (55 L. Ed. 159), which establish the doctrine that, where the conditions of the grant are subsequent, "the title cannot be forfeited, except upon proper proceedings by the government, judicial in their character, or an act of Congress competent for that purpose," are sufficient in their scope to justify the suit here brought at the instance of the Attorney General, which is a proper proceeding by the government, judicial in its character, and appropriate for the purpose of declaring a forfeiture.

[3, 4] The appellant contends that there was no authority in law or equity to hold its rights for cancellation, and in view of the language of section 20 of the act contends that the court was limited in its

judgment to declaring a forfeiture of that portion of the reservoir which had not been utilized, and refers to the fact, recited in the stipulation, that the reservoir mentioned in the bill is one of a series of three, which are all used in connection with each other. It would seem that the appellant's position is that the decree forfeits the ground occupied by all three reservoirs. There is nothing in the record to show this. The bill alleged that the appellant's application called for a reservoir site covering approximately 469 acres, with a dam at the outlet 50 feet in height, with a base width of 270 feet, a length on top of 230 feet, and a length at the bottom of 80 feet, calculated to store, when completed, water over the entire acreage of the reservoir. The record does not indicate upon what land the other two reservoirs are located. The decree makes no reference to them. If they are located upon the 469-acre tract, they have been constructed and maintained without authority of law, so far as the record advises us.

We do not agree with counsel for the appellant that section 18 of the Act (Comp. St. § 4934) confers a right independently of the provisions of section 19 (section 4935). Those two sections are obviously to be construed together. Nor do we find merit in the contention that to declare forfeiture it was necessary for the appellee to prove that a dam higher than 23 feet could have been practically used, or that there was sufficient water to have filled a larger reservoir. If the contrary were true, it was for the appellant to show it. It made no effort to amend its application, so as to justify the construction and maintenance of a dam of 23 feet, and when it was notified and cited to relinquish the reservoir site, or to show cause why judicial proceedings should not be instituted to cancel the grant for the failure to build the same in accordance with the application, it made no showing of cause, and no effort to amend its application.

The decree is affirmed.

MEAD v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919. Rehearing Denied June 2, 1919.)

No. 3238.

1. WAR ⊂⊃4—ESPIONAGE ACT—HINDERING MILITARY FORCES OR PROMOTING SUCCESS OF ENEMY—FALSE STATEMENTS—PERSONS TO WHOM MADE.
   In view of the terms of the Espionage Act and the obvious purposes of its enactment, to constitute a violation of its provisions it is not essential that the false reports or statements intended to hinder the operation of the military forces of the United States, or to promote the success of its enemies, must have been made to persons in the military or naval service of the United States; it being sufficient that they were made to recruits for the Canadian forces.

2. CRIMINAL LAW ⊂⊃304(2)—JUDICIAL KNOWLEDGE—MATTER OF COMMON KNOWLEDGE—WAR.
   Courts take judicial notice of the commencement and existence of the war between the United States and Germany, and of the further fact that it has been conducted in conjunction with the United Kingdoms of Great

Britain and Ireland and the Dominion of Canada, among other nations, and that to promote the success of Germany is to promote the success of an enemy of the United States.

3. WAR ⇐4—ESPIONAGE ACT—FALSE STATEMENTS HINDERING CANADIAN RECRUITING.

Defendant, who made false statements tending to interfere with the successful operation of the Canadian recruiting offices authorized in the United States by Act Cong. May 7, 1917 (Comp. St. 1918, § 10174), violated the Espionage Act by making false statements interfering with the success of the military and naval forces of the United States, and tending to promote the success of its enemies.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

W. E. Mead was convicted of violating the Espionage Act, and brings error. Affirmed.

H. E. Foster, of Seattle, Wash., for plaintiff in error.

Robert C. Saunders, U. S. Atty., Clarence L. Reames, Sp. Asst. Atty. Gen., and Hinman D. Folsom, Jr., all of Seattle, Wash., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was charged by indictment with a violation of the Act of Congress of June 15, 1917, c. 30, 40 Stat. 217, known as the Espionage Act, and convicted and sentenced to imprisonment in the penitentiary.

The act provided, among other things, as follows:

"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, * * *" shall be punished, etc. Comp. St. 1918, § 10212c.

It is asserted with much apparent confidence on the part of the plaintiff in error that the indictment is insufficient to state any offense under that statute. It contains two counts, the first of which charges in effect:

That during the times therein stated the United States, as well as the United Kingdom of Great Britain and Ireland and the Dominion of Canada, were and still are at war with the Imperial German government, as the defendant well knew, and that the military and naval forces of the countries mentioned were and still are co-operating and fighting together against the said Imperial German government for the purpose of promoting the success of their armed military and naval forces, of all of which facts the defendant was well aware; that as the defendant well knew, at and during all the times mentioned, any injury done to or inflicted upon the military or naval forces of the Dominion of Canada, or of the United Kingdom of Great Britain and Ireland, and any disloyalty, mutiny, or refusal of duty by any soldier or recruit so engaged, would constitute and be an injury to and would interfere with the operation and success of the military and naval

forces of the United States; that at a certain designated time during the existence and progress of such war the steamship Queen was a vessel belonging to the Pacific Coast Company, a corporation of the state of New Jersey, licensed to do business in the state of Washington, under charter to the Pacific Steamship Company, a corporation of the state of Maine, which charterer was also licensed to do business in the state of Washington, both of which corporations were actually transacting business in that state; that the said steamship was during all of the times mentioned in the indictment duly registered under the laws of the United States, the flag of which country it flew while on the high seas; that on a certain named day during the existence and progress of the said war, and while the said steamship was on the high seas and out of the jurisdiction of any particular state, en route from San Francisco, Cal., to Seattle, in the state of Washington, the said defendant, being a passenger thereon, and within the jurisdiction of the court below, did then and there willfully and feloniously orally make and convey certain false reports and false statements, with the intent to then and there and thereby interfere with the operation and the success of the military and naval forces of the United States, such false statements and reports consisting of the following words, phrases and sentences:

"I understand that you have given up a job at $150 per month and sold your auto to join the forces. I can give you a thousand reasons why you shouldn't fight. This is a capitalistic war, started by England because she is afraid of Germany corraling commerce. President Wilson is in the same swim with the British in backing up the capitalist. You are a damned fool to take any interest in it whatever."

That said statements were willfully and feloniously made by the defendant to Herbert Kortlang and J. F. Storry, they then and there being, as the defendant well knew, recruits in the Canadian Expeditionary Forces theretofore recruited for the Sixth Field Company of Canadian Engineers, and each of them, as the defendant well knew, being about to proceed to take an active part in the said war on the side and in behalf of the Dominion of Canada and against the armed military and naval forces of the Imperial German government, there being then and there also present, as the defendant well knew, and to whom he then and there made the said false reports and statements, a large number of other recruits of the said Canadian Expeditionary Forces, among whom were M. Long, John Doe McKenzie, John Doe O'Toole, John Doe Ryan, and other recruits whose names are to the grand jurors unknown; that in making and conveying the said false reports and statements the defendant then and there did so willfully and feloniously and with the intent to thereby interfere with the operation and success of the military and naval forces of the United States whereas, in truth and in fact he then and there well knew that the said report and statement:

"I can give you a thousand reasons why you shouldn't fight. This is a capitalistic war, started by England because she is afraid of Germany corraling commerce. President Wilson is in the same swim with the British in backing up the capitalist. You are a damned fool to take any interest in it whatever"

—and each and every sentence and phrase thereof and each and every of said statements and charges were then and there false and untrue, and were by the said W. E. Mead then and there as aforesaid spoken and uttered to the said Canadian recruits with the intent then and there in the said W. E. Mead to interfere with the operation and success of the military and naval forces of the United States, contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America.

The second count of the indictment is precisely similar to the first, except that it charges the defendant with having willfully made the said reports and statements with the intent to promote the success of the enemies of the United States.

The failure of the indictment to set forth the false reports and statements, in order to give the defendant the necessary information to enable him to prepare for his defense, which was the basis of the judgment of this court in the case of Foster et al. v. United States, 253 Fed. 481, — C. C. A. —, sustaining the demurrer to the indictment in that case, was obviated by the pleader in the case at bar; for here the alleged false reports and statements are specifically set forth.

[1] In view of the terms of the act of Congress and the obvious purposes of the enactment, we are unable to hold that in order to constitute a violation of its provisions it is essential that the false reports or statements must have been made to persons in the military or naval service of the United States. In the consideration of such cases it should never be forgotten that war is a matter of life or death, and that a nation in such circumstances is no more powerless to protect its life than is an individual to save his, when attacked, by the use of such force as is necessary. It was in the exercise of that power that Congress passed the act which is the basis of the present indictment. Free speech in times of war is by no means the same thing as free speech in times of peace. The false reports and statements inhibited by the statute under consideration are such as are willfully made or conveyed "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."

[2] Apart from the circumstance that the fact was proved by witnesses in the present case, it does not admit of doubt that the courts take judicial knowledge of the commencement and existence of the present war between the United States and Germany, and of the further fact that it has been conducted in conjunction with the United Kingdom of Great Britain and Ireland and the Dominion of Canada, among other nations, nor does it admit of question that to promote the success of Germany is to promote the success of an enemy of the United States.

The assignments of error respecting the evidence introduced amount to nothing, for the obvious reason that not one of them specifies any evidence of which complaint is made. The charge of the court, we think, fairly presented the case to the jury, whose exclusive province it was to determine the facts.

[3] Congress by its act made it criminal for any one, while this country is at war, to willfully make false statements or convey false re-

ports, "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 by act approved May 7, 1917 (40 Stat. 39, c. 11 [Comp. St. 1918, § 10175]), expressly authorized its allies, England and Canada, to open recruiting offices in the various cities of the United States. That any interference with such recruiting service necessarily interfered with the success of the military and naval forces of the United States and tended to promote the success of its enemies we consider too plain for argument.

The judgment is affirmed.

SANDBERG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 19, 1919.)

No. 3187.

WAR ⊂⊃4—ESPIONAGE ACT—SEDITIOUS STATEMENTS.

Statements made by defendant, in each case to a single person in the course of a private conversation relating to the war, *held* mere expressions of opinion, not made in violation of section 3 of the Espionage Act.

In Error to the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Criminal prosecution by the United States against August Sandberg. Judgment of conviction, and defendant brings error. Reversed.

C. N. Gary, of Oakland, Cal., and A. A. Worsley, of Tucson, Ariz., for plaintiff in error.

Crittenden Thornton, of San Francisco, Cal., amicus curiæ.

Thomas A. Flynn, U. S. Atty., of Phœnix, Ariz., C. R. McFall, Asst. U. S. Atty., of Tucson, Ariz., John W. Preston, Sp. Asst. Atty. Gen., and Caspar A. Ornbaun, of San Francisco, Cal., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. Section 3 of the act of Congress known as the Espionage Act, approved June 15, 1917, 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 willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished" in a prescribed way. 40 Stat. 219, c. 30, tit. 1 (Comp. St. 1918, § 10212c).

The plaintiff in error was charged by indictment containing six counts with certain violations of that law. A demurrer to the fourth count was sustained, and demurrers to each of the other counts were overruled, followed by his trial, conviction, and sentence. The first count charged that the defendant on a certain named day in Decem-

ber, 1917, within the district of Arizona, with intent to interfere with the operation and success of the military and naval forces of the United States, did willfully make this false statement in the presence of one Robert E. Cameron and other persons to the grand jurors unknown:

"That our entry into the war was brought about by the Wall Street interests, in order to protect our foreign loans to the Allies."

By the second count it was alleged that the defendant willfully attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, in that he did on the 22d of July, 1917, within the district of Arizona, in the presence of one E. M. Graham and other persons to the grand jurors unknown, make this statement:

"That the German government was much more democratic than ours; that the German people enjoyed greater liberties than the Americans; that it will be a great blow to civilization if Germany should lose."

By the third count it was charged that the defendant willfully attempted to cause similar insubordination, disloyalty, mutiny, and refusal of duty by making, in the presence of Eugene H. Broughton and other persons to the grand jurors unknown, this statement:

"That the Germans had a better form of government than the people of America, that President Wilson was a weak character to allow England to dictate its policy, and then the President coming out and making speeches to back up the British policies."

By the fifth count the defendant was charged with having on the 15th of December, 1917, within the district of Arizona, willfully attempted to cause similar insubordination, disloyalty, mutiny, and refusal of duty, in that he did make, to Robert E. Cameron and other persons to the grand jurors unknown, this statement:

"That the invasion of Belgium by Germany was justified, also that the submarine warfare carried on by Germany was right and legitimate, and that the sinking of the Lusitania was justified, on account of its carrying arms, munitions, and supplies."

The sixth count charged that the defendant, on the 22d of February, 1918, in the district of Arizona, did willfully attempt to cause similar insubordination, disloyalty, mutiny, and refusal of duty, in that he did, in the presence of William B. Cramer and other persons to the grand jurors unknown, make this statement:

"That Germany is not as much of an autocracy as the United States, because the United States does not permit criticism. There is not as much danger of revolution in Germany as in the allied countries, including the United States."

Assuming, but not holding, that the court below was correct in overruling the demurrers to the above-stated counts of the indictment, a careful reading of the record satisfies us that it was in error in not granting the motion that was made on behalf of defendant at the conclusion of all the evidence, and direct a verdict for the defendant.

The record shows that the plaintiff in error, who is a native of

Sweden and a graduate of the University of that country in chemistry, geology, and mineralogy, came to the United States in 1896, since which time he has been pursuing his profession in this country, Mexico, and Canada, having been much of the time in the employ of the Phelps-Dodge Corporation as consulting metallurgist, in which capacity he was employed at the time of his indictment and arrest. It appears that in December, 1912, he made application for admission to citizenship of this country; that he has three brothers who are such citizens, and two nephews who volunteered in the United States Navy. And while he admits in his testimony that, prior to the entry of the United States into the war, his sympathies were in favor of Germany as against England, there is a total lack of any showing in the evidence of any incriminating act on his part, other than the statements made by him to the several persons named in the indictment, in each instance in the course of private conversation while the two were traveling companions and friends, and in neither instance in the presence of any third party. In each instance there is some difference between the testimony of the witnesses for the government and that of the defendant in the case regarding his statements to them, and it is, of course, clear that for the purposes of our decision we must accept as correct their testimony as against his.

The first and fifth counts of the indictment, as will have been seen, relate to statements alleged to have been made by the defendant to Robert E. Cameron, in the first of which the charge is that the defendant said:

"That our entry into the war was brought about by the Wall Street interests, in order to protect our foreign loans to the Allies."

And in the other of those counts the charge is that he said to Cameron:

"That the invasion of Belgium by Germany was justified, also that the submarine warfare carried on by Germany was right and legitimate, and that the sinking of the Lusitania was justified, on account of its carrying arms, munitions, and supplies."

The substance of the testimony of Cameron, and the whole of it as stated in the record, is as follows:

"I am 36 years of age; am the testing engineer for Phelps-Dodge; have known Dr. Sandberg four years. We talked about the war on two occasions, December 6 and 26, 1917, on the way from Douglas to Bisbee. He talked almost continuously about the war, saying that the United States was more autocratic than Germany, because it suppressed criticism. He said the American people thought the income tax was higher in Germany, but that taxes were getting much higher in the United States, and the people would not stand for it. He talked about Dr. Dye, formerly assistant manager of the Phelps-Dodge Corporation, being in the diplomatic service, and having gone to Norway to investigate conditions in Sweden, and that he might see Dr. Dye over there, as he had a position there, if he could get out with his stuff. He explained 'his stuff' as meaning his notes. He said he would not take his money to Sweden, as American money is only worth 60 cents on the dollar. He said the submarine warfare was right and legitimate. His reasons for it I do not remember. He said the sinking of the Lusitania was right, on account of it carrying munitions to the Allies." The witness said he did not remember whether these statements were made in 1915 or 1916. He said he

did not mention it to any one for a long time afterwards. "He said the American diplomatic service was about as useful as a bunch of 10 year old boys. I do not know what Dr. Sandberg's intentions were in talking about the war, and did not think about it at that time. I did not mention the conversation to any one, except to one party, until the Secret Service asked me about it, three months after the first conversation, and two months after the second."

The mere perusal of that testimony shows that it contains nothing even tending to support the charge in the first count of the indictment, even if it could be held that the statement there counted on was anything more than the mere expression of opinion; and so far as the testimony of the witness goes to sustain the statements alleged in the fifth count to have been made by the defendant, they having been made long prior to the enactment of the law upon which the indictment is based, it is obvious that they cannot be held to have constituted any crime.

In support of the second count is the testimony of the witness Graham, which is as follows:

"My name is Edward M. Graham: am 38 years old; represent W. S. Tyler Company, manufacturers of mining machinery. I have known August Sandberg for four—about four—years in a business way. He talked once with me regarding this war, July 22, 1917, at the Gadsden Hotel, in Douglas, Ariz., starting the conversation. No one else was present. He (Mr. Sandberg) said that Germany had a more democratic government than the United States; that the people had greater liberties in Germany. He gave me the name of a book to read on that subject. The name of the book was 'Comparison of Constitutional Law' by Prof. Burges. He referred me to another book concerning England in the war by Thompson. That was in connection with England being to blame for the war.

"He stated that it would be a great blow to civilization if Germany should lose the war; that President Wilson was pro-British, and led the American people into the war." Witness said he did not know whether the statements made with reference to governments, including Germany and ours, were true or false. He did not mention it to any one for a long time afterwards.

The third count is based upon what the defendant is alleged to have said to Broughton, whose testimony, given in support of that charge, is as follows:

"I am 30 years old. I know Dr. Sandberg in a business way. He talked with me about the war in the office of the test mill at Bisbee, between December 5 and December 10, 1917, and also in June or July, 1917. Dr. Sandberg said to me that in a speech that the President had made he said that America and the Allies will fight Germany and her Allies until the German people will overthrow the present form of government and establish a democratic form, and will not make peace with the present rulers of Germany. He said the President was wrong in saying that, because the German people did not want a different form of government; that their form of government was more democratic than the government of the United States; that President Wilson had more powers than the Kaiser; that President Wilson could declare war, and the Kaiser could not. He said the President had a weak character in allowing the British to dictate his policies and the President to make speeches on those policies, so the people would back the President up in his policies. The witness said there was an article written in a magazine, the 'Review of Reviews,' November 17th, by Frank Simonds, entitled 'England's Great Fight.' Part of this article was about the gradual wearing away of the male members of the German army, or the killing off of the male Germans. Mr. Simonds compared the present conflict with a hare and hound chase. Hounds are em-

ployed to run down a hare, one hound would run the hare until he was tired, and then the second hound would take up the chase, and so on. France was compared to the first hound, England to the second, and the United States the third. The United States was to deliver the final blow, or kill the males of the German army. He said it was the most brutal thing he ever heard of; that it was like the American savage of long ago; that, if that was the opinion of the American people, it showed a very uncivilized people. He said the President had a weak character in allowing the British to indicate his policies. He said that, if the American people were of the opinion of the writer, it showed a very uncivilized people. This conversation was called out by a magazine containing the article lying on my desk, and Dr. Sandberg saw it. One other thing I can remember he said, when I told him about the things I had been through in training camp, as a reserve officer in the regular army. He said the rate of deaths per thousand in the cantonments in the Middle West was very high, much more as to number, as he remembered, in this country, than they were in his country, when they were mobilized."

Witness said he did not regard any of the statements as an attempt to influence him to be unpatriotic, and that the discussion came up, and that there was no feeling manifest one way or the other. He said that he had full confidence in Dr. Sandberg in every way; that he had no suspicion whatever that Dr. Sandberg, the defendant, was an enemy of the country, and that his conduct and what he said did not lead him to believe that he was attempting to hinder the operation of the war. He did not mention it to any one for quite a long time afterwards.

The sixth and last count is based upon what the defendant is alleged to have said to Cramer, whose testimony is as follows:

"One statement Dr. Sandberg made on or about February 13, 1918, I remember very well, and in particular was that he said to his mind the entry of the United States into the war was brought about by Wall Street interests, for the purpose of protecting our loans to the Allies. He stated that Germany was perfectly justified in the invasion of Belgium and made the inference—(Worsley objected to the inference. Objection sustained by the court.) And stated that it was a well-known fact that, if Germany had not invaded Belgium, France or England had planned to go through Germany in that way. He stated that the sinking of the Lusitania was justified, inasmuch as it carried arms and munitions, and when I remarked to him, 'Can you possibly say that that you think the sinking of the Lusitania was justified?' he said quite heatedly that Germany had not started this submarine warfare until England had strewn the North Sea with mines, and that we read only of boats and people lost as the result of German submarines, but heard nothing of the ships that went down as a result of the laying of mines in the North Sea. He stated that to his mind the ruthless submarine campaign of Germany was all right. He stated that Germany was not as much an autocratic country as the United States; that there was a whole lot more danger of revolution in the allied countries, including the United States, than in Germany. He stated that Germany and the Kaiser did not start the war, and went on to explain that the Kaiser did not have the power to start the war, as he had to be backed by the Reichstag and the Bundersrath, and he laid the blame for the war particularly on England. He said England was to blame for the war. He said Earl Gray was to blame for the war. He said he did not think President Wilson was doing right, appealing to the German people to overthrow the Kaiser, and stating, as the President did at that time, that he would not consider making peace with the present ruling powers. He said that President Wilson was wrong for stating that in states like Alsace-Lorraine it was to be left to the people with what large powers they were to be allied.

"A great many of the statements that Dr. Sandberg made on that day were much the same as made 10 days before, and in addition the doctor delivered a

very interesting discourse on the history of the formation of the German Empire, and he traced that from the time of inception up to the present, and enlightened me on a great many points I had not known as to the powers of the Reichstag and the Bundersrath, and the form of their government."

The witness stated that no one else was present. The witness stated that it did not cause him to have any disloyal feelings towards his country. The witness stated that he was 37 years old, and not of draft age. The witness said that he did not mention anything about the matter for about 3 weeks afterwards. Witness said he did not know absolutely whether the statements made by the defendant were true or false. It is obvious that almost all of the last-quoted testimony relates to statements in no way connected with that charged in the sixth count.

Bearing in mind the fact, already alluded to, that in each instance the several statements made by the defendant were made in the course of private conversation, to a friend and traveling companion, and in neither instance in the presence of any third party, and after carefully considering the language of the defendant so used, we can but regard it as mere matter of opinion, which does not fairly come within the provisions of the act of Congress upon which the indictment is based.

The judgment of the court below must therefore be and hereby is reversed.

GALBREATH et al. v. UNITED STATES.

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

No. 3130.

1. BANKS AND BANKING ⊂=257(3)—OFFENSES.
   In a prosecution against the president of a national banking association and his successor, under Rev. St. § 5209 (Comp. St. § 9772), for directing false entries in the books with intent to deceive and for misapplication of funds, evidence *held* sufficient to sustain a conviction.
2. BANKS AND BANKING ⊂=256(1, 3)—OFFENSES—INTENT.
   In a prosecution, under Rev. St. § 5209 (Comp. St. § 9772), against the president and another officer of a national banking association for misapplication of funds and for directing false entries in the books, a showing that the false entries were made with intent to deceive, and that the misapplications were made to injure or defraud bank, is essential to conviction.
3. BANKS AND BANKING ⊂=257(4)—NATIONAL BANKING ASSOCIATION—OFFENSES.
   In a prosecution, under Rev. St. § 5209 (Comp. St. § 9772), against the president and another officer of a bank for making false entries in the books and misapplying funds, evidence *held* sufficient to carry to the jury the question whether the entries were made with intent to deceive and the misapplications with intent to injure or defraud the bank.
4. BANKS AND BANKING ⊂=256(3)—NATIONAL BANKS—OFFENSES.
   An intent to injure or defraud a national banking association by misapplication of funds, which offense is defined by Rev. St. § 5209 (Comp. St. § 9772), is not inconsistent with the desire for the ultimate success and welfare of the bank, and such intent may, within the meaning of the law, result from an unlawful act voluntarily done, the natural tendency of which is to injure the bank.

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

5. CRIMINAL LAW ⇐1144(17)—APPEAL—PRESUMPTIONS—JUDGMENT.
Where there is one good count in the indictment, and the evidence is sufficient in law to support it, and judgment is such as might have been imposed upon it alone, the presumption is that it was imposed upon the good count, supported by evidence, and will not be reversed, though there are bad counts, or counts unsupported by evidence.

6. BANKS AND BANKING ⇐257(3)—NATIONAL BANKS—OFFENSES—EVIDENCE.
In a prosecution under Rev. St. § 5209 (Comp. St. § 9772), against the president and another officer of the national bank for misapplying funds and making false entries in the books, which practices occurred in connection with loans and advances to a company in which those officers were interested, the admission in evidence of parts of the record in bankruptcy proceedings of such company, showing it was adjudicated a bankrupt on admission in writing that it was entirely insolvent, and that dividends of only 10 per cent. were paid, was proper, though the last transaction charged in the indictment occurred six months before the bankruptcy.

7. CRIMINAL LAW ⇐369(1)—EVIDENCE OF OTHER OFFENSES—REMOTENESS.
In a prosecution under Rev. St. § 5209 (Comp. St. § 9772), against the president and another officer of a bank for misapplying its funds and making false entries in the books in connection with loans and advances to a company which became insolvent, evidence of similar transactions occurring two or three years before those set forth in the indictment is admissible, over the objection of remoteness.

8. CRIMINAL LAW ⇐1153(6)—REVIEW—EVIDENCE—SECONDARY EVIDENCE.
The sufficiency of proof of loss of records to warrant the admission of secondary evidence of their contents is primarily addressed to the trial judge, whose findings should not be disturbed, unless plainly wrong.

9. CRIMINAL LAW ⇐402(1)—SECONDARY EVIDENCE—LOSS OF BOOKS.
In a prosecution against the president and another officer of a bank for misapplication of funds and the making of false entries in the books in connection with loans and advances to a corporation which became bankrupt, testimony by an expert accountant, who had examined the books and records of the company which became a bankrupt, and had made summaries thereof, *held* admissible on proof of loss of such books and records.

10. CRIMINAL LAW ⇐1169(5)—HARMLESS ERROR—EVIDENCE—INSTRUCTIONS.
In a prosecution against the president and director of a bank for making false entries and misapplication of funds in connection with loans to a company which became bankrupt, the admission of evidence of the contents of books and records of such bankrupt was not error, where the court charged there was no presumption that defendants knew the contents of such books, and that the evidence could be considered only to the extent it was shown defendants did have knowledge of the contents.

11. CRIMINAL LAW ⇐400(8)—EVIDENCE—SECONDARY EVIDENCE.
In a prosecution against officers of a national bank, who were charged with making false entries, etc., an expert accountant may testify as to summaries which he made of the contents of such books, in connection with loans to a company which became bankrupt and whose books were lost; the fact that the accountant reversed certain items in making his summary not rendering the testimony inadmissible, where the changes were explained to him by the jury.

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; John E. Sater, Judge.

Elmer E. Galbreath and Charles H. Davis were convicted of violating Rev. St. § 5209 (Comp. St. § 9772), declaring that every president, director, and cashier of any national banking association, who

embezzles, abstracts, or misapplies any moneys, or makes any false entries in any book, etc., shall be punished, and they bring error. Affirmed.

Walter M. Shohl, Froome Morris, and Miller Outcalt, all of Cincinnati, Ohio, for plaintiffs in error.

Edward K. Bruce, Asst. U. S. Atty., of Cincinnati, Ohio.

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

WESTENHAVER, District Judge. Plaintiffs in error, referred to herein for convenience as defendants, were jointly indicted April 10, 1913, for alleged violation of section 5209, Revised Statutes of the United States (Comp. St. § 9772), the material parts of which section are copied in the margin.[1] The indictment contains 28 counts, and a general verdict of guilty was rendered upon all of them, and each defendant sentenced to imprisonment for a term of 7½ years. This proceeding is to reverse that judgment.

The transactions upon which the several counts of the indictment are based cover a period from October 3, 1910, to December 12, 1911, and consist of 14 different transactions. Each one is made the basis of 2 counts. Davis was president of the Second National Bank of Cincinnati, Ohio (hereinafter referred to as the bank), during the period covered by these transactions until early in 1911, after which he was chairman of its board of directors. Galbreath was vice president of the bank and succeeded Davis as president. The transactions in question were in connection with the Ford & Johnson Company, sometimes hereinafter called the company.

The first 7 counts charge misapplication of certain funds of the bank, and the third 7 counts charge false entry on the books of the bank in connection with the same transaction. They are based on alleged misapplication of funds by use of what are called in the record "transfer checks," and false entry on the books by carrying these checks as currency. The second 7 and the fourth 7 counts are based on overdrafts in the Ford & Johnson Company account; the first group charging that these overdrafts were misapplication of funds, and the last group that they were abstraction of funds.

The misapplication counts, 1 to 7, inclusive, are all similar in character, so that a statement of one will do for all. This first count charges that on November 8, 1910, the Ford & Johnson Company presented to the bank and received credit for a check of $30,000 drawn by it on the Cincinnati Trust Company, at which time the Ford & Johnson Com-

[1] Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association, * * * or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, * * * shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

pany had no money to its credit in the trust company, and that said check was not presented by the bank to the trust company for payment, but was held and carried as currency in the bank until December 13, 1910, when it was withdrawn from the bank, having been paid by check drawn by the Ford & Johnson Company on the bank and from a loan made to it by the bank. The remaining counts, 2 to 7, inclusive, are of the same general character, involving checks drawn at intervals between December 13, 1910, and November 24, 1911, for amounts ranging from $2,000 to $7,500, and being similarly held without presentation for payment for from 1 to 3 months.

The third group of 7 counts, 15 to 21, inclusive, charge that these 7 different checks were carried on a book of the bank, known as the "Receiving Teller's Cash Book," as currency during the time they were so withheld from presentation for payment, and that, therefore, false entries were thereby made in a book of the bank with intent to deceive the National Bank Examiner. As to the remaining counts based on misapplication and abstraction by means of overdraft, we deem any specific statement unnecessary.

[1] The errors assigned are that a verdict of not guilty should have been directed as to both defendants, and the judgment should therefore be reversed, because the evidence was not sufficient to sustain a conviction as to any of them, that the court erred in one respect in its charge, and that it erred by the admission of sundry items of evidence. The error mainly urged and relied on is that the verdict is without sufficient evidence to support it. Defendants' contention is that the evidence does not connect either of the defendants with any of these transactions, and that there is no evidence of any intent to injure or defraud the bank. This contention calls for an examination of the evidence, and this we have done with care. In our opinion there was sufficient evidence to go to the jury, and to sustain a conviction as against both defendants. A brief review of the outstanding facts will show the reasons for our conclusion.

Defendants' counsel, as we understand, do not assert that these transactions, if they occurred as alleged, were not misapplication of the funds of the bank, and were not false entries. The contention is that the several witnesses who testified thereto left it uncertain as to who authorized and directed the misapplication and the false entries, and that upon the familiar rule that, where the evidence shows a crime to have been committed by one or the other of two defendants, but does not show which, a verdict of guilty is not sustained as against either. The evidence here does not seem to us to be of that indefinite nature.

Davis, as has been already stated, was president of the bank until early in 1911; he then became chairman of the board of directors at a reduced salary. Galbreath was vice president, and succeeded Davis in the presidency. These two persons were, during all the time under investigation, in the active management and control of the bank's business; they were its executive heads and managers. The cashier, assistant cashier, receiving teller and the vice president all testified in the case. They testified that all these transfer checks, and the false entry thereof on the receiving teller's book as cash, were authorized and di-

rected by one or the other of the two defendants. No witness was able to say as to any one transaction that it was directed by Davis or by Galbreath, but all say that the directions were given by one or the other; that all were handled and directed from the front office—that is, the president's room, which was occupied by Davis, while he was president, and adjacent to which was the desk of Galbreath; that no other officer or person connected with the bank either claimed or exercised any authority or direction in connection therewith; that whichever one was present or accessible whenever a transaction of this kind had to be passed on did so; that the practice of handling and directing these transactions by one or the other of the defendants was so well known that all minor bank officers or employés went direct to them, and not to their immediate superior.

The representative of the Ford & Johnson Company, namely, George V. Cutter, its secretary, when necessity arose for a favor of this kind from the bank, would apply direct either to one or the other of the defendants, and the transfer check, with proper deposit slip and directions to carry as cash, would be transmitted to the bookkeeper and receiving teller from the front office. There was testimony that the cashier would be called to the president's office, sometimes Davis would be there, sometimes Galbreath, sometimes both of them, and he might not know what the conversation had been, or what the arrangements were, but one or the other would hand him a transfer check, tell him to make out a deposit ticket, deposit it to the credit of the Ford & Johnson Company, and have the receiving teller hold it as cash. The answers of the witness so testifying, and of others, that he was unable to remember whether it was Davis or Galbreath who handled each or any specific transaction, does not limit or qualify this evidence. The jury was warranted in inferring that at least some of these transactions were handled jointly by the defendants in the manner described.

The learned trial judge in his charge, however, gave defendants the full benefit of the law as they contend it is, and in effect directed a verdict of acquittal as to the transfer check and false entry counts, unless the jury found that there was a plan or agreement between the two defendants that these several transactions should be handled in this way. There was, in our opinion, sufficient evidence to warrant a finding that there existed a general plan or system, to which both defendants were parties, to use the bank's funds in this way by transfer checks for the benefit of the Ford & Johnson Company.

Both defendants during all the time in question were large stockholders in the Ford & Johnson Company. Davis was a director of the company as early as 1907, and its vice president, drawing a salary of $4,000 a year from 1908 until as late as September, 1910, if not later. Galbreath was its treasurer downward from 1908 to March, 1910, and drew a salary of $3,000 a year. The evidence tends to show that both were active in its financial management; Galbreath especially was fully informed concerning its affairs, so much so that, after he ceased to be treasurer, one of the experts examining into its affairs says he could always get information from him about any matter as to which all other persons seemed to be unfamiliar.

In the fall of 1909, and perhaps earlier, the Ford & Johnson Company was in serious financial difficulties. It was unable at times to meet its pay rolls; its account at the bank was frequently, if not continuously, overdrawn in large amounts; the needs of its daily business were financed from "hand to mouth" with the assistance of the bank; it was losing money on the business done, and was getting deeper into debt. The evidence tends to show familiar knowledge of these difficulties by both defendants. Furthermore, between July, 1908, and October 1, 1909, the Ford & Johnson Company engaged in a series of transactions of more than doubtful propriety, with which both defendants must have been familiar, and which have an important relation to the transactions under consideration.

The company created a number of subsidiary companies, transferred to each of them some of its assets, taking in exchange therefor capital stock of the subsidiary companies. This capital stock had no value behind it, except the assets transferred from the parent to the subsidiary companies, and the valuation placed thereon for the purpose of issuing stock was approximately $1,250,000 in excess of the book value of these assets. This capital stock was made the basis for an issue of what is called gold trust notes; that is, the Ford & Johnson Company issued gold trust notes in the sum of $1,000,000, payable in 1919, pledging this capital stock alone as security therefor. These notes, although carried in the statements of the company as outstanding obligations for which value had been received, payable in 10 years, were never in fact sold, but were pledged as security for demand or short time paper. A part of the large indebtedness of the Ford & Johnson Company to the bank had no other security back of it, except these gold trust notes.

The extent of the indebtedness of the company to the bank, in addition to the transfer check transactions, is not definitely shown, but was admittedly large, and in excess of the amount permissible under the law to be made to any one customer. The Comptroller of the Currency and the national bank examiner during this period complained frequently of this indebtedness, called attention to these excessive loans, and stated that there was serious danger of loss. This correspondence need not be summarized, but the evidence shows that it came to the attention of both defendants, and that they joined in representing that the company's affairs were in good shape and that it was reducing its obligations. Both assumed to have knowledge of the financial condition of the company.

Many transactions similar to those described in the first to the seventh counts are shown to have taken place. They began as early as the fall of 1909, and continued thenceforward to and during the period covered by the indictment. They were all handled, authorized, and entered in the same way. Ordinary overdrafts were passed on by the cashier, but overdrafts and transfer checks of this company were handled and passed on only by one or the other of the defendants. These transactions were not brought to the attention of the board of directors. So far as the evidence shows, the board of directors was informed only once, and that on August 26, 1910, that the company's account was overdrawn. A loan of $25,000 on the security of assigned accounts re-

ceivable was then authorized, on condition only that an overdraft for $64,000 be similarly secured. Davis and Galbreath were both present at this meeting.

This is by no means all the evidence tending to show a plan or system, and the joint participation of the defendants therein, of using the bank's funds in this manner for the benefit of the Ford & Johnson Company. On the whole testimony, we are of opinion that the court below was warranted in submitting the case to the jury, and that the jury was warranted in finding that defendants jointly participated in all these transactions.

[2, 3] The criminal intent with which these acts must have been done, in order to warrant a verdict of guilty, differs as to the false entry counts from the misapplication counts. As to the former, the intent required to be proved is that the false entries were made with intent to deceive any officer of the association, or any agent appointed to examine its affairs, while, as to the misapplication counts, the intent, to be criminal, must have been to injure or defraud the bank. Defendants' counsel, although urging that the evidence is insufficient to show a criminal intent, seem to limit their argument to a lack of evidence to show any intent to injure or defraud the bank. An intent to deceive by these false entries is plainly inferable from the facts proved. The evidence shows that the receiving teller's cash book is a book of the bank, that in due course of business there is entered therein the cash on hand, distributed under headings, gold, silver, currency, and cash items; that to carry these transfer checks as cash required them to be entered either as gold, or silver, or currency, and not as a cash item. The only correct entry of these checks would have been to have included them among cash items, in which event the full nature of the transaction would have appeared upon the receiving teller's cash book. The necessary or reasonably probable effect of entering them as currency was to deceive any agent or examiner.

This intent to deceive is further evidenced by the fact that no funds to meet these checks were in the Cincinnati Trust Company during the time they were thus carried; also by the fact that in one instance, perhaps more, currency was got from the trust company on a transfer check, and held in preparation for a visit of the bank examiner, and returned later after his departure, and the transfer check taken back and held thereafter as currency until later canceled in the usual manner.

The contention that the evidence is not sufficient to show an intent to injure or defraud is in part covered by the foregoing summary of the evidence. Certain additional contentions with respect thereto are made. It is said Davis was ill for some period not definitely shown prior to August 15, 1910, and that thereafter he passed less time at the president's office, and took a less active part in the conduct of its affairs, and that after retiring from the presidency and becoming chairman of the board of directors early in 1911 he was absent on a trip for his health for a period variously stated as a month, six weeks, or two months. It is also said that an operating committee in September or October, 1910, took charge of the affairs of the Ford & Johnson Company, and that what was done thereafter in the conduct of its business

was done with the approval of this committee, and could not have been done otherwise by the defendants, or either of them, than in entire good faith, and without any intent to injure or defraud. From this premise, and the fact that the transactions described in the indictments occurred after the operating committee took charge, it is argued that the evidence fails to show sufficiently any criminal intent.

The trial judge charged the jury that Davis could not be held for any transaction in his absence and not personally participated in by him, unless they found beyond a reasonable doubt that a general plan or agreement existed between him and Galbreath whereby the acts of one bound the other, even while absent. He also instructed the jury that if the defendants acted honestly and in good faith, for what they believed to be the advantage and protection of the bank, they could not be convicted, although they may have exercised bad judgment in managing and in conducting its affairs, and that mistakes made in good faith and in an honest belief do not constitute a crime. He summarized fully all defendants' contentions, tending to show that they were acting in good faith and without intent to injure or defraud. The charge of the court in this respect is not complained of.

This operating committee, so called, was created in September or October, 1910. Neither Davis nor Galbreath was a member of it. Louis A. Ireton, attorney for the Cincinnati Trust Company, and Charles M. Leslie, attorney for the bank, were members of it. These two members had charge principally of its financial affairs after the committee was constituted. The creation of this committee arose in this wise. In March, 1910, when Galbreath ceased to be treasurer of the company, a man named Powell succeeded him. Powell had become connected with the company on the basis of representations contained in a report of an audit company made up in October, 1909, and on representations as to its condition made by its officers, including Galbreath and Davis. He obtained loans amounting to $200,000 from banks with which he had friendly business relations. He became convinced that the report of the audit company and the representations made to him were incorrect, and procured an audit to be made by an expert accountant. This disclosed that the liabilities were much in excess of what had been represented; that the company's account at the banks was overdrawn $95,000; that the gold trust notes, apparently issued for real money and payable in 1919, had not been sold, but had been pledged on demand or short time paper, and were in fact a current, instead of a deferred, liability. Feeling that he had been imposed upon, and that he had innocently involved friendly banks in the sum of $200,000, he called a meeting of officers of the company, and of the bank, and of the Cincinnati Trust Company, which it seems was involved similarly with the Second National Bank. Davis was not present, but Galbreath was.

All this information, and more, reflecting on the solvency and business methods of the company, was disclosed by Powell at this meeting. It was then agreed that notes would be given for $200,000, to be indorsed by Davis, Galbreath, and others, to take up the loans which Powell had procured, and he thereupon severed his connection with

the company. Davis signed these notes, and the evidence tends to show that he was present at a meeting of the directors of the company on August 15, 1910, and at the bank on August 26, 1910, and regularly thereafter. Everybody concerned, subsequent to the date of this meeting, seemed to have known that the Ford & Johnson Company was on the verge of insolvency and collapse. The general understanding was that if its affairs were well managed it might pay creditors dollar for dollar, but stockholders would get nothing. Leslie and Ireton concerned themselves with its financial operation. They saw that the money received was applied in payment of bills, determining which ones should be paid. The evidence does not show that they knew anything of the transfer check transactions which had been indulged in between the company and the bank previously, or at any time while they were serving on the committee; in fact, the evidence tends to show that they did not. George V. Cutter, secretary of the company, who prior thereto had conducted these transactions with the defendants, continued to do so thereafter. No transfer check issued and credit taken on the books of the bank and falsely held as currency was ever authorized as a result of any request or with the knowledge of the committee, or any member of it. The defendants alone were responsible, so far as the evidence shows, at all times therefor.

[4] It was for the jury to say whether or not an intent to injure or defraud was shown or repelled by these extenuating circumstances. An intent to injure or defraud, as contemplated by the statute, is not inconsistent with a desire for the ultimate success and welfare of the bank. It may, within the meaning of the law, result from an unlawful act voluntarily done, the natural tendency of which may have been to injure the bank. A wrongful misapplication of funds, even if made in the hope or belief that the bank's welfare would ultimately be promoted, is none the less a violation of the statute, if the necessary effect is or may be to injure or defraud the bank. Such is the well-settled law. United States v. Harper (C. C.) 33 Fed. 471; United States v. Kenney (C. C.) 90 Fed. 257; United States v. Breese (D. C.) 131 Fed. 922, 923.

The bank had become heavily involved as a result of previous irregular acts in which the defendants had participated. They had involved themselves with the Comptroller and bank examiner by representations and statements concerning the bank's loans to the Ford & Johnson Company and the condition of its business. They may have thought that, if the plan and method of misapplying funds by transfer checks and falsely entering these checks as cash were ended, the Ford & Johnson Company would go to the wall, dragging down the bank with it, and bringing upon themselves as stockholders in both, and as responsible agents of the bank, loss and censure. In any event, whether or not a criminal intent existed was properly submitted to the jury, under a charge fair to the defendants, and its verdict should not be disturbed.

[5] In view of the conclusion thus reached respecting the transfer check and false entry counts, we deem unnecessary a consideration of defendants' contentions respecting the overdraft and abstraction

counts. The sentence was general, and such as might have been imposed for a conviction on any count. The law is settled that if there is one good count, and evidence sufficient in law to support it, and the judgment such as might have been imposed upon it alone, the presumption is that it was imposed upon the good count, supported by evidence, and will not be reversed, even if there are bad counts, or counts not supported by the evidence. If we were of opinion that these counts were not supported by the evidence, we would feel that this rule should be applied, and an examination, therefore, of the evidence is unnecessary, and will not be made. Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Hardesty v. United States (C. C. A. 6) 168 Fed. 25, 93 C. C. A. 417; Bartholomew v. United States (C. C. A. 6) 177 Fed. 902, 101 C. C. A. 182; Bennett v. United States (C. C. A. 6) 194 Fed. 630, 114 C. C. A. 402.

One error assigned and urged in the brief is that the court failed to charge, as specially requested, that the law presumes the character of the defendants to be good and that such presumption is evidence in their favor. On the hearing this assignment was withdrawn; counsel admitting that Mullen v. United States (C. C. A. 6) 106 Fed. 892, 46 C. C. A. 22, which was cited in support of it, is not to be taken as the law, in view of Greer v. United States, 245 U. S. 559, 38 Sup. Ct. 209, 62 L. Ed. 469.

[6] Error is assigned to the admission in evidence of certain parts of the record in the bankruptcy proceedings of the Ford & Johnson Company. In April, 1912, this company was adjudged a bankrupt upon an admission in writing by resolution of its board of directors that it was absolutely insolvent and unable to pay its debts. This admission in writing, its schedule of liabilities showing its indebtedness to the bank, and the order showing the payment of a dividend only of 10 per cent. were thus admitted over objection and exception. It is urged that, inasmuch as six months had elapsed from the last transaction charged in the indictment, that changes were shown to have taken place in the assets of the company, and that in any event the amount realized by a bankruptcy sale of assets is no fair test of value, these items were irrelevant, and the admission thereof was prejudicial to the defendants. The date and fact of bankruptcy, and the percentage distributed on debts, however, had already appeared in the testimony without objection or exception. Evidence had also been given showing the financial condition of the company, and the changes in its assets, and their value from year to year, both during, before, and after the period covered by the transactions described in the indictment.

The trial judge told the jury that the guilt or innocence of the defendants was to be determined upon a consideration of the facts and circumstances as they existed at the times mentioned in the indictment; that they must not answer that question by looking back in the light of their present knowledge, but that they must transport themselves to the dates specified, and consider the position of the defendants as it then was, and the situation, facts, and circumstances then existing, and which were then known to them. They were also

told that the amounts realized from a bankruptcy sale of assets were not to be taken as any evidence of the value thereof at the time of sale, or any prior time. They were also charged that the bankruptcy proceedings, on account of the difference in time, should be entirely disregarded as to the transfer check and false entry counts. In our opinion, in view of these considerations, the admission of this evidence does not constitute prejudicial error, even if immaterial and irrelevant.

[7] Error is also assigned to the admission in evidence of similar transactions. It is said that some of them thus admitted were too remote, and that others were not similar. The other transactions admitted in evidence were similar. The transfer checks were issued by the company, held without presentation for payment, and entered on the receiving teller's cash book as currency, in precisely the same manner as those under consideration. The only difference in any of them is that some of the transfer checks were drawn on a different bank. The evidence tends to show that from October, 1909, with great frequency, down to and including the period covered by the indictment, such transactions took place. In our opinion, none of these transactions were too remote, and all were admissible in evidence in accordance with well-settled rules. 12 Cyc. 411; Jones on Evidence, § 142; Griggs v. United States (C. C. A. 9) 158 Fed. 572, 85 C. C. A. 596; Hardesty v. United States (C. C. A. 6) 168 Fed. 25, 93 C. C. A. 417; Prettyman v. United States (C. C. A. 6) 180 Fed. 30, 103 C. C. A. 304; Hoss v. United States (C. C. A. 8) 232 Fed. 328, 146 C. C. A. 376; Shea v. United States (C. C. A. 6) 236 Fed. 97, 149 C. C. A. 307, and cases therein cited.

[8, 9] Error is also assigned to the admission in evidence of certain testimony given by one Walter Lewis, an expert accountant. This witness had examined the books and records of the Ford & Johnson Company in 1912, and had prepared certain summaries and schedules therefrom. One of them was an operative statement of assets and liabilities year by year, beginning July 1, 1905, and continuing to April 30, 1912. The other showed the profit and loss of its operations by fiscal years, beginning June 30, 1905, and ending April 30, 1912. One objection is that the books and records were not produced in court or made accessible to the defendants. Many witnesses were called to prove the loss of these books and records. The sufficiency of this evidence, so as to dispense with the necessity for their production, is addressed primarily to the trial judge. His finding should not be disturbed, unless plainly wrong (Jones on Ev. § 214), and, in our opinion, his finding is not only not wrong, but is fully sustained by the evidence. Conceding that the proper rule requires that books and records should be produced, or at least made accessible to the opposing parties, in order to render admissible this class of the testimony, it is none the less true that when such books are lost, or are beyond the jurisdiction of the court, the rule applicable to lost documents and the admission of secondary evidence is also applicable in that situation. Wigmore on Evidence, § 1230; Burton v. Driggs, 20 Wall. 125, 135, 136, 22 L. Ed. 299; Jones on Evidence, §§ 211, 217.

[10] Another objection is that the defendants were not shown to be

familiar with the contents of these books and records. The financial condition of the company and whether it was making or losing money were relevant matters of inquiry. The trial judge told the jury that there was no presumption that either defendant knew the contents of these books and records, and that such contents were to be considered only to the extent the evidence tended to show the defendants had knowledge of what was thereby disclosed. In our opinion, the admission of this evidence, taken with these instructions, was not error. Wilson v. United States (C. C. A. 2) 190 Fed. 427, 437, 111 C. C. A. 231; Bettman v. United States (C. C. A. 6) 224 Fed. 819, 831, 832, 140 C. C. A. 265; Sparks v. United States (C. C. A. 6) 241 Fed. 777, 154 C. C. A. 479.

[11] Another objection urged to the admission of this testimony is that the witness, in making up his schedule, reversed certain entries on the books, thereby reducing its assets. The most striking instance of this consisted in shrinking the value of the capital stock received from subsidiary companies in exchange for assets of the parent company to the figure at which these assets had been carried on the company's books. This and other changes made by him were fully explained to the jury, and in view of such explanations, and the instructions of the court, it does not seem to us that any confusion could have been produced in the minds of the jury, nor any prejudice could have resulted therefrom to the defendants.

Finding no prejudicial error in the record, the judgment is affirmed.

MEMPHIS ST. RY. CO. v. PIERCE.

(Circuit Court of Appeals, Sixth Circuit. March 10, 1919.)

No. 3171.

1. APPEAL AND ERROR ⟸1064(1), 1067—HARMLESS ERROR—INSTRUCTIONS.
In an action by a negro passenger, wounded in an exchange of shots between the conductor and another negro passenger, giving of instructions on the conductor's right to shoot in self-defense, and the refusal to charge thereon as requested, *held* not error prejudicial to the street railway company.

2. CARRIERS ⟸321(23)—CARRIAGE OF PASSENGERS—ACTION FOR INJURIES—INSTRUCTION.
In an action against a street railway for the wounding of a negro passenger in a shooting affair between the company's conductor and another negro passenger, instruction *held* not erroneous, in view of all the facts and circumstances, and a discussion between counsel, as telling the jury it was a proven or admitted fact that the conductor came into the car without reason and deliberately started a fight with the negro.

3. TRIAL ⟸295(1)—INSTRUCTIONS—CONSIDERATION AS A WHOLE.
Instructions must be considered as a whole.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by John P. Pierce against the Memphis Street Railway Company. To review a judgment for plaintiff, defendant brings error. Affirmed.

Sam P. Walker, of Memphis, Tenn., for plaintiff in error.
Milton J. Anderson, of Memphis, Tenn., for defendant in error.

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

KILLITS, District Judge. By law, street railways in Tennessee are required to separate the races by placing white passengers in one end of a car and colored passengers in the other, passengers of either race being compelled to remain within the half of the car reserved to them, unless it should happen that it had been filled and seats remained in that part of the car set off to passengers of the other race. The result of the regulation is that vacant seats, if any, in either half of the car will be those nearest the center. The car which figures in this case had a side door; it was a trailer in charge of Conductor Bullock, the motorcar being in charge of Conductor Bright. The plaintiff, Pierce, was a colored man seated towards the rear, that being the half assigned to colored passengers. As the car left the center of the city of Memphis, there were many vacant seats in each half, but a white passenger, one Barker, instead of turning to the right and seating himself among the whites, insisted on taking the first seat to the left of the door in the colored section. The car began to fill with a preponderance of colored passengers until there was but one seat remaining in the negro end, that beside Barker. A colored woman entered and undertook to sit beside him; her action being met by his strong objection. Thereupon a negro passenger named Knox came up from the rear, giving his seat to the colored woman, and engaged in an altercation with Barker, in which some profanity was used, and which Conductor Bullock could not quell. The latter thereupon gave the ordinary stopping signal for the street which the cars were approaching and opened the door, to order both Knox and Barker from the car. When the train stopped, Conductor Bright came from the front car, and firing began between him and the negro Knox, who was killed. One of Bright's shots hit Pierce, who had no part in the transaction, and it is for injuries by him sustained that this action was brought against the defendant, plaintiff in error here, which seeks to reverse the judgment against it following the verdict.

The assignments in error, four in number, are predicated upon alleged errors of the court relating to the charge to the jury. The first, third, and fourth may be grouped together and thus disposed of, having been argued in that collocation by plaintiff in error's counsel. It is first urged that what the court said to the jury on the subject of self-defense was erroneous under the circumstances of the case, and that the court erred in refusing to give certain requests upon this subject which are the subjects of the third and fourth assignments. The court's charge on self-defense excepted to was as follows:

"In order for you to determine the rights of the parties, it is necessary for the court to instruct you upon the law of justifiable homicide as applicable to the facts in this case. In the first place, the conductor, Bright, would be justified in shooting the negro, John Knox, if he did so in self-defense, and on that subject I charge you as follows:

"If the conductor, Bright, was in real or apparent danger of death or great bodily harm, or honestly believed himself to be in such danger, as evidenced by the facts and circumstances justifying such a belief as they appeared to him, and in acting in good faith under such an apprehension he shot and killed the negro, John Knox, and at this time accidentally wounded John Pierce, the court charges you that this is justifiable homicide; and if you believe that the conductor, Bright, acted in the honest belief and was justified by the circumstances, then you must find for the defendant.

"Considering the self-defense theory, which is relied upon by the defendant, you will first look to all the facts and circumstances in the case, and if from that you believe that the conductor, Bright, came to the trailer car door, and, without more, the passenger, Knox, fired at him, or drew his pistol to fire at him, and the conductor shot at him in self-defense under such circumstances, and the ball missed and struck the plaintiff, then the company would not be liable.

"But, on the other hand, if you believe that there was some controversy between Knox and a white man who was sitting on the seat with him, and that when the car stopped, and the conductor, Bright, came to the door with his pistol, or drew it as he got to the door, and threw it on the negro and told him, 'Hands up,' and the negro arose and drew his pistol and fired, then he was acting in self-defense; the company would be liable, and under such circumstances it would be immaterial whether Knox fired first or the conductor first, because under such conditions he would be the aggressor and could not avail himself of the plea of self-defense."

[1] The requests to charge on this subject were much more extended and discussed various theories alleged to be derived from the evidence and which the jury should examine. We are of the opinion that there was no error prejudicial to the plaintiff in error respecting either the court's charge or the refusal to charge as requested. It is conceded by counsel for plaintiff in error that the court's statement of the general principle of self-defense embodied in the second paragraph of the charge, as quoted above, was correct, but that the court's application of this principle by reference to the facts of the case, as set out in the third paragraph, was erroneous, because it withdrew from the jury, as alleged, a consideration of such movements or demonstrations as the negro Knox may have made which "would show to a reasonably prudent man that he had a pistol and was about to use it." Bright, who killed Knox, and shot Pierce, was not a witness, so that it was left to inference altogether as to what he saw or thought he saw by way of a hostile demonstration on the part of Knox. It is shown in the evidence that Bright stepped into the car with a drawn pistol in his hand, leveled at Knox, coupled with a threatening order. The evidence clearly preponderates that the first hostile demonstration was made by Bright. There is some conflict upon the question, but the best interpretation of the evidence leads to the conclusion that Knox fired first, his bullet striking Bright's money change box and thus saving him from injury, whereupon Bright started a fusillade into the rear of the car, resulting as above stated. The result, in our judgment, is that the request to charge on the subject of self-defense, tendered by the defendant below, so far departed from the actual evidence in the case as to tend to lead the jury into abstruse speculation as to what was in Bright's mind when he fired. In our judgment, the court employed the only concrete application of the general principles of the law of self-defense possible here. We think that to have

given the request of the defendant below might very well have had the result of confusing the jury, and whatever may be said by way of legitimate criticism of the court's charge—we are not suggesting that it is subject to criticism—in view of the whole charge this instruction did not tend to defendant's prejudice. The excerpt from the court's charge on the subject of self-defense, which was excepted to, and which we quote above, was not all the court said on the subject. A paragraph immediately followed directing the jury's attention to the consideration "whether Knox was acting as if he were in the attitude of assaulting any one." The effect of this, with later portions of the charge, alluded to below, was to present to the jury, in a clear way, all of the substance of defendant's request which the state of the evidence justified.

[2] Having first insisted that Bright shot in self-defense, it was further urged in his behalf that the shooting occurred while Knox was attempting a felony. In discussing this question, the court again invited the jury's careful scrutiny of the evidence bearing upon Knox's conduct, in which every right of the defendant below was well safeguarded. In the course of this instruction, the jury's attention was called to the law of Tennessee separating the races, and this part of the charge concludes with this paragraph which is the basis of the remaining assignment of error:

"That is what this trouble seems to have arisen from, but what was its condition, what was the intensity of it at the time the conductor on the front car came back? There is no evidence in that case that explains why he came back, or what induced him to come back. The car bell was rung to stop in the ordinary way for a stop, as the conductor testified there was no call made for any help; and you must apply your good common sense and judgment in determining just what was going on at the time this shot was fired that struck this plaintiff."

It is argued that this was extremely prejudicial, "for the reason that the court, in substance, told the jury that it is a proven or admitted fact that Conductor Bright came back from the motorcar without any reason and deliberately started a fight with the negro John Knox." This criticism does not appeal to the court as valid, nor do we see error in this charge, viewed in relation to all the facts and circumstances of the case, and especially when considered with a subsequent discussion of this subject between counsel for defendant below and the court in the presence of the jury and which was, in fact, part of the instructions. This discussion was as follows:

"Mr. Walker: I except because the court stated that there was no evidence in the case to cause Bright to return to the trailer car. I submit that there was a question as to whether or not there was sufficient evidence in the case to warrant Bright's return to the trailer car.

"The Court: I don't recall any direct evidence that showed what moved him to leave. It may be inferred from all the evidence in the case. There may be reasonable inference as to why he went back, and the jury may look to all the evidence in determining what caused him to go back. He is not here to speak on that subject."

[3] These considerations dispose of this case. There is no dispute as to the law applicable to this situation. The law of self-defense is well known. We must consider the instructions of the court as a

whole. So regarded, they are found to conform to well-settled law and there is no ground for inference that the jury was misled. We see no fair opportunity to presume that, if the criticisms of plaintiff in error to this charge were met in a new presentation of the same facts to a jury, the verdict might reasonably be otherwise than it was here.

The judgment of the court below, therefore, must be affirmed. Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 306; Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489.

SOUTHERN RY. CO. v. PETTIT et al.

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

No. 3188.

1. CARRIERS ⊂⊃25—REGULATION OF SHIPMENTS—RULES OF INTERSTATE COMMERCE COMMISSION—"BURNT COTTON."
Rule of the Interstate Commerce Commission providing that burnt cotton, which is cotton that has been on fire, and which has not been subsequently repicked and rebaled, must not be offered for shipment until it has been reconditioned, or until not less than five days have elapsed since the last evidence of fire therein, does not forbid shipment of cotton which had been part of a larger mass that had been on fire after five days elapsed, merely because there was fire in other cotton about 200 yards distant at the time of the shipment.

2. CARRIERS ⊂⊃136—CARRIAGE OF GOODS—EVIDENCE.
In an action against a railroad company for the value of burnt cotton, which was destroyed while in transit, the question whether the cotton was on fire at the time of the shipment, or whether it caught on fire while in transit, *held* one of fact for the jury.

3. CARRIERS ⊂⊃134—DESTRUCTION OF SHIPMENT—VALUE—EVIDENCE.
In an action for the value of burnt cotton, which was destroyed while in transit after it had been salvaged, testimony by witness of large experience in buying and selling burnt cotton as to its value, based on the market value of merchantable cotton, *held* competent and sufficient to support a verdict for damages, though the witness did not state the cost of reconditioning the cotton, on which his estimate of value had been based; that being matter for cross-examination.

4. APPEAL AND ERROR ⊂⊃1048(6)—REVIEW—HARMLESS ERROR.
In action for the value of burnt cotton, which was destroyed in transit after it had been salvaged, refusal to permit cross-examination of plaintiff as to the amount paid for the cotton, which the carrier desired to introduce on the question of value, *held* harmless; there being no showing of the expense of handling, salvaging, repicking the cotton, etc.

5. CARRIERS ⊂⊃132—CARRIAGE OF GOODS—LOSS BY FIRE—BURDEN OF PROOF.
Where a carrier accepted for shipment burnt cotton that had been salvaged, and the bill of lading acknowledged the receipt of the shipment in apparent good order and free from fire, and there was evidence that it had been free from fire five days previous, there is a presumption that the failure of the carrier to deliver the cotton which burned during transit was due to its fault, and refusal to charge that before the shipper might recover he must show some evidence of negligence on part of the carrier, was proper.

6. APPEAL AND ERROR ⊂⊃719(7)—REVIEW—ASSIGNMENT OF ERROR.
Where burnt cotton, which had been salvaged, was destroyed while in transit, and no inherent defect or vice was suggested, except the existence

of smouldering fire, and that was fully covered by the charge, the refusal of a request that there could be no recovery if the fire originated because of inherent defect or vice of cotton will not be considered on appeal; no assignment of error having been taken, and the case not being one where the court should, under rule 11 (202 Fed. viii, 118 C. C. A. viii), review the ruling without an assignment.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by Hugh Pettit and the Newberger Cotton Company against the Southern Railway Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Earl King, of Memphis, Tenn., for plaintiff in error.

Julian C. Wilson, of Memphis, Tenn., for defendants in error.

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

KNAPPEN, Circuit Judge. On May 6, 1916, defendants in error, hereinafter called plaintiffs, shipped over the line of plaintiff in error, hereinafter called the carrier, from Decatur, Ala., consigned to Memphis, Tenn., several carloads of "salvaged cotton"; that is to say, cotton which had been in a fire. During transportation, three of the carloads, aggregating 56,801 pounds, were burned up. This suit was brought for the recovery of its value. The carrier, in addition to general denial, pleaded that the loss was occasioned through plaintiff's negligence, and, by counterclaim, asked recovery for the injury to its equipment, etc., by reason of the fire, which was alleged to have been due to plaintiffs' negligence, in that the cotton was loaded into the cars while still containing fire, and without the exercise of due care, and in not ascertaining that it contained fire. There was a trial to a jury, and verdict and judgment for plaintiffs for $5,021, as the value of the cotton; the counterclaim being rejected.

[1, 2] 1. The Gulf Company's compress at Decatur, Ala., was burned April 25, 1916. Previous to the fire, there were in the compress about 9,000 bales of cotton; a portion of this was bought by plaintiffs on May 2d, which was four days before the shipment in question. A rule of the Interstate Commerce Commission provides that—

"'Burnt cotton' is cotton that has been on fire, and which has not been subsequently repicked and rebaled. It must not be offered or accepted for shipment at an originating station until it has been reconditioned by picking and repacking in bales, or until not less than five days have elapsed since the last evidence of fire in it. It must be marked and described on shipping orders and bills of lading as 'Burnt cotton, yellow label,' and cars containing any quantity of it must be protected by the inflammable placard."

The bill of lading acknowledged receipt of a large number of both bales and bundles of "burnt cotton," with notation "Inflammable placard applied, yellow label." Its conditions, as respects interstate shipments, were made subject to the provisions of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [Comp. St. § 8563 et seq.]). The waybills for the shipments were each marked "Inflammable." One covered 13 bales and 40 bundles, another 62 bun-

dles, the third 65 bales, of "burnt cotton." There was testimony that the cars bore the "inflammable placards." At the conclusion of the testimony, defendant moved for directed verdict in its favor, upon the ground that it conclusively appeared that the plaintiff broke the Interstate Commerce rule by shipping cotton within five days since the last evidence of fire in it, that in fact there was fire smouldering in it when loaded, that plaintiff was thus guilty of negligence, and that the cotton was consumed as the result of this smouldering fire.

This motion was properly overruled. There was substantial and competent testimony tending to show that the cotton was free from fire when shipped and for more than five days before. This testimony is not subject to the criticism of being merely an expression of opinion, as distinguished from actual knowledge. The officer of the Salvage Company, which took charge of the cotton on the 25th of April, testified to his segregating bales that had been on fire, "handling them individually, and examined every one of them," piling it, inspecting it, and repiling three times for the purpose of discovering fire; that in the case of baled cotton, which appeared little affected by fire, the affected portions were pulled out, water applied with a hose, and the existence of heat further tested by the hand; these tests were applied for several days. Unpressed cotton was saturated with water, raked into winrows, reraked, resaturated, and finally packed into sacks; that while the inspection was made by men in charge of it, as well as himself, he inspected all of it personally, and saw personally that all precautions were taken; that to the best of his knowledge "the fire was absolutely out two days before it was offered for sale," which would be six days before the shipment in question. The testimony of the witness was clear and emphatic.

One of the plaintiffs testified to his personal charge and examination of all the cotton previous to shipment and its freedom from fire when shipped. The testimony of conscientious witnesses could not well go further. There was other testimony tending to the same result. There was some testimony tending to show the contrary, but the motion to direct verdict did not involve the rule of weight of affirmative as opposed to negative testimony. There was, however, an item of testimony that at the time of the shipment there was fire in some cotton situated about 200 yards from the cotton in question, and if this testimony is to be accepted as conclusive, and if the Commission's rule is to be interpreted as forbidding shipment within five days after the existence of fire in any part of an originally larger mass, plaintiffs' testimony as to the absence of fire was possibly not definite enough to cover such situation; but we cannot so interpret the rule, which merely forbids the shipment of "cotton that has been on fire * * * until not less than five days have elapsed since the last evidence of fire in it." There was affirmative evidence, on the carrier's part, tending to show that the cars were fire-tight and that the engine's equipment effectually excluded the possibility of fire from sparks; but, while this testimony was not directly contradicted, it merely raised a question of fact. It did not, in our opinion, necessarily exclude all reasonable possibility that the cotton was free

from fire when loaded, even though the other theory might seem to us the more probable.

[3] 2. It is urged that there was no evidence on which to base the verdict, in that there was no competent testimony of the value of the cotton. The contention is that the test is market value, and that the testimony of one of plaintiffs (the only witness on the subject) was merely a guess. This contention must be rejected. It appeared that the market value of merchantable cotton is based on the Memphis Cotton Exchange price of upland middling; the higher grades bringing more, the lower grades less, than middling. The witness, who had had large experience in buying and selling burnt cotton, testified that, while there was no exchange price for burnt or irregular cotton, there was a market value for it; the value being based on the Memphis Exchange price for regular cotton, taking into account the cost of reconditioning, etc. He testified generally that the value of the burnt cotton, when reconditioned, would be from one-half a cent to one cent less than middling cotton (whose exchange price, from May 6 to May 23, ranged from 12½ to 13 cents), and that the cotton in question was "mostly high grade." He further said that the cotton which was not burnt in transit was, on reaching Memphis, divided into three grades: White, stained and burnt; the burnt pickings selling at 7¼ cents without being reconditioned; the stained cotton, for the most part, at 10½ to 11 cents as fast as conditioned; the baled cotton was said to be worth 1½ or 2 cents more than the loose or sacked cotton. After saying that "this very cotton" would be worth 12 to 12¼ cents after it had been reconditioned, in answer to a question what it was worth "as a whole" on May 10th or 11th, at the time it "ought to have arrived," he answered, "About 10½ or 11 cents a pound" (the recovery was at about 9 cents a pound). We think it fairly open to inference that the cotton consumed in transit was intended to be covered by that answer, notwithstanding the interpolated query of the witness, "As it was when it arrived here?" The cost of reconditioning was not stated, nor the relative proportions of the three grades; but these were matters open to cross-examination, and their omission affected only the weight of the testimony of value at Memphis. The average value given by the witness was apparently intended to be based upon the market price, as shown by the quotations at the time the cotton should have reached Memphis, less the cost of reconditioning and making it marketable. This we think proper, in view of the experience of the witness.

[4] Complaint is also made that defendant was not permitted to show by cross-examination what plaintiffs paid for the burnt cotton at Decatur. Assuming, for the purposes only of this opinion, that its admission would not have been error, we think there was no reversible error in rejecting it. The testimony of amount paid (it was not bought by the pound) would be of no substantial value, in the absence of complete showing of the expense of handling, salvaging, and repicking at Decatur, the proportion of the cotton wholly lost in that operation, the cost of the transportation to Memphis, and the expenses of reconditioning and reselling.

[5] 3. Error is assigned upon the refusal to charge that, "before the plaintiff in the original suit can recover, he must show some evidence of negligence upon the part of the railroad company," and upon the instruction that the burden was on defendant to show (in order to relieve itself from liability for loss of the cotton) that plaintiff delivered, for shipment, the cotton afterwards burned within five days after the last evidence of fire in the bulk of the cotton.

The carrier would not be liable for fire caused by plaintiffs' fault. Not only did the bill of lading acknowledge the receipt of the shipment "in apparent good order, * * * which said company agrees to carry to its usual place of delivery at said destination," but plaintiffs had given affirmative oral testimony tending to show, not only that the cotton was in good shipping condition when received by the carrier, and free from fire, but that it had been so free for more than five days before. The nondelivery by the carrier raised the presumption that the cotton had been lost through its negligence, and the burden was thus cast on it to show that the fire, and consequent failure to deliver the cotton, was due, not to its fault, but to plaintiffs' fault: Galveston, etc., Ry. Co. v. Wallace, 223 U. S. 481, 492, 32 Sup. Ct. 205, 56 L. Ed. 516; Chicago, etc., Ry. Co. v. Collins Co. (C. C. A. 7) 235 Fed. 857, 863, 149 C. C. A. 169.

[6] 4. Defendant complains of the failure to charge that, "if the fire originated by virtue of the inherent defect or vice of the cotton shipped," the defendant must have verdict. No error was assigned on the failure to give this request; and, under our rule 11 (202 Fed. viii, 118 C. C. A. viii), we are not called upon to consider it. We see no occasion to exercise discretion in its favor. No "inherent defect or vice" is suggested, except the existence of smouldering fire; and that subject was fully covered by the court's charge. Indeed, that defendant's counsel so understood is indicated by its assignment of error in the charge "that the burden of proving that the fire in question was occasioned by the inherent vice of the property was upon the defendant."

Finding no reversible error in the record, the judgment of the District Court is affirmed.

ERIE R. CO. v. SCHLEENBAKER.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1919.)

No. 3199.

1. MASTER AND SERVANT ⟸285(7)—INJURY TO RAILROAD EMPLOYÉ—MOVING DEFECTIVE CAR—PROXIMATE CAUSE—QUESTION FOR JURY.

In an action by a conductor, injured when he missed the grabiron on the caboose, from which the rear lights had been removed, and fell under the following car, on which the caboose lights had been placed, and which was at the rear of the train because it had no drawbar or coupler at its rear end, such hauling of the crippled car being unlawful under Act March 2, 1893, § 2 (Comp. St. § 8606), Act March 2, 1903, § 1 (Comp. St. § 8613), and Act April 14, 1910, § 5 (Comp. St. § 8622), and constituting negligence, question of whether the transportation of the defective car was the proximate cause of the conductor's injury *held* for the jury.

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

3. MASTER AND SERVANT ⟸111(1)—INJURIES TO RAILROAD EMPLOYÉ—HAULING DEFECTIVE CAR.

A railroad was negligent in hauling at the rear of a freight train, back of the caboose, a freight car, defective in that it had no drawbar or coupler on its rear end, an act unlawful under Act March 2, 1893, § 2 (Comp. St. § 8606), Act March 2, 1903, § 1 (Comp. St. § 8613), and Act April 14, 1910, § 5 (Comp. St. § 8622).

3. MASTER AND SERVANT ⟸111(1)—INJURIES TO RAILROAD EMPLOYÉ—HAULING DEFECTIVE CAR.

The effect of a railroad's violation of its duty under Act March 2, 1893, § 2 (Comp. St. § 8606), Act March 2, 1903, § 1 (Comp. St. § 8613), and Act April 14, 1910, § 5 (Comp. St. § 8622), in hauling at the rear of a freight train, back of the caboose, a freight car, defective, in that its rear end was without drawbar or coupler, and also any liability arising therefrom, extended to an employé, such as the conductor of the train.

4. MASTER AND SERVANT ⟸204(2), 228(2)—RAILROAD EMPLOYÉS—EMPLOYERS' LIABILITY ACT—SAFETY APPLIANCE ACT—CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

The purpose of Congress, through the Employers' Liability Act (Comp. St. §§ 8657–8665), and the Safety Appliance Acts (Comp. St. § 8605 et seq.), considered together, is not only to make a railroad's duty absolute, but also, where the injury is in part occasioned by the failure of the road to comply with the acts, to excuse employés from the effect alike of the rules of contributory negligence and assumption of risk.

5. TRIAL ⟸343—VERDICT—FORM AND EFFECT.

Verdict for plaintiff, under instructions that only three issues were to be considered, must be treated as general in form, and as finding all the submitted issues in favor of plaintiff.

6. APPEAL AND ERROR ⟸1078(4)—ASSIGNMENT OF ERROR—WAIVER BY FAILURE TO MENTION IN BRIEF.

Where nothing is said in the brief in support of an assignment of error to the reception of evidence, it must be regarded as waived.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by Jacob Schleenbaker against the Erie Railroad Company. To review judgment for plaintiff, defendant brings error. Affirmed.

J. Paul Lamb, of Cleveland, Ohio, for plaintiff in error.

Lewis Brucker, of Mansfield, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657–8665]) to recover damages for personal injuries sustained by plaintiff below, Schleenbaker, on the 8th of September, 1915, and while in the employ of the defendant railway company. Admittedly defendant was at that time operating as a common carrier of passengers and freight in interstate commerce by railroad, and plaintiff was the conductor of one of its freight trains. This train was then running on a west-bound trip between Kent and Marion, Ohio, and pursuant to orders previously given by defendant a freight car was coupled to the rear end of the caboose of plaintiff's train at Ashland. The car thus becoming the last one of the train had no drawbar or coupler at its

rear end, and under the orders mentioned was to be hauled to Marion for purpose of repair; it was, moreover, loaded with interstate freight, and, like the rest of the train, being used in interstate commerce. The placing of the crippled freight car at the end of the train necessitated removal of the markers, whether for day or night travel, from the rear end of the caboose to that of the freight car. The train proceeded to Galion and left there about 9 p. m. In attempting to board the caboose while in motion, plaintiff tried and failed to obtain a hold upon the rear grabiron which was bolted to the side of the caboose, and fell so that his left arm lay across the adjacent rail of the track; the wheels on that side of the defective car passed over his arm and practically severed it between the wrist and elbow.

Among the negligent and wrongful acts charged in the petition as causing the injury were violations by defendant of the federal Safety Appliance Acts (Act March 2, 1893, c. 196, 27 Stat. 531, Act March 2, 1903, c. 976, 32 Stat. 943, and Act April 14, 1910, c. 160, 36 Stat. 298 [Comp. St. § 8605 et seq.]), in transporting the defective car, which ran over plaintiff's arm, and in maintaining an improper grabiron on the caboose. At the close of all the evidence motion of defendant to direct a verdict in its favor was denied; and the court in charging the jury instructed them that only three issues were to be considered: (1) Whether the transportation of the defective car was the proximate cause of plaintiff's injury; (2) whether the grabiron in question had the required minimum clearance, two inches; and (3) if it had not whether the injury was proximately caused by such defect in the grabiron. The court further charged that if the jury should find the affirmative either of the first or of the second and third of the issues, the plaintiff was entitled to recover. Verdict was returned and judgment rendered for plaintiff, and defendant seeks reversal under the writ of error.

[1-3] The assignment of error relied on was the refusal to withdraw from the jury consideration of the first issue above alluded to. The insistence is that the absence of a coupler and drawbar at the rear end of the freight car had no connection with the infliction of plaintiff's injury and hence, as matter of law, could not have been the proximate cause. This is amplified in several ways, and finally by contention that plaintiff would have met with the same injury if a perfect car, instead of the crippled car, had been attached to the rear of the caboose. This may be conceded, and yet it does not meet the case in hand. The caboose was at the rear end of the train, the usual position of such a car, until the crippled car was placed behind it, and it is to be remembered that this attachment of the crippled car was not due to a mere yard or switching movement. The train was running on the main west-bound line and in the course of a regular trip. The ordinary and natural position of a perfect car would have been ahead, not to the rear, of the caboose; a car without drawbar or coupler could not, consistently with the Safety Appliance Acts, have been so placed and transported in the train. 36 Stat. 299, § 4 (Comp. St. § 8621); Erie R. Co. v. United States, 240 Fed. 28, 32, 153 C. C. A. 64 (C. C. A. 6).

Application of the doctrine of proximate cause is always difficult. Efforts to solve the question by illustration generally complicate the subject through doubtful analogy, and at last right solution is found to depend upon the facts and circumstances of the particular case. Hence, what is the immediate and operating cause of an injury usually presents a question of fact. Brief mention of the circumstances of plaintiff's injury will, we think, disclose a satisfactory test of the trial judge's refusal to decide the question of proximate cause as matter of law. The defective condition of the car was at once the reason for hauling it to a place of repair and for attaching it to the rear of the caboose; this resulted, as before pointed out, in a removal of the lights from the rear of the caboose to the rear of the defective car; these conditions were apparently unusual, and calculated to render performance of the conductor's duties more difficult, not to say dangerous. It was dark when the conductor attempted to board the caboose; when the train started, he was near its forward end, engaged in the discharge of his duties. He proceeded toward the rear of the moving train, and when he reached the caboose the train had attained a speed of 6 to 8 miles an hour; carrying his lantern as the only means of light to aid him, he attempted, as before stated, to catch the rear grabiron of the caboose and to mount the steps of its platform; but missing the grabiron, he caught the railing at the rear of the platform, and was thrown between the caboose and freight car, and injured as already described. Now, bearing in mind the changed conditions under which the conductor sought to board the caboose, it is to be observed that the vital condition, the one without which plaintiff would certainly not have lost his arm, was created by the unlawful act of the company. This unlawful act consisted in hauling the freight car in its crippled condition. 27 Stat. 531, § 2 (Comp. St. § 8606); 32 Stat. 943, § 1 (Comp. St. § 8613); 36 Stat. 299, § 5 (Comp. St. § 8622); Great Northern Ry. Co. v. Otos, 239 U. S. 349, 351, 352, 36 Sup. Ct. 124, 60 L. Ed. 322. The act also constituted negligence on the part of the company. San Antonio Railway v. Wagner, 241 U. S. 476, 484, 36 Sup. Ct. 626, 60 L. Ed. 1110; St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281, 294, 295, 28 Sup. Ct. 616, 52 L. Ed. 1061. Moreover, according to the very terms of the statute, such hauling was "at the sole risk of the carrier" (36 Stat. 299, § 4 [Comp. St. § 8621]); and the effect of the violation of duty involved as also the liability arising therefrom, extended to an employé such as the plaintiff conductor (Louisville & Nashville R. R. Co. v. Layton, 243 U. S. 617, 621, 37 Sup. Ct. 456, 61 L. Ed. 931).

[4] Coming, now, to the question of causal relation between the negligence and the injury, can it, for example, be safely said as matter of law that plaintiff would have failed in his attempt to board the rear platform of the caboose if the lights usually carried at that end of the car had been present? Clearly the aid that such lights would have furnished plaintiff, or, stated in another way, the effect of their absence, presented an inquiry of fact. The removal of the lights was in furtherance of the unlawful act of hauling the defective car. Such removal would seem to have been a step in the line of natural and con-

tinuous sequence resulting from the unlawful act of hauling; and it need not be repeated that without such unlawful hauling and the negligence it implied the injury would not have occurred. It is not an answer to say that plaintiff knew of the conditions. The purpose of Congress, through the Employers' Liability Act and the Safety Appliance Acts, considered together, is not alone to make the defendant's duty absolute, but also, where, as here, the injury is in part occasioned by the failure of the carrier to comply with the acts mentioned, to excuse the employés from the effect alike of the rules of contributory negligence and assumption of risk. 35 Stat. 66, §§ 3 and 4; Grand Trunk Ry. Co. v. Lindsay, 233 U. S. 42, 49, 50, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168; Great Northern Ry. Co. v. Otos, supra, 239 U. S. at page 352, 36 Sup. Ct. 124, 60 L. Ed. 322. Defendant's motion to direct a verdict in its favor was therefore rightly denied. This, after all, is but to apply the principle declared by Mr. Justice Strong in Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

Our court has had frequent occasion to apply this rule, as, for example, Winters v. Baltimore & O. R. Co., 177 Fed. 44, 50, 100 C. C. A. 462; Erie R. Co. v. White, 187 Fed. 556, 559, 560, 109 C. C. A. 322; Hales v. Michigan Cent. R. Co., 200 Fed. 533, 537, 118 C. C. A. 627; Heskett v. Pennsylvania Co., 245 Fed. 326, 329, 157 C. C. A. 518.

[5, 6] We may add that the contentions made under decisions relied on by the railway company must fail for lack of analogy between the facts there involved and the facts of the instant case, and that the remaining assignments of error which have been argued do not point to anything that seems to us prejudicial to the company. The verdict must be treated as general in form, and as finding all the submitted issues in favor of the plaintiff. Error is assigned to the receiving of evidence concerning the second and third issues as to the condition of the grabiron, but nothing is said in the brief in support of such assignment, and it must therefore be regarded as waived. Wege v. Safe-Cabinet Co., 249 Fed. 696, 705, 161 C. C. A. 606 (C. C. A. 6).

The judgment is affirmed, with costs.

ROBBINS v. PENNSYLVANIA CO.

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

No. 3204.

1. RAILROADS ⊂⊃350(1)—INJURIES ON TRACK—NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad for a death on its track at a crossing, withdrawal from the jury of the question of the railroad's negligence *held* erroneous, in view of the testimony.

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

2. DEATH ⟸58(1)—PRESUMPTION—EXERCISE OF CAUTION.
The law presumes that one killed on a railroad crossing followed the instinct of self-preservation, and exercised due caution, and looked and listened for approaching trains; a presumption which is disputable and must yield to convincing evidence.

3. RAILROADS ⟸350(13)—DEATH ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
In an action against a railroad for a death on its track, question of decedent's contributory negligence *held* for the jury.

In Error to the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Action at law by Charles Robbins, administrator of the estate of Dinna Beamer, deceased, against the Pennsylvania Company. To review a judgment for defendant, plaintiff brings error. Reversed, with direction to award new trial.

Francis R. Marvin, of Cleveland, Ohio, for plaintiff in error.

Thomas M. Kirby, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Suit for the negligent killing of decedent. At the conclusion of plaintiff's testimony the trial court directed verdict for defendant.

The main street in the village of Nevada, Ohio (which we shall call Main street), runs north and south. It is crossed at right angles by defendant's railroad right of way, on which were at least two tracks. On each side of Main street there was a cross walk over the railroad right of way. According to the tendency of the proof, decedent, who was 19 years of age, at about 8:10 p. m. of December 27th left the house of her friend, which was on the east side of Main street and 50 or 60 feet south of the railroad tracks, for the purpose of mailing a letter at the post office, which was on the west side of Main street and on the north side of the tracks. She expected to return to her friend's house immediately on mailing the letter. At the time she started on this errand the south track was occupied by a long and slowly-moving east-bound freight train. At about the time the caboose at the rear of this freight train passed out of the street, an engine drawing a short, west-bound freight train on the northerly track, and running at a speed of 55 to 60 miles an hour, suddenly burst into view, without ringing of bell or blowing of whistle. The proof tended to show that it was this west-bound train on the northerly track which struck and killed decedent.

The grounds on which the verdict was directed were, first, that plaintiff had not sustained the burden of showing that defendant's alleged negligence was the direct and proximate cause of decedent's death; and, second, that decedent conclusively appeared contributorily negligent.

The place where the collision occurred is material on the question both of defendant's and of decedent's negligence. No one saw dece-

dent after she left her friend's house, and the point of collision is left to inference. The language of the trial judge in directing verdict suggests that he thought the collision must have occurred at the east crossing. However that may be, we think the inference more natural that it occurred at the west crossing. To say the least, such inference is entirely permissible. It is supported by the considerations, first, that, the post office being on the west side of Main street decedent would naturally, to save time, pass over to the west crossing while the freight train was going past, even though there was no planked crossing on the south side of the tracks; second, the first evidence of the place of collision, in the way of fragments of decedent's body, was found, two hours later, 100 feet west of the west crossing and between the rails of the north track.

[1] In our opinion it was error to withdraw from the jury the question of defendant's negligence. But two witnesses testified to seeing the two trains. Neither gave the precise situation of the trains at a given moment, beyond the fact that both were between the two street crossings at the same time, and within the limitations about to be stated. One testified that the caboose of the east-bound train "was on the crossing about the same time as the engine of the west-bound train," and later that the "caboose of the train going east and the engine of the train going west I would estimate as occupying the foot crossing on the east side at the same time, but it might have been a little farther east and it might have been a little farther west." The other testified, in substance merely, that the "east-bound train when I first saw the west-bound train, was going across the crossing; going east across the crossing. The rear part of the east-bound train was crossing the crossing when the west-bound train came into view. By that I mean about the caboose part." And again: "So that the engine of the west-bound train and the caboose of the east-bound train were on some portion of the highway at the same time." The fact that decedent, a telephone operator—there being nothing to indicate that she was not at least of ordinary intelligence and in the possession of her faculties—coming from the south, was struck by an engine suddenly projected without warning bell or whistle from the east across the main street of the village at the speed stated (which would require less than one second to cross an ordinary four rod street), concealed at first from decedent's view by the presence of a long freight train in front of her, which also muffled the sound of the west-bound train, would clearly support an inference that defendant's negligence in so operating its west-bound train was the direct and proximate cause of the accident.

[2, 3] As respects the charge of contributory negligence: The trial judge thought decedent must either have crossed behind the east-bound train immediately on its clearing the sidewalk, when she was not in position to see the west-bound train, or have gone ahead without looking to see whether a train was coming from the east. This conclusion is not, in our opinion, inevitable, at least on the theory that the collision occurred at the west crossing. Defendant had the burden of proving decedent's negligence. The law presumes that

following the instinct of self-preservation she exercised due caution, and that before crossing the tracks she looked and listened for approaching trains. Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262; Worthington v. Elmer (C. C. A. 6) 207 Fed. 306, 309, 125 C. C. A. 50; Pittsburgh, etc., R. R. Co. v. Scherer (C. C. A. 6) 205 Fed. 356, 359, 123 C. C. A. 484. True, this presumption of due care is disputable, and must yield to convincing evidence that had decedent looked east after the east-bound train had ceased to obstruct her view she must have seen the west-bound train in time to save herself. Evans v. Railway Co. (C. C. A. 6) 213 Fed. 129, 129 C. C. A. 375.

But such condition does not, we think, conclusively appear. It did not appear how far away the west-bound train could be seen by one standing at the west crossing on the south side of the two tracks. There was no evidence of the condition of the headlight of the west-bound engine, or how far to the east the track was either straight or unobstructed. It affirmatively appeared that the night was dark and the lights in the town poor, and it did appear that buildings completely hid the west-bound train from the view of persons 200 to 400 feet north of the crossing, and on either side of the main street, until the engine was actually "on the crossing." It did not appear what the distance was between the two tracks in question, and as the case stood it was reasonably conceivable that had decedent looked and listened before attempting to cross she might have been struck by the swiftly moving train before she could get out of its way. The sudden appearance without warning of the train on the north track might well have created a confusion accounting for the collision. Pittsburgh, etc., R. R. Co. v. Scherer, supra, 205 Fed. at page 359, 123 C. C. A. 484.

The instant case is in its controlling facts substantially like the Scherer Case, in which we held that the question of contributory negligence was for the jury. The most prominent difference is that in the Scherer Case there was evidence of the movement of later trains on the night of the collision, but in view of the conclusion that the testimony supports an inference that the west-bound train in question was the one which struck and killed decedent, the differences between the two cases are unimportant.

We think the question of plaintiff's contributory negligence should also have been submitted to the jury.

The judgment of the District Court is reversed, with direction to award a new trial.

LAKE ERIE & W. R. CO. v. SCHNEIDER.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1919.)

No. 3164.

1. RAILROADS ⊜350(1)—INJURIES AT CROSSING—NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.
In an action against a railroad for injuries to a motor truck owner and driver at a crossing, questions of the railroad's negligence and its effect in producing the accident *held* for the jury.

2. APPEAL AND ERROR ⊜1064(1)—HARMLESS ERROR—INSTRUCTION.
In an action against a railroad for injuries to a motor truck owner and driver at a crossing, where the evidence fairly admitted finding that the view was not so obstructed, and there was not so much noise, as to prevent a careful and prudent person from discovering the train, *held* not prejudicial error to qualify the railroad's requested instruction on plaintiff's duty to stop before crossing to the extent that was done by the court.

3. NEW TRIAL ⊜72—TRIAL ⊜139(1)—CONSIDERATION OF MOTION—WEIGHING OF EVIDENCE.
It was not the province of the trial court to weigh the evidence when passing on motion to direct verdict, but when he came to consider the motion for new trial he was required to weigh evidence.

4. RAILROADS ⊜350(13)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
In an action against a railroad for injuries at a crossing to the owner and driver of a motor truck, question of plaintiff's contributory negligence *held* for the jury.

5. RAILROADS ⊜327(7)—INJURIES AT CROSSING—DUTY TO STOP.
The owner and driver of a motor truck along a good road, so that the truck was not noisy, in approaching a single-track railroad crossing, was not required as a matter of law to stop to avoid the implication of negligence contributing to his injuries, when struck by a special train running at an unusual time; the view not being so obstructed as to require plaintiff to stop.

6. RAILROADS ⊜346(2)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.
In the federal courts, the burden to prove the defense of contributory negligence rests upon defendant in a suit for injuries at a crossing.

7. APPEAL AND ERROR ⊜1003—REVIEW OF EVIDENCE BY FEDERAL COURT.
A federal appellate court does not weigh the evidence, though it must be satisfied that there is proper evidence in law sufficient to support the verdict.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action at law by Fred. Schneider against the Lake Erie & Western Railroad Company. To review a judgment for plaintiff, defendant brings error. Affirmed.

Frank S. Lewis, of Toledo, Ohio, for plaintiff in error.

Newcomb, Newcomb, Nord & Chapman, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. Plaintiff below, Schneider, recovered verdict and judgment for $3,525 against the railroad company,

and the latter seeks reversal under the present writ of error. The suit was for personal injuries sustained by plaintiff at the crossing of an ordinary highway, Hawkins road, and the railroad near the village of Fairlawn, Ohio. Hawkins road runs north and south, and the railroad in a southwesterly direction at the crossing and at the places in question here.[1] About 4 o'clock in the afternoon of June 1, 1916, plaintiff was driving his own motor truck north and over the crossing mentioned, when he and his machine were struck and injured by a west-bound train of the defendant company. The usual issues of negligence of the railroad company and contributory negligence of the plaintiff were made in the pleadings and contested by facts and circumstances disclosed by witnesses testifying in open court.

We cannot think it necessary to discuss the various assignments of error set out in the record. A motion made at the close of all the testimony to direct a verdict for defendant was denied. No grounds were stated in support of the motion, but they are to be inferred from exceptions reserved to the court's charge and to its refusal of a particular request. It is objected, for example, that one effect of the court's instruction was to permit the jury to find under the evidence that it was negligence on the part of defendant to operate its train over a country crossing, as here, at a speed of 25 to 30 miles an hour. Upon this subject the court charged the jury at some length, saying among other things:

"Ordinarily, if it [railway company] exercises the duty and degree of care required—that is, ordinary care—to notify and to warn persons of the approach of its trains, it may in the open country operate its trains across a highway at any rate of speed it sees fit, consistent with the safety and the operation of its trains; and the rate of speed will not, in and of itself, without other circumstances tending to impose other duties and obligations on the defendant company, constitute an act of negligence."

[1] The petition alleges, and there is testimony tending to show, that at the crossing the train was running 30 miles an hour without having given "warning of any kind of the approach"; that is, that neither the whistle nor the bell of the locomotive was sounded in approaching or passing over the crossing. The petition also alleges that the railroad is maintained in a cut several feet in depth for some distance east of Hawkins road, and that along the south side of the cut the defendant had permitted weeds and shrubbery to grow upon its right of way; and there is also testimony tending to show that as respects trains approaching the crossing from the east the effect of the cut and growth was more or less to obstruct the view of persons approaching the crossing, as plaintiff was, from the south along the Hawkins road. It is true that the testimony as to warning or not by whistle and bell and as to obstruction of view is in conflict; but these features signified conditions naturally affecting the matter of speed,

[1] The presence of the Garman road, which extends from the Hawkins road in a northeasterly direction and some 30 feet south of the railroad, and its relation to some of the testimony, are not overlooked; but specific discussion of the testimony in that respect would not be helpful to a right understanding of the opinion.

and, when so considered, it is clear enough, under the motion to direct, that the question of defendant's negligence and its effect in producing the accident were matters for the jury. Robbins, Adm'r, v. Pennsylvania Co., 257 Fed. 671, — C. C. A. —, decided by this court March 4, 1919; Zimmerman v. Pennsylvania Co., 252 Fed. 571, 572, 164 C. C. A. 487 (C. C. A. 6); Hales v. Michigan Cent. R. Co., 200 Fed. 533, 536, 118 C. C. A. 627 (C. C. A. 6).

[2] The request made and refused as stated follows:

"If the view of this train, approaching from the east, was obstructed by weeds, shrubs, or trees, or anything else, it was the duty of the plaintiff to stop, if that was necessary, in order to see or hear the approaching train."

This was presented at the close of the general charge, and in its stead the court instructed the jury thus:

"If the situation was such that the plaintiff could not see an approaching train, that imposed upon him a higher degree of care in the exercise of his other faculties to ascertain whether or not a train was approaching. I do not say to you, as a matter of law, that it was his duty to stop his automobile or his vehicle in that situation; but if, not being able to see, and if the noises were such that an ordinarily careful and prudent person would have stopped his car in order to listen before undertaking to cross, then the plaintiff here would be guilty of contributory negligence if he attempted to cross without stopping his car to ascertain whether or not a train was approaching."

[3, 4] These instructions, of course, had reference to the defense of contributory negligence. It will be observed that the instruction refused, as well as the one given in its stead, in terms made the duty of plaintiff to stop before entering upon the track dependent on whether this was necessary to the discovery of the approach or not of a train. Stating the same thing in another way, if an approach could be determined by the sense of sight or hearing, neither instruction purported to impose a duty to stop. Thus far the two instructions are substantially alike. The ultimate difference between them concerned a situation where the question of approach was not clearly determinable without first stopping the motor truck; in that event the request denied imposed the duty to stop as matter of law, while the one given imposed this duty or not according to the standard of ordinary care and prudence. If, then, the evidence was such as fairly to admit of a finding that neither the view was so obstructed nor the existence of noises was such as necessarily to prevent an ordinarily careful and prudent person from discovering the approach of the train, it certainly was not prejudicial error to qualify defendant's request to the extent indicated by the instruction given in its place. It would seem that the safest test of this, to be found in the record, is whether under all the pertinent evidence fair-minded men might honestly draw different conclusions touching the question of caution or fault on the part of plaintiff in approaching and driving upon the track.

Plaintiff appears to have looked and listened with reasonable diligence before entering upon the crossing, but it does not appear that he stopped his machine. It is said that his own testimony "at least tended to show that he was guilty of contributory negligence." This would seem to be true if we consider only what the plaintiff said of the obstruction

to his view as he approached the crossing, and particularly what he said under cross-examination and largely in response to leading questions concerning the effect of some underbrush and small trees upon his view. The extent of the obstruction was a disputed question at the trial. The defendant sought in several ways, among which was the introduction of a map prepared by its own engineer, to show that there was no substantial obstruction to the view; and this attitude of defendant at the trial must be considered in connection with the testimony of the plaintiff, including that elicited through his cross-examination, and indeed with the entire testimony upon the subject.

Moreover, the opportunity to hear the approach of the train is also to be borne in mind in connection with the instruction refused and the one given. It is reasonably clear that the approach of a train was discoverable through the sense of hearing. It is not shown that plaintiff's truck was a noisy machine; he was driving on what defendant's engineer describes as a "cinder road in good condition"—Hawkins road; and while it is true that an automobile overtook plaintiff, sounding its horn, and passed his machine shortly before he reached the track, yet these circumstances were calculated at most to show only momentary diversion of plaintiff's attention and the reasonably low rate of speed at which it otherwise appears he was traveling. Furthermore, defendant filed a motion for new trial based on grounds substantially including the contentions made here; and this is important because of the trial judge's denial of the motion, notwithstanding his opportunity to see the witnesses and hear them when delivering their testimony. It was not the province of the judge to weigh the evidence when passing on the motion to direct, but when he came to consider the motion for a new trial he was required to weigh the evidence. Big Brushy Coal & Coke Co. v. Williams, 176 Fed. 529, 532, 99 C. C. A. 102, and citations (C. C. A. 6). In overruling the motion, Judge Westenhaver said:

"An examination of the brief and authorities therein cited in support of this motion for a new trial leaves me with the opinion entertained during and at the conclusion of this trial, namely, that the plaintiff's contributory negligence was on the testimony a question for the jury, and that the verdict of the jury is not so manifestly against the weight of the testimony that I would be justified in setting it aside."

[5, 6] This is in accord with our own view of the record. We are the more content with this conclusion for several reasons, which it may not be amiss to add. We cannot say, as matter of law, that the conditions call for the application of the exceptional rule which requires a traveler to stop, as well as to look and listen, before entering upon a railroad crossing. The nature of the crossing now in question, the natural conditions surrounding it, and the circumstances attending plaintiff's attempt to pass over it, all combine to differentiate the instant case from the cases relied on by counsel where the more drastic rule to stop, besides looking and listening, was imposed. This is sufficiently illustrated by the facts disclosed and considered by this court in Shatto v. Erie R. Co., 121 Fed. 678, 59 C. C. A. 1; the present Mr. Justice Day having prepared the opinion.

Further, while the trial judge did not permit the circumstance to in-

fluence his instructions to the jury, it is worthy of notice in testing the conduct of plaintiff that only a single track was maintained at and near this crossing, and that the train in question was a special and run in a direction and at a time quite unusual. The plaintiff was familiar, not only with the place, but also with the schedule and direction of regular trains operated along this portion of the track—two in the morning west bound, and two in the evening east bound. The running of the special, it is true, was in itself lawful; but the facts mentioned were admissible as circumstances tending to explain the degree of care and caution prudent travelers with plaintiff's knowledge of the situation would ordinarily exercise—in a word, whether they would stop in addition to looking and listening—before entering upon the crossing. Again, and it scarcely need be said, the long-settled rule of the federal courts is that the burden of proving the defense of contributory negligence rests upon the defendant. Robbins, Adm'r, v. Pennsylvania Co., supra; Harmon v. Barber, 247 Fed. 1, 6, 159 C. C. A. 219, L. R. A. 1918F, 428 (C. C. A. 6); Texas & Pacific Railway v. Volk, 151 U. S. 73, 77, 14 Sup. Ct. 239, 38 L. Ed. 78.

[7] Our consideration of the assignments, those not specially alluded to, as well as those mentioned, convinces us that no reversible error intervened. Counsel seem to overlook the rule that a federal appellate court does not weigh the evidence, though, of course, the court must be satisfied, as we are here, that there is proper evidence which in law is sufficient to support the verdict.

The judgment must therefore be affirmed, with costs.

CITY OF HOLLAND et al. v. HOLLAND CITY GAS CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 13, 1919.)

No. 3211.

1. CORPORATIONS ⟸586—HOLDING COMPANY—ACQUISITION OF OWNERSHIP—ASSUMPTION OF OBLIGATIONS.
   Holding company, which acquired control of gas company through ownership of stock and bonds, *held* not to have in effect supplanted the gas company, assumed its obligations, and become the owner of all its rights and property, despite the use made by the holding company of its power to select directors for the gas company, and also certain statements made by the holding company in its prospectus, reports, etc., to its own stockholders.

2. CORPORATIONS ⟸590(1)—CONTROL BY STOCK OWNERSHIP—RELIEF AGAINST CONTROLLING COMPANY.
   Where one corporation acquires a controlling interest in the stock of another, and so secures opportunity alike to benefit or to injure the interests of such other company and its customers, it being engaged in the public business of supplying gas to a community, courts will not hesitate to look into such a situation, the controlled company having become bankrupt, and to grant merited relief against the holding company.

3. BANKRUPTCY ⟸43—RIGHT OF CONTROL OF GAS COMPANY—INTERFERENCE WITH SUIT IN STATE COURT.
   A gas company in a city of Michigan, a majority of whose stock and bonds was owned by a Delaware holding company, no statute either of

Michigan or Delaware prohibiting such ownership by the Delaware company, was entitled to go into bankruptcy, and its proceedings therein cannot be regarded in judicial contemplation as an undue interference with suit by the city and another against the gas company and the holding company to enjoin an increase in the charge for gas, which the gas company had notified the city was necessary.

Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Intervening petition by the City of Holland and Evert P. Stephan to vacate and set aside an order adjudging the Holland City Gas Company a bankrupt, as well as the bankruptcy proceeding itself, against the Gas Company and the Grand Rapids Trust Company, trustee in bankruptcy. From an order dismissing the petition, petitioners appeal. Affirmed.

Appeal from dismissal of intervening petition to vacate and set aside order adjudging Holland City Gas Company a bankrupt, and the bankruptcy proceeding itself. The city of Holland, a municipal corporation of Michigan, through ordinance approved March 10, 1903, granted permission to Bascom Parker and his assigns for a period of 30 years to lay and maintain gas pipes, mains, conduits and service pipes in the city streets and highways to supply manufactured gas for illuminating and fuel purposes both to the city and its inhabitants, at prices and subject to conditions therein provided. In September following, the rights thus granted were transferred to the Holland Gas Company, a Michigan corporation, and, in August 1905, to the Holland City Gas Company, another Michigan corporation; and the gas works and plant were thereafter, at least until commencement of the bankruptcy proceeding in question, maintained and operated and gas was supplied and sold in the name of appellee, the Holland City Gas Company.

However, on June 17, 1912, a corporation was organized under the name of American Public Utilities Company and pursuant to the laws of the state of Delaware, for purposes of production, distribution, and sale of artificial gas and electricity, and also the purchase of shares of stock in any corporation of "the state of Delaware, or of any other state, territory, or country." Later in that month this Delaware company purchased from the holders thereof a majority of the corporate shares in the Holland City Gas Company, and has purchased since then nearly all the rest of such shares, the total capital stock being $200,000 par value, divided into shares of $100 each, and prior to November, 1912, acquired from the various owners $160,500 par value of the gas company's outstanding first mortgage bonds, and since that time has purchased further bonds of the gas company, until the total holding is upwards of $298,000 par value, principally upon advances made by the Delaware company, some of them being on account of acquisition of what are known as the Zeeland properties for supplying gas in territory adjacent to the city of Holland. Through the shares of stock so obtained the Delaware company has ever since chosen and kept in place the directors, 5 in all, composing the board provided for the Holland City Gas Company, and these directors have from time to time selected from their number the officers of the company, viz. president, vice president, secretary, and treasurer.

In February, 1918, when the intervening petition was filed herein, the directors of the Holland City Gas Company were stockholders and directors of the Delaware company, though the latter company appears to have had 14 directors; the office of president of each company was held by the same person, and this is true of the positions of secretary and treasurer. The president of the two companies holds 1,932 shares of stock in the gas company in trust for the Delaware company, and the remaining directors of the gas company each hold one share of stock in that company.

The Delaware company owns and votes a large interest, doubtless a controlling interest, in the stock of various other corporations, viz. Albion Gas

& Light Company, at Albion, Mich.; Elkhart Gas & Fuel Company, at Elkhart, Merchants' Heat & Light Company, at Indianapolis, Valparaiso Lighting Company, at Valparaiso, all of Indiana; Wisconsin-Minnesota Light & Power Company, at La Crosse and other localities in Wisconsin and Minnesota; Jackson Light & Traction Company, at Jackson, Miss.; Utah Gas & Coke Company, at Salt Lake City; and Boise Gaslight & Coke Company at Boise, Idaho. The total assets of the Delaware company are valued at upwards of $12,845,000, admittedly comprising a "large percentage of the stock and of the bonds of the corporations" just mentioned.

A firm, Kelsey, Brewer & Co., composed of directors common to both the Holland City Gas Company and the Delaware company and claimed to be experienced in the operation and management of public utilities companies, is retained to give to all the companies above named the benefits of its experience.

On November 7, 1917, the Holland City Gas Company sent a communication to the mayor and council of the city, stating in substance that the operation of the gas properties at the prevailing prices could be continued only at an actual loss of money; that this was a fact under normal business and price conditions; that unless relief were provided at once it would be impossible under the present abnormal conditions to continue the operation of the plant; that from the 10th inst. the charge for gas in the city would be at the rate of $1.25 per thousand cubic feet, with a discount of 10 cents per thousand upon payment by the 15th of the month following that in which the gas would be consumed; that this price would "continue throughout the period affected by the duration of the war"; and that, should this increase fail to produce the necessary revenue to meet actual expenses, the company would be "compelled to close the plant and stop the supply of gas." This was 25 cents per thousand cubic feet in excess of the price then prevailing.

On December 1, 1917, the present appellants commenced suit against the gas company, and the Delaware company in the Ottawa circuit court, in chancery, setting up the facts touching the gas grant in question and its ultimate transfer to the Holland City Gas Company, alleging that this was the only source of gas supply for the inhabitants of the city; that there were upwards of 1,790 consumers dependent on gas for fuel; for cooking purposes, heat, and light; that in June, 1913, the gas company, its franchises and property, became the property of the Delaware company, which had ever since dominated the affairs and conducted the business of the gas company; that the price of gas was fixed by ordinance; that the Delaware company, through the gas company, sent the communication above pointed out to the mayor and council of the city; that such threatened increase in price was contrary to equity and good conscience, and would cause irreparable injury; and praying an order restraining defendants from exacting the threatened increase in price and also a mandatory injunction directing them to manufacture and supply gas to the city and its inhabitants in compliance with the provisions and rates of the ordinance. On December 3, 1917, an order was entered enjoining defendants from collecting a rate in excess of that fixed by the ordinance, and from closing the gas plant and stopping the supply of gas, until the further order of the court.

During the oral argument in the instant case we understood counsel to concur in the statement that the suit in the state court was commenced and the order of injunction granted without notice to the defendants in the case. It is to be inferred from one of the answers that nothing further was done in the case prior to the bankruptcy. The defendants filed separate answers, though it is not shown at what time. However, in the answer of the gas company, it is alleged that "since the time of the filing of the bill of complaint" it had "entered into voluntary bankruptcy" and had "been adjudged a bankrupt." The petition in bankruptcy was filed and the adjudication made February 1, 1918. It is stated in the opinion below that it was upon the voluntary petition of the Holland City Gas Company that the company was adjudged a bankrupt, and the parties stipulate that the petition as well as the adjudication was in the usual form. Appellants' intervention in the proceeding occurred later in the month, February 22d.

It is in effect alleged in the intervening petition, and admitted in the an-

swer herein, that, through either the receiver or the trustee in bankruptcy, gas is being supplied to meet the requirements of the inhabitants of the city of Holland. The answer alleges without denial that this is being done under a license from the city and at the rate of $1.25 per thousand cubic feet, which "was estimated to be the actual cost of production of the same without profit to the said trustee." Moreover, we understood at the oral argument that this was also sanctioned by an order of the court below, entered after hearing from both sides, and that the price was subject to the old discount of 10 cents per thousand cubic feet.

It is difficult to ascertain some of the relevant facts because of the omission to include in the record in addition to proofs of claims a further transcript of the bankruptcy proceedings (particularly a copy of the gas company's petition), and the dates of filing answers in the state court. The case was presented here upon the intervening petition, the joint answer of the bankrupt and trustee, certain exhibits, and a stipulation.

Charles H. McBride, of Holland, Mich., and Charles E. Ward, of Grand Rapids, Mich., for appellants.

Gerrit J. Diekema, of Holland, Mich., for appellees.

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

WARRINGTON, Circuit Judge (after stating the facts as above). Counsel urge the claims of appellants in the following order: (1) The Delaware company is bound to perform the gas contract; (2) the court below was without jurisdiction, since under the Bankruptcy Act the gas company has no right to become a bankrupt; (3) a public service corporation cannot under the amendment of 1910 become a voluntary bankrupt; (4) the gas company has no real existence apart from the Delaware company; (5) the case is a fraud upon the courts and the public.

[1] The second and third claims involve questions of law which may be passed for the present. The first and the last two claims concern the Delaware company's ownership of shares of stock and mortgage bonds of the gas company. The theory is that through such ownership the Delaware company has in effect supplanted the gas company, assumed its obligations, and become the owner of all its rights and property. The claimed basis of this is the use that is made by the majority stockholder of its power to select directors for the gas company, and also certain statements made by such stockholder, the Delaware company, to its own stockholders. Identity in directors, as well as certain officers, of the two companies, has been pointed out in the statement. In a prospectus of the Delaware company offering to underwriters preferred and common stock of its own issue, and in reports to its stockholders, information is given concerning, not only the company's own business affairs, but also those of the companies in which it holds capital stock and bonds. In distinguishing, for intance, its assets from those of the other companies, the company at times speaks in terms which at first sight create a wrong impression as to the actual relationship between the Delaware company and the companies in which it is interested. Use is made of such words and expressions as "control," "constituent companies," "subsidiary companies," "properties intrusted to its management," "your properties,"

"financing subsidiaries," and from these and the associated language appellants' counsel infer intent on the part of the Delaware company to assert absolute ownership in itself of franchises and property of the so-called constituent companies, and so counsel rely on such expressions as these to support an allegation of the intervening petition:

"That on, to wit, the 30th day of June, 1912, the Holland City Gas Company, its franchise, property, * * * became the property" of the Delaware company.

That was the time, as the statement points out, when the Delaware company made its first purchase of stock and bonds issued by the gas company. The prospectus and reports, however, when considered as an entirety, show that the terms in dispute were employed as convenient means for identifying and differentiating companies and objects, and not to describe precise corporate relationships. This is made clear by other and explicit statements. For example, it is stated in one of the reports:

"Control of this company (Holland City Gas Company) by American Utilities Company is maintained by the ownership of its capital stock."

The same language is used with the same object as respects all the other so-called subsidiary companies. These statements also explain a doubtful expression, found at the beginning of the same report, where it is said:

"With the organization of the American Public Utilities Company in 1912, there came into the possession of a single financing and directing organization a group of public service properties having peculiar advantages for economical supervision and operation."

This could not have meant, as counsel claim, that the Delaware company was thus asserting "ownership" of the "group of public service properties" mentioned, since, as we have seen, the company specifically stated in the same instrument that it controlled those companies through its ownership of capital stock therein. Again, in reporting its assets, the Delaware Company sets out its total holdings of "stocks of subsidiary companies," also of bonds, treasury stock, marketable securities, accounts receivable, cash, and the like, but of tangible property only "furniture and fixtures"; also a comparative statement expressly showing "gross earnings of subsidiary companies" for the years 1914, 1915, 1916, and 1917. Another example of the Delaware company's ambiguous statements is found in the report of December, 1917, to its own stockholders in relation to steps taken to secure an increase in rates for gas supplied in the city of Holland. It is there said:

"It has been the judgment of the officers of the company that this result is preferable to suffering further loss over the period of the franchise."

It is claimed for appellants that this allusion to officers means officers of the Delaware company; yet when the entire report is read, in connection with the report of the Holland City Gas Company to the mayor and council, mentioned in the statement, we think it plain that the term "officers of the company" meant the officers of the gas company.

[2] Whatever, then, may in other respects be said of the relations between the Delaware company and the gas company, we cannot think that the use of doubtful phrases, like those shown in the prospectus and reports just considered, warrants a conclusion that the stockholder, the Delaware company, had become the owner, as appellants allege, of the franchise and property standing in the name of the gas company, and it is not suggested that any formal transfer in this behalf has been made. It must be conceded, however, that through acquisition of shares of stock in the gas company, and through interrelations of the directorates and officers of the two companies, the Delaware company secured opportunity alike to benefit or to injure the interests of the gas company and its patrons. Courts will not hesitate to look into a situation like this and to grant merited relief. Corporate forms afford no protection where it is sought through such means to impose unlawful burdens or to commit fraud. Chicago, M. & St. P. Ry. v. Minn. Civic Ass'n, 247 U. S. 490, 501, 38 Sup. Ct. 553, 62 L. Ed. 1229. What, then, is to be deduced under the present record from the stock ownership of the Delaware company in the gas company and the official relations of the two companies?

[3] It is to be noticed that the Delaware company is not a party to this cause, and hence may not be bound by any conclusion reached here. Appellants insist, moreover, that it cannot be held in this case that the Delaware company is not bound to perform the gas contract, for the reason that the state court first obtained jurisdiction of that subject. We cannot, however, avoid passing on the status and condition of the gas company. Accordingly it is to be observed that there is no statute of the state of Michigan which forbids a corporation of another state, like the Delaware company, to purchase and hold shares in a Michigan corporation such as the gas company. It is distinctly shown that the Delaware company is possessed of power and authority to acquire and hold such shares; and what is said of shares of stock is also true of corporate bonds. In a word, no public policy prevailing in the state of Michigan is claimed to have been violated by the Delaware company's ownership of stock and bonds of the gas company. Further, it is not shown that the Delaware company, in its capacity as a stockholder or otherwise, has diverted or depleted, or in any wise impaired or damaged, the revenues, assets, or property of the gas company. The evidence, on the contrary, tends strongly to show that the Delaware company has through financial support materially aided and benefited the gas company. This obviously inured to the benefit of the City of Holland and its inhabitants, as patrons of the gas company; and yet it is not shown that the Delaware company has derived any profit from its ownership of stock in the gas company, or anything more than current interest on the bonds of that company.

Despite the interlocking scheme of directors and officers of the two companies, the case is devoid of evidence that these officials have through either acts or omissions prejudiced the interests of the gas company or interfered with its due discharge of corporate duty. We do not perceive, and it is not shown, how it could have been to the interest of the Delaware company or the directors or officers of the gas

company to inflict injury of any sort upon the rights or property of the gas company. Enough has already been said of the Delaware company's relations to the public service companies before named, including the Holland City Gas Company, to disclose a distinct purpose of the Delaware company to secure current and continuing income through its investments in these companies. Apart from such a purpose the Delaware company does not seem to have any reason to exist. No legitimate way of maintaining such a company is apparent, except through income derived from rightful earnings of the plants belonging to the other companies—in brief, the success of that company appears to depend upon the success of the others—since the interests of the Delaware company apparently reside, as here, in the capital stock of those companies.

Furthermore, it is to be observed that the Delaware company's holdings are not in naturally competing companies. The companies named in the present record are widely separated and operate in distinct municipalities, and the gas plant here in question is the only one in the city of Holland and is entirely within the state of Michigan. The case, therefore, does not fall within any principle opposed to the suppression of competition, as, for instance, the underlying principle of the Northern Securities Case, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, nor within any statutory inhibition against interlocking directorates similar to that of the Clayton act (Act Oct. 15, 1914, c. 323, 38 Stat. L. 732, § 8 [Comp. St. § 8835h]). It is to be added, in the language of the learned trial judge when speaking of the gas company:

"There has been no concealment of name or business operations. The local company has its own officers, its own office and books of account. It is the older company, and, so far as the public is concerned, there has been no change in the character of its business since its incorporation. It has at all times transacted business in its own name. It has complied with all state and municipal requirements. It has been dealt with and recognized by the state, the city of Holland, and its customers as a separate corporation."

Hence, under the facts of the instant case, we do not see why the status of the gas company should not be determined by the decisions cited and distinguished in Chicago, Minneapolis & St. Paul Ry. Co. v. Minn. Civic Ass'n, supra, 247 U. S. at page 500, 38 Sup. Ct. at page 557 (62 L. Ed. 1229) where Mr. Justice Clarke, speaking for the court, interpreted the rule of those decisions to be:

"* * * Ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two."

In addition to the ownership of stock involved in all of those cases, at least two, namely, Pullman Car Co. v. Missouri Pacific Co., 115 U. S. 587, 589, 596, 6 Sup. Ct. 194, 29 L. Ed. 499, and Peterson v. Chicago, Rock Island & Pac. Ry., 205 U. S. 364, 390, 27 Sup. Ct. 513, 51 L. Ed. 841, show that such ownership had in fact been used to create official relations between the stockholding companies and the com-

panies whose issues of stock were so held; and it may therefore be safely concluded that the foregoing interpretation was intended to embrace corporations also officially related, where, as here, the company whose stock is so held has been organized for legitimate purposes and separately maintained and employed in the rightful exercise and performance of its powers and duties. Such was the ruling principle applied by this court in what are called the Carpenter Cases, as respects the relations between the railroad company and the coal company and also the effort to hold the former upon the bonds of the latter. Wheeling & L. E. R. R. Co. v. Carpenter, 218 Fed. 273, 274, 276, 280, 134 C. C. A. 69; New York Trust Co. v. Carpenter, 250 Fed. 668, 674, 163 C. C. A. 14.

It results that the Chicago, M. & St. P. Ry. Case serves at once to distinguish the present controversy from the controlling principle of the decision in that case, and to render the decisions here relied on by appellants inapplicable. Clearly, then, the gas company was not supplanted by the Delaware company prior to the time the bankruptcy proceeding was instituted; and it cannot be that such a transition could have been effected by that proceeding. If we assume for the moment that a public service corporation is included within the true intent of the amendment of June, 1910 (36 Stat. p. 838, c. 412) to the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544), and that the gas company was actually bankrupt, the right of that company to secure the benefit of the statute could not be impaired or defeated merely because the right was exercised through the control or at the instance of the Delaware company; for this mode of exercising the right was in no sense wrongful on the part of either company and so cannot be regarded as a fraud or imposition upon the city of Holland or any of the gas consumers. The jurisdiction of the federal court in bankruptcy was therefore properly invoked; under the bankruptcy law this jurisdiction was essentially exclusive, and the proceeding so instituted cannot in judicial contemplation be regarded as an undue interference with the suit begun in the state court. In re Yaryan Naval Stores Co., 214 Fed. 563, 565, 131 C. C. A. 15 (C. C. A. 6). After careful consideration we are convinced that Judge Sessions rightly concluded as matter of law that the gas company was entitled to become a voluntary bankrupt, and, apart from the remark that the company is a "private 'business' corporation," we approve the reasoning of the opinion. The facts upon which the gas company was adjudged a bankrupt must be accepted as sufficient to justify the order of adjudication. In view of some of the claims urged we deem it proper to set out substantially all the opinion below. The order dismissing the intervening petition will be affirmed.

SESSIONS, District Judge. Upon its voluntary petition, the Holland City Gas Company has been adjudged a bankrupt by this court. The city of Holland and a customer of the bankrupt, who has been and is a consumer and user of gas produced at its plant, have filed their petition to set aside the adjudication and to dismiss the bankruptcy proceedings. The grounds of the application as set forth in the present petition, are in substance:

(1) That a public service corporation like the bankrupt is not entitled to claim or obtain the benefits of the Bankruptcy Act;

(2) That the Holland City Gas Company has ceased to exist as a separate and distinct corporation, and has become and is merely an instrumentality, agent, or department of the American Public Utilities Company, a Delaware corporation; and

(3) That the adjudication was fraudulently procured.

1. In the case of Gibbs v. Baltimore Gas Co., 130 U. S. 396, 408, 410, 411, 9 Sup. Ct. 553, 557, 558 (32 L. Ed. 979) the Supreme Court said: "The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. * * * It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests. * * * At common law corporations formed merely for the pecuniary benefit of their shareholders could, by a vote of the majority thereof part with their property and wind up their business, but corporations to which privileges are granted in order to enable them to accommodate the public, and in the proper discharge of whose duties the public are interested, do not come within the rule."

The case above cited illustrates and exemplifies the strongest and best argument that can be urged against permitting a public service corporation voluntarily to do any act which must result in disabling it from performing its public duties. In the absence of statutory direction and mandate, such argument would be, not only persuasive, but controlling. But implied limitations, even though based upon grounds of public policy or necessity, must yield to positive and express legislative enactment. Congress has spoken in no uncertain terms upon the subject of the right of all corporations, with certain specified exceptions, to become voluntary bankrupts. Section 4a of the Bankruptcy Act provides that "any person, except a municipal, railroad, insurance or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." Comp. St. § 9588. This language is plain and unambiguous and can have but one meaning. The Holland City Gas Company is a "person" (section 1a19 [Comp. St. § 9585]), and is not a municipal, railroad, insurance, or banking corporation; hence it is entitled to become a voluntary bankrupt. Collier on Bankruptcy, p. 142.

With laborious effort counsel have built an argument upon the provisions of section 4b of the Bankruptcy Act relating to involuntary bankrupts. Of course, such an argument can have no application to a proceeding in voluntary bankruptcy like the present one; but, if it could, the result would be the same. It is true that in some cases arising prior to the amendment of this section in 1910, the courts, by a process of reasoning not entirely clear or satisfactory, reached the conclusion that public service corporations could not be adjudged involuntary bankrupts. In re Hudson River Electric Power Co. (D. C.) 173 Fed. 934; Id., 183 Fed. 701, 106 C. C. A. 139, 33 L. R. A. (N. S.) 454; In re Bay City Irrigation Co. (D. C.) 135 Fed. 850. In one case (In re Wilkes Barre Light Co. [D. C.] 224 Fed. 248) arising subsequent to the amendment of 1910 a District Court reached the same conclusion. But a most cursory examination of the opinion in that case will show that the amendment was either overlooked or ignored. Whether the reasoning of these cases is sound or unsound is quite immaterial, because they have no application to the amended statute.

The amendatory act of 1910 effected radical changes in the law and made many corporations subject to involuntary adjudication which could not have been proceeded against under the provisions of the original act. For example, it was held that hotel companies (Toxaway Hotel Co. v. Smathers, 216 U. S. 439, 30 Sup. Ct. 263, 54 L. Ed. 558; In re United States Hotel Co. [C. C. A. 6] 134 Fed. 225, 67 C. C. A. 153, 68 L. R. A. 588), water companies (In re N. Y. & W. Water Co. [D. C.] 98 Fed. 711), laundry companies (In re White Star Laundry Co. [D. C.] 117 Fed. 570; In re Eagle Steam Laundry Co. [D. C.] 178 Fed. 308), real estate companies (In re Kingston Realty Co., 160 Fed. 445, 87 C. C. A. 406), construction companies (Butt v. C. F. MacNichol Construction Co., 140 Fed. 840, 72 C. C. A. 252), warehouse companies (In re Pacific Coast Warehouse Co. [D. C.] 123 Fed. 749), and res-

taurant companies (In re Wentworth Lunch Co., 159 Fed. 413, 86 C. C. A. 393), were not subject to involuntary bankruptcy proceedings under the provisions of the Bankruptcy Act prior to the amendment of 1910. Since the amendment, which provides that "any moneyed, business or commercial corporation, except a municipal, railroad, insurance or banking corporation, * * * may be adjudged an involuntary bankrupt," the adjudication of such corporations has become so common as to be an everyday occurrence. There is no room for doubt that the Holland City Gas Company is a private "business" corporation.

Section 4b of the Bankruptcy Act now conforms closely to the corresponding provisions of the Act of March 2, 1867, c. 176, 14 Stat. 517, and it must be assumed that, in the substantial re-enactment of the earlier statute, Congress had in mind the interpretation and construction of that act by the courts while it was in force. It was then uniformly held that public service corporations were subject to adjudication as bankrupts and that no principle of public policy required "that the plain provisions of the statute should receive such a judicial construction as would exclude this class of corporations." Adams v. Boston H. & E. R. Co., 1 Fed. Cas. 90, Case No. 47; same case affirmed 23 Fed. Cas. 530, Case No. 13,684; Winter v. Iowa, M. & N. P. Co., 30 Fed. Cas. 329, Case No. 17,890; New Orleans R. R. Co. v. Delamore, 114 U. S. 501–506, 5 Sup. Ct. 1009, 29 L. Ed. 244.

2. The American Public Utilities Company owns or controls all of the stock and substantially all of the mortgage bonds of the Holland Gas Company. The stock was purchased from former stockholders. Part of the bonds were bought in the open market and the balance were issued for money advanced and loaned. The Utilities Company through its stock ownership controls the Gas Company in the same way and to the same extent that stockholders usually control corporations. * * * Under such circumstances, it cannot be said to have become merged in the other company or to have lost its corporate identity. As was said by the Circuit Court of Appeals of this circuit in Richmond & Irvine Construction Co. v. Richmond, N. I. & B. R. Co., 68 Fed. 105, 108, 15 C. C. A. 289, 292 (34 L. R. A. 625): "The fact that the stockholders in each may have been the same persons does not operate to destroy the legal identity of either corporation. Neither does the fact that the one corporation exercised a controlling influence over the other through the ownership of its stock or through the identity of stockholders, operate to make either the agent of the other, or to merge the two corporations into one. There is no pretense of any fraudulent concealment of the interest of the one corporation in the other, or of the fact that the persons controlling the one corporation likewise controlled the other." See, also, Pittsburgh & Buffalo Co. v. Duncan (C. C. A. 6) 232 Fed. 584–587, 146 C. C. A. 542; Kardo Co. v. Adams (C. C. A. 6) 231 Fed. 950–964, 146 C. C. A. 146; Bigelow v. Calumet & Hecla Mining Co. (C. C. A. 6) 167 Fed. 721–728, 94 C. C. A. 13; In re Watertown Paper Co. (C. C. A. 2) 169 Fed. 252, 255, 256, 94 C. C. A. 528; C. Crane & Co. v. Fry (C. C. A. 4) 126 Fed. 278, 285, 61 C. C. A. 260.

3. The petition herein is replete with charges of concealment, deception and fraud. It is sufficient to say that the charges are not sustained by the proofs. Upon this record, the imputation of fraud rests largely, if not wholly, upon inferences sought to be drawn from the fact that, prior to the filing of the petition in bankruptcy, a suit was instituted in one of the state courts by these petitioners against the American Public Utilities Company and the Holland City Gas Company to restrain them from closing the bankrupt's gas plant and discontinuing its service and also from increasing rates as proposed and threatened. A temporary injunction was issued by the state court, but the case has not been tried upon the merits. No receiver has been asked for, and no attempt has been made to disturb or interfere with the possession and control of the plant or business. The sole purpose of the suit was to enforce what is claimed to be a contract obligation contained in the franchise granted by the city of Holland to a predecessor of the bankrupt. No creditor of the bankrupt, as such, is a party to the suit. The Gas Company insisted that it could not manufacture and furnish gas for the price fixed in and by its franchise and that it was suffering serious loss in the operation of its plant and threatened to discontinue its service unless it was permitted

to charge increased rates. Assuming that its threatened action would constitute a violation of its contract obligations, it is difficult to perceive how either the suit in the state court, the ultimate issues there involved, or the conduct of the bankrupt in applying to this court evidences such fraud as would bar an adjudication and prevent it from seeking or obtaining the benefits of the Bankruptcy Act. It is unnecessary to determine at this time the effect of the adjudication in bankruptcy upon the suit in the state court. Certainly it cannot affect any claims or rights which petitioners, or either of them, may have against the American Public Utilities Company.

The petition to vacate the adjudication will be denied.

STETSON v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 13, 1919.)

No. 3217.

1. POISONS ⟸2—FEDERAL NARCOTIC DRUG ACT—VALIDITY OF ADMINISTRATIVE PROVISIONS.
   The administrative provisions of Harrison Narcotic Drug Act, § 1 (Comp. St. § 6287g), relating to taxation and registration, are valid.

2. INDICTMENT AND INFORMATION ⟸111(4)—FEDERAL NARCOTIC DRUG ACT—NEGATIVING EXCEPTIONS.
   An indictment for violation of the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.), which described defendant as not being then and there an officer of the federal government or state government engaged in making purchases of the specified drug, and not being any other officer entitled to make such purchases, *held* not insufficient, as failing to negative all statutory exceptions from the operation of the statute by section 1.

3. INDICTMENT AND INFORMATION ⟸71—CERTAINTY.
   An indictment is sufficiently certain if it fairly informs accused of the crime intended to be charged, so as to enable him to prepare his defense, and so as to make the judgment a complete defense to a second prosecution.

4. INDICTMENT AND INFORMATION ⟸111(2)—FEDERAL NARCOTIC DRUG ACT—NEGATIVING EXCEPTIONS.
   Count of indictment for violation of the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.) *held* not bad, as not negativing the exception of section 6 (Comp. St. § 6287*l*), that the provisions of the act shall not be construed to apply to the dispensing of remedies not containing more than a quarter of a grain of morphine, etc.

5. INDICTMENT AND INFORMATION ⟸111(2)—NEGATIVING EXCEPTIONS.
   An exception in the enacting clause of a penal statute must be negatived by the indictment, but an exception in a later section need not be negatived.

6. INDICTMENT AND INFORMATION ⟸110(3)—DESCRIPTION OF STATUTORY OFFENSE.
   Description of a statutory offense in the language of the statute is sufficient, provided the language used according to its natural import fully describes the offense.

7. INDICTMENT AND INFORMATION ⟸110(3)—FEDERAL NARCOTIC DRUG ACT—DESCRIPTION OF OFFENSE—SUFFICIENCY—STATUTORY LANGUAGE.
   Indictment for violation of the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.), stating the charge substantially, though not literally, in the language of section 1 of the act, fully defining the offense, and also alleging the sale of morphine in certain so-called morphine checks and other forms, *held* sufficient.

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8. POISONS ⟸4—FEDERAL NARCOTIC DRUG ACT—"PREPARATIONS AND REMEDIES."

"Preparations and remedies," contained in Harrison Narcotic Drug Act, § 6 (Comp. St. § 6287*l*), *held* not to include clear morphine, but to relate to actual medicinal preparations and remedies not containing more than a quarter of a grain of morphine, remedies such as a physician or druggist would normally dispense.

9. POISONS ⟸9—FEDERAL NARCOTIC DRUG ACT—EVIDENCE.

In a prosecution for violation of the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.), defendant not being charged as a physician or a druggist, and the indictment not negativing the exception of section 6 of the act (Comp. St. § 6287*l*), it was open to him to show he was merely dispensing medicinal preparations and remedies containing not more than the amount of morphine permitted by section 6.

10. CRIMINAL LAW ⟸1186(4)—REVERSAL—TECHNICAL OBJECTION TO INDICTMENT.

Objection to indictment for violating the Harrison Narcotic Drug Act (Comp. St. § 6287g et seq.), in that it did not negative the exception of section 6 (Comp. St. § 6287*l*) relative to the dispensing of preparations and remedies not containing more than a quarter of a grain of morphine, *held* technical, unsubstantial, and unprejudicial, and within the terms of Comp. St. § 1691, and Judicial Code, § 269 (Comp. St. § 1246), as amended February 26, 1919.

11. CRIMINAL LAW ⟸1144(17)—APPEAL—PRESUMPTION AS TO SENTENCE—IMPOSITION UNDER VALID COUNT.

In the absence of evidence to the contrary, sentence which could have been imposed on conviction under either count of an indictment will be presumed to have been imposed under the valid count.

12. POISONS ⟸4—HARRISON NARCOTIC DRUG ACT—APPLICATION OF SECTION.

Harrison Narcotic Drug Act, § 8 (Comp. St. § 6287n), applies to the business of selling narcotic drugs as distinct from mere possession.

13. CRIMINAL LAW ⟸1090(8, 11)—MATTERS NOT REVIEWABLE—ABSENCE OF BILL OF EXCEPTIONS.

On appeal from a conviction, cricitisms of alleged lack of evidence in certain respects, of asserted erroneous proceedings on trial, and of the introduction of certain undisputed evidence, cannot be considered, where the record contains no bill of exceptions, and thus no evidence.

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

Frank Stetson was convicted of violating the federal Narcotic Drug Act, and he brings error. Affirmed.

Frans E. Lindquist, of Kansas City, Mo., for plaintiff in error.

Frederic L. Eaton, Asst. U. S. Atty., of Detroit, Mich.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Stetson was indicted for violating the Harrison Narcotic Drug Act (U. S. Comp. St. 1916, § 6287g et seq.). The indictment contained two counts. The first charged him with engaging in carrying on the business of dealing in and selling morphine, by selling and dispensing the same to persons unknown, without having registered with or paid the special tax to the collector of internal revenue, as required by section 1 of the act. The second count charged him with a violation of section 8, in having morphine in his possession

for purposes of sale without having registered or paid the special tax. Under his plea of not guilty he was tried, convicted, and sentenced. He challenges the constitutionality of both sections 1 and 8 of the act, and the sufficiency of each count in the indictment.

[1] 1. The recent decisions of the Supreme Court of the United States in United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. ——, in which petition for rehearing has been denied, and Webb & Goldbaum v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. ——, foreclose the question of the constitutionality of section 1. While those decisions directly relate to section 2, it follows, from the sustaining of the act as a revenue measure, that the validity of the administrative provisions of section 1, relating to taxation and registration, is unassailable.

[2, 3] 2. Section 1 contains a proviso exempting from the requirements of registration and payment of tax "officers of the United States government who are lawfully engaged in making purchases of the above-named drugs for the various departments of the Army and Navy, the public health service, and for government hospitals and prisons, and officers of any state government, or of any county or municipality therein, who are lawfully engaged in making purchases of the above-named drugs for state, county, or municipal hospitals or prisons, and officials of any territory or insular possession, or the District of Columbia, or of the United States, who are lawfully engaged in making purchases of the above-named drugs for hospitals or prisons therein."

Stetson is described in the indictment as "not being then and there an officer of the federal government or state government engaged in making purchases of the above-named drug, and not being then and there any other officer entitled to make purchases of said narcotic drugs." The indictment is criticized as failing to negative all the statutory exceptions. We think this criticism without merit. The statute does not except all officers of counties or municipalities, nor all officials of any territory or insular possessions, but only such as are lawfully engaged in making purchases of the drugs in question for hospitals and prisons. We think the negative contained in the indictment, while more general, is even broader than the statute. Defendant cannot complain that the exception is made to cover more than it need to. It does not affect his substantial rights, nor tend to his prejudice. An indictment is sufficiently certain if it fairly inform the accused of the crime intended to be charged so as to enable him to prepare for his defense, and so as to make the judgment a complete defense to a second prosecution for the same offense. United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; Tyomies Pub. Co. v. United States (C. C. A. 6) 211 Fed. 385, 389, 128 C. C. A. 47; Daniels v. United States (C. C. A. 6) 196 Fed. 459, 465, 116 C. C. A. 233.

In our opinion, the indictment, so far as the question we are considering is concerned, responds to this test.

[4-7] 3. Section 6 of the Harrison Act (Comp. St. § 6287*l*) declares that its provisions "shall not be construed to apply to the sale, distribution, giving away, dispensing, or possession of preparations and rem-

edies which do not contain more than * * * one-fourth of a grain of morphine; * * * Provided that such remedies are sold, distributed, given away, dispensed, or possessed as medicines, and not for the purpose of evading the intentions and provisions of this act."

The criticism that the first count of the indictment is bad, because not negativing this exception, does not impress us as meritorious. The general rule is that an exception in the enacting clause must be negatived by the pleader, but that an exception in a later section of the statute need not be negatived. United States v. Cook, 17 Wall. 168, 21 L. Ed. 538; Ledbetter v. United States, 170 U. S. 606, 611, 18 Sup. Ct. 774, 42 L. Ed. 1162; Shelp v. United States (C. C. A. 9) 81 Fed. 694, 696, 26 C. C. A. 570; Breitmayer v. United States (C. C. A. 6) 249 Fed. 929, 934, 162 C. C. A. 127.

In United States v. Cook, supra, it is said, somewhat obiter (17 Wall. 176, 21 L. Ed. 538), that although the exception is not in the enacting clause, yet if it is so incorporated with that clause "that it becomes in fact a part of the description, then it cannot be omitted in the pleading, but if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is matter of defense and must be shown by the other party, though it be in the same section or even in a succeeding sentence." It is also the rule that a description of a statutory offense in the language of the statute is sufficient, provided the language used, according to its natural import, fully describes the offense. Potter v. United States, 155 U. S. 438, 444, 15 Sup. Ct. 144, 39 L. Ed. 214. In our opinion the first section of the act fully defines the substantive offense with which defendant is charged. That section makes it unlawful for any person required to register under the act to deal in, sell or dispense morphine without registering and paying the tax. The indictment states the charge substantially, although not literally, in the language of the section. Moreover, it alleges the sale of morphine "in certain so-called morphine checks and other forms."

[8-10] Defendant pleaded to the indictment without questioning its sufficiency. We think that the words "preparations and remedies" contained in section 6 are not meant to include clear morphine, but relate to actual medicinal "preparations and remedies which do not contain more than * * * one-quarter of a grain of morphine"—such preparations and remedies as a druggist or a physician would normally dispense. In view of the fact that defendant is not charged as a physician or a druggist, we think he was sufficiently informed of the accusation, and that under that accusation it was open to him to show that he was merely dispensing medicinal "preparations and remedies," containing not more than the permitted amount of morphine. We think this conclusion finds more or less support in Shelp v. United States, supra, where, in an indictment for selling liquor contrary to the act forbidding the "importation, manufacture, and sale of intoxicating liquors" in Alaska, "except for medicinal, mechanical and scientific purposes," it was held not necessary to negative the exception mentioned in the statute; also Ledbetter v. United States, supra, where it was held sufficient to charge the offense in the language of the stat-

ute and unnecessary to negative the exception "other than as hereinafter provided," in the statute forbidding the carrying on of a liquor business. See also Smith v. United States (C. C. A. 8) 157 Fed. 721, 85 C. C. A. 353; Young v. United States (C. C. A. 6) 249 Fed. 935, 937, 162 C. C. A. 133. In view of the considerations stated, and of the further fact that whether he was within the subject-matter of the exception was peculiarly within defendant's own knowledge, we think the criticism we are considering is technical, unsubstantial and unprejudicial, and thus within the terms of section 1691 of the Compiled Statutes and section 269 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [Comp. St. § 1246]), as amended February 26, 1919 (40 Stat. 1181, c. 48).

[11, 12] 4. The conclusion reached as to the sufficiency of the first count makes consideration of the second count unnecessary. The conviction was a general one, and covered both counts. The sentence was such as could have been imposed upon a conviction under either count. In the absence of evidence to the contrary, it will be presumed to have been imposed under the valid count. Claasen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Hardesty v. United States (C. C. A. 6) 168 Fed. 25, 26, 93 C. C. A. 417, and cases cited; Bartholomew v. United States (C. C. A. 6) 177 Fed. at p. 905, 101 C. C. A. 182; Botsford v. United States (C. C. A. 6) 215 Fed. 510, 132 C. C. A. 22. In thus passing by the second count, we must not be understood as questioning its sufficiency or the validity of section 8 of the act. That section applies to the business of selling, as distinguished from mere possession. United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854.

[13] 5. The criticisms of alleged lack of evidence in certain respects, of asserted erroneous proceedings on the trial, and of the introduction of certain undisputed evidence, cannot be considered. The record contains no bill of exceptions, and thus no evidence. So far as concerns the proceedings below, it is confined to the indictment, the plea, the verdict, the sentence, and motion that a proposed bill of exceptions be signed, and the order denying that motion. Before the writ of error was returned to this court we denied an application for mandamus to compel settlement of bill of exceptions, for the reason that it affirmatively appeared that the court below had lost jurisdiction so to do by the lapse of the term at which the judgment was entered, without reservation of jurisdiction over the settlement, and without attempt on the part of defendant to have such jurisdiction reserved.

Finding no reversible error in the record, the judgment of the District Court is affirmed.

FEDER et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 205.

1. CRIMINAL LAW ⟸424(1)—EVIDENCE—STATEMENTS BY ONE DEFENDANT AFTER FAILURE OF CONSPIRACY.
In a prosecution of two defendants for conspiracy to defraud the United States, testimony of statements or admissions by one defendant, made to a representative of the Department of Justice after the conspiracy, if it had existed, had ended in failure, *held* inadmissible against the other defendant.

2. CRIMINAL LAW ⟸673(4)—FAILURE TO LIMIT EVIDENCE—CODEFENDANTS.
In a prosecution for conspiracy to defraud the United States, where testimony was admitted of the statements or admissions of one defendant, made to a representative of the Department of Justice after the conspiracy had ended in failure, it was prejudicial error to refuse to instruct that such statements, made out of court, were not competent as against the other defendant.

3. CONSPIRACY ⟸48—CONVICTION OF ONE DEFENDANT AFTER DEATH OF OTHER—EFFECT OF ACQUITTAL OR NOLLE PROSEQUI.
Though the union of the minds of at least two persons is a prerequisite to the commission of the crime of conspiracy, yet one may be convicted after the other accused is dead before conviction; but, if one be acquitted, the other also must be acquitted, as is the case if the prosecutor enter a nolle prosequi as to one.

4. CRIMINAL LAW ⟸1186(1)—REVERSAL—IMPROPER CONVICTION OF ONE OF TWO COCONSPIRATORS—EFFECT ON CONVICTION OF OTHER.
In a prosecution of two defendants for conspiracy to defraud the United States, where on his writ of error there must be a reversal of the conviction of one defendant for the improper admission of evidence against him, there must also be a reversal of the conviction of the other.

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

Isabelle Feder and Michael Polsky were convicted of conspiring to defraud the United States, and they bring error. Judgments reversed, and new trials ordered.

Robert H. Elder, of New York City (Otho S. Bowling, of New York City, of counsel), for plaintiff in error Polsky.

Max D. Steuer, of New York City (Theodore Megaarden, of New York City, of counsel), for plaintiff in error Feder.

Melville J. Franee, U. S. Atty., of New York City, and James D. Bell, 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, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. Although plaintiffs in error were brought to trial under two indictments, they were convicted and sentenced under one only.

They were in common form accused of conspiring to defraud the United States by procuring, or endeavoring to procure, the acceptance by the War Department of, and payment by the United States for, a

large number of "barrack bags" which were improperly made, defective, and "useless to the United States for the purpose for which they were manufactured." The overt act relied upon and pleaded consisted in giving to certain representatives of the War Department of the United States money for the purpose of corrupting them and so procuring the acceptance of the aforesaid defective articles of manufacture. Criminal Code (Act March 4, 1909, c. 321) §§ 37, 39, 35 Stat. 1096 (Comp. St. §§ 10201, 10203). The defendants were convicted and took out several writs of error.

The record shows that ample evidence was offered by the prosecution tending to show that defendant Feder formed and endeavored to carry out the plan of corruptly influencing those representatives of the United States whose business it was to see that the barrack bags in question were good bags, and thus to procure their acceptance, although they did not comply with the specifications under which they were manufactured. But as the indictment was for conspiracy the crucial question was whether the two defendants had corruptly agreed to endeavor to bring about this result—no matter what may have been the purposes of the defendant Feder.

The indictment charges these two defendants only; it contains no allegation that they were but part of a larger body of conspirators, nor the usual averment that they conspired and agreed not only with themselves, but with "other persons to the grand jury unknown." Neither is there any evidence that any person or persons were engaged or concerned in or about said conspiracy except Feder and Polsky.

[1, 2] In order to sustain this accusation the prosecutor demanded of defendant Feder (who took the witness stand) whether or not she had made certain admissions or volunteered certain statements to a representative of the United States, which admissions or declarations, if made, strongly tended to prove the existence of the conspiracy. Defendant Feder denied having made some of the suggested and material statements, admissions or declarations, whereupon the prosecution produced a stenographic transcript of the conversations at which the statements in question had been made, and the same was admitted in evidence against both defendants.

The person to whom these statements or admissions had been made was a representative of the Department of Justice, and it is beyond all question from the record that at the time Feder was produced before said representative the conspiracy (assuming that it existed) had ended, and ended in failure. Thereupon counsel for Polsky (who did not testify) requested the court to instruct the jury that—

"None of these statements * * * made by the defendant Feder * * * is any evidence against the defendant Polsky, and they must not consider such statements or any part of them as being evidence against Polsky."

This request the court denied. At the close of the evidence and after the court's colloquial charge, counsel for Polsky again requested the court to charge the jury that—

"In determining the question of Polsky's guilt the jury cannot consider as evidence against him any statement or statements which tended to implicate him and were made by the defendant Feder as set forth in the stenographic record."

And this request the court refused.

It is true that the established rule of Logan v. United States, 144 U. S. 309, 12 Sup. Ct. 617, 36 L. Ed. 429 (recently reiterated by this court in Erber v. United States, 234 Fed. 228, 148 C. C. A. 123), was not specifically brought to the attention of the trial judge when these requests were proffered. But that rule, to the effect that only those acts and declarations of a coconspirator are admissible against his fellows "which are done and made while the conspiracy is pending and in furtherance of its object," was plainly violated in a way as plainly prejudicial to Polsky. This conspiracy had come to an end, and when that occurred, "whether by success or by failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others."

Since defendant Feder was proffered as a witness, whatever was extracted from her on the witness stand was competent, relevant, and material against her; but the refusal to charge that the said statements made out of court were not competent as against Polsky was prejudicial error.

[3] The question remaining is: What disposition must be made of these writs under the circumstances shown? If defendant Feder had been tried alone, the record would have exhibited no error. Although the union of minds of at least two persons is a prerequisite to the commission of the crime of conspiracy, yet one may be convicted after the other accused is dead before conviction. Per Kent, J., People v. Olcott, 2 Johns. Cas. (N. Y.) at 310, 1 Am. Dec. 168. Yet not only if one of two conspirators be acquitted must the other also be acquitted, but, even if the prosecutor enter a nolle prosequi as to one, the other must be acquitted. State v. Jackson, 7 S. C. 283, 24 Am. Rep. 476; Commonwealth v. Edwards, 135 Pa. 474, 19 Atl. 1064. And even where evidence tended to show that three defendants had conspired, and the jury declared that A. had conspired with one of the other two, but they could not tell which one, it was held by Lord Campbell, C. J.:

"I think under these circumstances the verdict against A. cannot be supported. It is conceded that, if there be an indictment against two persons for a conspiracy, the acquittal of one must invalidate the conviction of the other. I cannot draw a distinction between the cases of two or three persons, if one only is found guilty. If three are indicted and two found not guilty the third must also be acquitted." Reg. v. Thompson, 16 Q. B. 832.

The rule as to convictions in conspiracy may be summed up by saying that, provided the acquittal or death of coconspirators does not remove the basis of the charge, one defendant may be convicted of the offense. Cf. People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; People v. Richards, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716, and cases supra.

[4] In the cause at bar Polsky is plainly entitled to a new trial, but unless he is guilty there can be no conspiracy. The basis of the charge is swept away if in point of fact there was no union of minds between Polsky and Feder, no matter what Feder's intent, purpose or effort may have been. While even in conspiracy a new trial has been granted to one of numerous defendants without disturbing the verdict

against others (Rex v. Mawbey, 6 T. R. 619), the rule was formerly general that, if a new trial be given to one after a conviction for conspiracy, it is given to all who were found guilty. In Reg. v. Gumpertz et al., 9 Q. B. 482, Denman, C. J., said:

"We cannot grant a new trial to one conspirator without granting it to all who are convicted; as we cannot separate the defendants, there must be a new trial as to all."

This remark must be taken with the limitation above indicated, and indeed commented upon by Lord Denman's colleagues by referring to Rex v. Mawbey, supra. The rule is founded upon much reason, as was remarked in Commonwealth v. McGowan, 2 Pars. Eq. Cas. (Pa.) 341, a case which followed the Gumpertz decision, soon after the latter was rendered. It has been accepted by writers of authority. Vide Wharton's Criminal Law (10th Ed.) § 1395; Bishop's New Criminal Procedure (4th Ed.) § 1038.

The reason for the rule is in our opinion the indivisibility of the crime for which a plurality of defendants are tried. This perhaps is best illustrated by the application of it made in Dutcher v. State, 16 Neb. 30, 19 N. W. 612, where, because of error in respect of one of several defendants accused of tumultuous and unlawful assembling, a new trial was granted to all.

The matter has received some consideration in this court. United States v. Cohn (C. C.) 128 Fed. 615, was an indictment for conspiracy against three men in respect of an agreement to defraud the United States made by them and "others to the jurors unknown." Two only of the defendants were brought to trial. The trial judge gave a new trial to one of them and denied it as to the other, who thereupon took a writ of error, reported as Browne v. United States, 145 Fed. 1, 76 C. C. A. 31 (certiorari refused 200 U. S. 618, 26 Sup. Ct. 755, 50 L. Ed. 623). This point is considered at page 13, and holds in substance that the jury might well have convicted the one person ultimately held guilty for conspiring, not with the defendant to whom a new trial was awarded but with the absent defendant named, and the "persons to the jurors unknown."

But where, as here, it is impossible that Feder should be guilty unless Polsky is, the crime is in every sense indivisible, its essence is the mental confederation not of any two of numerous persons (some perhaps to the "grand jury unknown"), but of these two particular defendants, Feder and Polsky. We (in Lord Denman's phrase) "cannot separate" these defendants; for the conspiracy is already reduced to its very lowest terms, viz. two persons. Therefore the rule still applies.

Judgments reversed, and new trials ordered.

FINNIE v. WALKER et al.

(Circuit Court of Appeals, Second Circuit. April 22, 1919.)

No. 180.

1. INSURANCE ⟨⟩122—ASSIGNMENT OF LIFE POLICY—VALIDITY—WAGERING CONTRACT.

The assignment of a life insurance policy, in effect contemporaneously with its issuance or later, with wagering intent, to one having no insurable interest as relative, dependent, or creditor, is invalid but does not invalidate the policy and the proceeds received by the assignee are recoverable for the benefit of the estate of the insured, less such sums as the assignee may have paid out thereon.

2. INSURANCE ⟨⟩648(1)—SUIT AGAINST ASSIGNEE—EVIDENCE.

Evidence that an insured was in poor health at the time of the assignment of the policy, and of knowledge of such fact by the assignee, is competent on the question whether the assignment was with wagering intent.

Ward, Circuit Judge, dissenting.

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

Suit in equity by Nelle E. Finnie, administratrix of the estate of David T. Finnie, deceased, against Alfred P. Walker and George K. Morrow. Decree for defendants, and complainant appeals. Reversed.

Rollins & Rollins, of New York City (E. A. Merrill, of Westfield, N. J., on the brief), for appellant.

Owen N. Brown, of New York City (Conover English, of Newark, N. J., of counsel), for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The Equitable Life Assurance Society, in August, 1912, issued five policies of life insurance in the principal sum of $5,000, upon the life of David T. Finnie. These policies were all delivered to A. S. Herenden, general agent of the society, and remained in his possession until their delivery by him.

[1] Policy No. 1,778,976, payable to Finnie's wife, with right of revocation, was assigned September 26, 1913, to Morrow. Finnie paid the first premium to the agent of the company. Policy No. 1,778,977, payable to the estate of Finnie, was assigned August 22, 1912, to the appellee Morrow. Policy No. 1,778,978, payable to the estate of Finnie, was assigned August 20, 1912, to Morrow. Policy No. 1,779,245, payable to the estate of Finnie, was assigned September 12, 1912, to Morrow. Policy No. 1,779,241, payable to the estate of Finnie, was assigned August 22, 1912, to the appellee Walker, and on September 16, 1913, Walker assigned the policy to Morrow. The premiums on four of these policies were paid by Morrow, and on the fifth by Walker's note, but Morrow paid the note.

Finnie died September 18, 1917, and the moneys due on the five policies were paid to Morrow on September 20, 1917. The administratrix of the estate now sues in equity to recover the proceeds paid to Morrow, and praying that the appellees be allowed their respective

sums paid for premiums, with interest, and that the difference be paid to the estate she represents. The theory of the action is that each assignee had no insurable interest in the life of Finnie and that the assignments were in law wagering contracts. The trial judge dismissed the bill.

If Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924, has not been overruled or is not inconsistent with what was held in the later case of the Supreme Court, Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863, the appellant is entitled to the relief she seeks. In the Warnock Case, supra, the plaintiff's intestate, on procuring insurance upon his life, entered into an agreement with a firm whereby it was to pay all fees and assessments payable to the underwriters on the policy and to receive nine-tenths due thereon at his death. Pursuant to this agreement, the intestate executed an assignment of the policy and the firm paid the fees and assessments. Upon his death, the firm collected from the underwriters nine-tenths of the amount due on the policy, plus the premiums paid. The administrator sued the underwriters for this nine-tenths. There was no claim or charge of fraud upon the part of any one. In approving a recovery, the court said, speaking of insurable interest:

"But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are therefore, independently of any statute on the subject, condemned, as being against public policy.

"*The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion, merely, of the insurance money.* To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money. * * *

"It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will therefore hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was also lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life, and encourage the evils for which wager policies are condemned."

In an earlier case, Cammack v. Lewis, 15 Wall. 643, 21 L. Ed. 244, the policy of insurance for $3,000 was procured by the debtor at the suggestion of a creditor to whom he owed $70. It was assigned to the creditor to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one-third of the proceeds was to go

to his widow. On his death, the assignee collected the money from the insurance company and paid the widow $950 as her proportion, after deducting certain payments made. The widow, as administratrix of the deceased's estate, sued for the balance of the money collected and was successful. It was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering operation, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, for such advances as he might have afterwards made on account of it, and that the assignment was valid only to that extent.

In the case relied upon by the appellees (Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. [N. S.] 642, Ann. Cas. 1913B, 863) it, at best, limited the doctrine of Warnock v. Davis, supra, so as to permit a policy previously taken out, under circumstances which made it perfectly valid, to be assigned to one who had no insurable interest in the life of the insured, providing a valid consideration was paid therefor by the assignee. A life insurance policy taken out in good faith by the insured, with no idea of assigning it, can afterwards, in good faith, and for a valuable consideration, be sold and assigned to one who has no insurable interest in the life, under this latter case. In considering the authorities, Justice Holmes said:

"And cases in which a person having an interest lends himself to one without any as a cloak to what is in its inception a wager having no similarity to those where an honest contract is sold in good faith. * * * But the case in which the strongest of them occurs was one of the type just referred to, the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once. Warnock v. Davis, 104 U. S. 775 [26 L. Ed. 924]."

In the Grigsby Case, supra, the insured, after paying two premiums and when the third was overdue, was in need of a surgical operation, obtained it from a doctor, and prevailed upon the doctor to buy the policy, for which the doctor paid $100. This was held to be a valid assignment. It will be noted, however, that this was an out-and-out assignment, and there was no agreement, as in the Warnock or Cammack Cases, for a part interest only in the insurance; in other words, there were no conditions imposed which limited the extent of the assignment.

These policies were issued to the estate of the intestate and the salutary rule of public policy which condemns wagering assignments, forbids the appellees retaining the moneys they received, other than the premiums paid by them. Contemporaneous assignments of life insurance policies are wagering contracts, and should be treated as such, just as the policies are where the beneficiary has no insurable interest. Here the policy was taken out with a view of its assignment. The assignment was contemporaneous with the issuance of the policy, and the facts disclosed in this record permit a fair inference that it was the intent of the appellees to obtain just such a result as the issuance of a wagering contract of insurance permits.

Justice Holmes, in Grigsby v. Russell, supra, indicates a desire on the part of the court to give as much commercial freedom and value as possible to the owner of a life insurance policy which has a market value; but that decision cannot be extended to cover facts such as are presented here, where there are four assignments of policies, with no consideration moving to the insured, and no consideration of commercial advantage is urged to sustain the assignments. As we read the opinion of the court, it is at least intimated that the court would follow the Warnock Case under similar circumstances, and it therefore follows that this court should visit its condemnation upon the assignments in the case now under consideration in this court.

It seems to us the facts require a conclusive presumption of wagering intent as to the fifth (that is, policy No. 1,778,976), assigned to Morrow in September, 1913. Even though this assignment be remote, in point of time, from the other contemporaneous assignments, and therefore not subject to the condemnation by reason thereof, it will be held illegal and void beyond the sums advanced. This presumption was kept alive because of the inference in law arising from the wagering intent, established by the fact that Morrow knew, at the time of this assignment, that Finnie was a very sick man, and that the amount of the contract, compared with what was paid, permitted playing for a large stake. There was an intimate and close business connection between this transaction and the previous ones, wherein Morrow was gradually accumulating the five policies upon the life of the deceased. If, from these facts, the wagering intent may be presumed, as it must, that avoids the assignment. Any contract, the tendency of which is to endanger the public interest and affect the public good, and which is subversive of sound morality, ought never to receive the sanction of a court of equity or be the foundation for its judgment. Ritter v. Mutual Life Ins. Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.

In endeavoring to do equity between the two parties, the appellees will have full equity administered to them by obtaining the premiums and interest and other charges which they may have invested in keeping alive these policies. Relief should not be denied the appellant because the appellees have been paid by the insurance company. They may not keep the moneys which, through error of law or fact, or both, have been paid to them by the insurance company. Because of the mistake of the insurance company, they should not have what the law says is not their property. The right to make them account as trustees for the moneys paid them by the insurance company cannot be denied the appellant. This would be contrary to Warnock v. Davis, as demonstrated by the language of the court above quoted. The assignment of a policy to a party not having an insurable interest, with wagering intent, is as objectionable as the taking out of a policy in his name. The court can do no other than declare the assignment void; but it does not follow that the policy, which was issued and under which the money was paid, is void. Where the courts have held the assignments void and unenforceable, nevertheless the policy is valid, and the assignee may retain the antecedent debt or other consideration and advances made to keep the policy alive.

The theory of such a result seems to be that the assignment is said to be good as a designation of an appointee to receive payment from the insurance company and as a security for advancements. The illegality is in the attempt of the assignee to retain the entire proceeds. Stevens v. Warren, 101 Mass. 564; Page v. Burnstine, 102 U. S. 644, 26 L. Ed. 268; Warnock v. Davis, supra. Certainly, if the assignment is held to be invalid, the administratrix may recover by virtue of her original title to the policy, for the reason that it never went out of the assignor or vested in the assignee. One who seeks equity must do equity, and therefore the administratrix here must permit the appellees to retain, out of the proceeds of the policy, the consideration and other charges paid.

[2] Since there must be a new trial, we must consider the appellant's fourth assignment of error. The District Judge in his opinion, stated that the case presented a legal point of great importance, new in this jurisdiction, and he treated it as a law point, stating that if he was wrong there must be a new trial, because of the rejection of evidence offered by the appellant which would be of importance under the theory of law announced in this opinion. The appellant offered evidence as to Finnie's bad health and knowledge thereof by assignee. Condition of health of the insured at the time of the assignment of his life insurance policy was competent and important in determining the question of wagering intent. It was therefore error to exclude this testimony.

Judgment reversed.

WARD, Circuit Judge (dissenting). The theory of the bill is that the assignees of the policies had no insurable interest to sustain absolute assignments, and that they should be construed only to secure any advances made to Finnie in his lifetime; the balance of the insurance collected by the defendant Morrow from the insurance company to be paid to Finnie's estate.

The defendants in their demurrers denied that they had advanced any moneys to Finnie in his lifetime, or that they held the policies as collateral security. On the contrary, they claimed to be absolute owners as purchasers. It is true that the defendant Morrow testified on the trial that Finnie owed him some $400 to $500; but this was rightly rejected by the District Judge as having been a consideration for the assignments to him. The bill cannot be sustained on this theory. Neither of the defendants had any insurable interest in Finnie's life as relative, dependent, or creditor.

Policy 1,778,976, dated August 20, 1912 and executed by the company August 21st, was delivered to Finnie against his note for the first annual premium, which note he paid. Subsequently he revoked the designation of his wife as beneficiary, and assigned the policy to the defendant Morrow for an expressed consideration of $1. This being a valid policy on Finnie's life, it was his property, which he could sell or give to any one, without reference to insurable interest, as held in Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863.

The other four policies, though payable to his estate, were never delivered by the company to Finnie; he never paid any premiums upon them, and never owned them at all. They did not come into existence until delivery to his assignees against payment by them of the first annual premium. Finnie never had a valid policy to sell or give away, within the decision in the Grigsby Case. The situation was exactly as if the assignees had originally taken out wagering policies upon his life payable to them. Therefore I think, not merely the assignments, but the policies themselves, were void as wagering insurance. The fact that the insurance company has paid them to the defendant Morrow, assignee, as absolute owner, without raising any question of invalidity, does not change their character qua Finnie's estate.

But the court, relying upon Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924, holds that the assignments are void, but the policies valid. It must be admitted, as intimated by Mr. Justice Holmes in the Grigsby Case, that the language of Mr. Justice Field was too broad, although he finds the decisions themselves to be consistent with each other. I think they can be reconciled on the theory that in Warnock v. Davis the policy itself was held valid, perhaps because taken out by and delivered to the insured, he paying at least one-tenth of the first annual premium, and being liable for at least one-tenth of the subsequent premiums, and his widow, or, in case of her death, his estate, being entitled to at least one-tenth of the insurance.

This may have justified treating the assignment of the remaining nine-tenths as valid, but only as security for repayment of premiums advanced by the assignee. But the four policies in the instant case were in my opinion never valid at all, being pure wagers from their inception, and therefore neither Finnie in his lifetime nor his estate after his death had any standing to make claims against the insurance company or the person to whom it has paid the insurance. I think the decree should be affirmed as to the first policy, because it was valid, and as to the four policies, because Finnie's estate has no interest in them, and not because they are valid.

BROWN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3224.

1. ARMY AND NAVY ⊜20—SELECTIVE SERVICE ACT—VIOLATIONS—INFORMATION.

An information charging a violation of the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k), in that defendant willfully failed and refused to present himself for registration on June 5, 1917, is not fatally defective for want of an allegation that defendant is a citizen of the United States.

2. DISTRICT AND PROSECUTING ATTORNEYS ⊜3(4)—INDICTMENT AND INFORMATION ⊜52(3)—VERIFICATION BY ASSISTANT DISTRICT ATTORNEY.

Under Rev. St. § 363 (Comp. St. § 538), giving the attorney general power to employ, in the name of the United States, attorneys to assist the dis-

trict attorney in the discharge of his duties, an information is not open to attack because verified by an assistant United States district attorney, for such assistants come within the general rule that an assistant duly appointed to prosecute is clothed with all of the powers and privileges of the prosecuting attorney.

3. INDICTMENT AND INFORMATION ⊂⊃ 52(4)—VERIFICATION—INFORMATION AND BELIEF.

It is only where it is sought to issue a warrant that the Constitution requires that the affidavit must be by one knowing the facts; therefore, as there is no statute requiring the verification of an information, an information is not open to attack because verified on information and belief.

4. ARMY AND NAVY ⊂⊃20—SELECTIVE SERVICE ACT.

In a prosecution under the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k) for failure to present himself for registration on June 5, 1917, evidence *held* not to show that defendant was entitled to the direction of a verdict in his favor, on the ground that he was not bound to register under Selective Service Regulations, § 56, pt. 3, declaring that citizens and persons who have declared their intention to become citizens, residing abroad, are not required to register.

5. ARMY AND NAVY ⊂⊃20—SELECTIVE SERVICE ACT—FAILURE TO REGISTER—EVIDENCE.

An opinion by the local legal advisory board to the effect that defendant was not required to register is no defense to a prosecution for failure to register on June 5, 1917, as required by the Selective Service Law (Comp. St. 1918, §§ 2044a–2044k); the advisory boards not being created until November of that year, when the Selective Service Regulations were promulgated.

6. ARMY AND NAVY ⊂⊃20—SELECTIVE SERVICE ACT—FAILURE TO REGISTER—EVIDENCE.

In a prosecution under the Selective Service Act (Comp. St. 1918, §§ 2044a–2044k) for failure to register on June 5, 1917, vouchers given to defendant in February, 1917, which on their face indicated that he was at that time acting as deputy sheriff for Lincoln county, Mont., *held* admissible in evidence; defendant's contention being that he was then a resident of Canada.

7. CRIMINAL LAW ⊂⊃1054(1)—APPEAL—EXCEPTIONS—EVIDENCE.

Rulings on evidence, not presented by an exception, cannot be considered on appeal.

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

Howard Brown was convicted of failure and refusal to register on June 5, 1917, as required by the Selective Service Law, and brings error. Affirmed.

J. M. Blackford, of Libby, Mont., and R. P. Henshall, of San Francisco, Cal., for plaintiff in error.

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

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted upon an information which charged him with willfully failing and refusing to present himself for registration on June 5, 1917, at the

registration place in the precinct of Lincoln county, Mont., in which he then and there had his permanent home and actual place of legal residence; he being a male person between the ages of 21 and 30 years, and not an officer or an enlisted man of the Regular Army or Navy, or Marine Corps, or in other service of the United States, or in the Reserve Corps, etc.

[1] It is assigned as error that the court admitted testimony on an information which failed to state facts sufficient to constitute a public offense. No objection to the introduction of evidence was suggested to the trial court, but it is now said that the information is fatally defective for want of an allegation that the plaintiff in error was a citizen of the United States. In Ruthenberg v. United States, 245 U. S. 480, 38 Sup. Ct. 168, 62 L. Ed. 414, the court held that it was not necessary to charge that the accused who refused to register was a citizen of the United States.

[2] The information was verified by an assistant United States district attorney, and on that ground it is urged that it was fatally defective. Section 363, Rev. Stats. (Comp. St. § 538), gives the Attorney General power to employ, in the name of the United States, attorneys "to assist the district attorneys in the discharge of their duties." It places no restriction upon the powers of the assistant district attorneys. They come within the general rule that an assistant, duly appointed to prosecute, is clothed with all the powers and privileges of the prosecuting attorney, and all acts done by him in that capacity must be regarded as if done by the prosecuting attorney himself. 32 Cyc. 724; Parish v. United States, 100 U. S. 500, 25 L. Ed. 763; May v. United States, 236 Fed. 495, 149 C. C. A. 547.

[3] The further objection is made that the verification is made on information and belief. There is no statute which requires the verification of an information. It is only where it is sought to issue a warrant that the Constitution requires that there must be the affidavit of one who knows the facts. Weeks v. United States, 216 Fed. 292, 132 C. C. A. 436, L. R. A. 1915B, 651, Ann. Cas. 1917C, 524.

[4] Error is assigned to the denial of the motion of plaintiff in error for a directed verdict, and our attention is directed to section 56, part 3, of the Selective Service Regulations, which provides:

"Citizens and persons who have declared their intention to become citizens, residing abroad, are not required to register."

The record shows that the plaintiff in error made no motion for a directed verdict. We have looked into the testimony, however, sufficiently to see that there was evidence which tended to prove that his residence was at Eureka, Mont., which was his place of registration. He admitted that he was not a citizen of Canada, and had taken no steps to become such, and that he was in Eureka on the day of registration. The evidence was that his father had two farms, one near Eureka, in Montana, and one in Canada, a short distance across the border; that the plaintiff in error spent a portion of his time at Eureka, where he maintained a lodging room and kept some of his clothes, and where he received a portion at least of his mail; and that he spent portions of his time on his father's farm in Canada.

[5] It is contended that the court below erred in denying the plaintiff in error the opportunity to prove that he had been furnished with an opinion from the local legal advisory board to the effect that he was not required to register. To this it is to be said, first, that no exception was taken to the ruling of the court, and no assignment of error is directed thereto. Again, there was no offer to show that the opinion had been given on or prior to June 5, 1917. From the fact that the advisory boards were not created until November 8, 1917, when the Selective Service Regulations were promulgated, it is to be inferred that the opinion was furnished after that date. In that case the opinion could be no defense to the failure to register on June 5, 1917.

[6] Error is assigned to the admission of a number of vouchers given to the plaintiff in error in February, 1917, which upon their face indicate that at that time he was acting as deputy sheriff of Lincoln county, Mont. His brother at that time was the sheriff of that county, and at his brother's instance the plaintiff in error conveyed a man to an insane asylum and received the vouchers in payment of his expenses. The sheriff testified that he did not make a written appointment of his brother as a deputy sheriff, and it is argued that there is no statutory prohibition against the appointment of a nonresident as deputy sheriff. The court below ruled that the vouchers were public records assumed to be authentic, and that the fact that the plaintiff in error acted in that capacity was a circumstance which the jury might consider. In that view we agree. The vouchers were properly taken into consideration, to be given the value to which the jury might think they should be entitled, in connection with the other evidence as to the actual residence of the plaintiff in error on June 5, 1917.

[7] A witness was asked whether he was acquainted with the common knowledge in the community in which he lived as to where the home of the plaintiff in error was. An objection to the question was sustained, and to that ruling error is now assigned. It is sufficient to say in answer that no exception was reserved to the court's ruling.

We find no error. The judgment is affirmed

SCOTT v. CLINE.*

(Circuit Court of Appeals, Eighth Circuit. May 7, 1919.)

No. 5232.

BANKRUPTCY ⇐143(10)—PROPERTY PASSING TO TRUSTEE—PROPERTY HELD IN TRUST FOR BANKRUPT.

Trustee of a bankrupt corporation *held* entitled to recover real estate held in the name of a person who, with his family, owned all the stock of the corporation, on the ground that it was held in trust for the company, but not entitled to such person's homestead and other property in which funds of the company were not invested.

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

*Rehearing denied September 1, 1919.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Joseph W. Woodrough, Judge.

Suit in equity by M. E. Cline, trustee in bankruptcy of the Grove Lumber Company, against W. A. Scott. Decree for complainant, and defendant appeals. Modified.

Charles B. Rogers, of Tulsa, Okl. (F. A. Fulghum, of Tulsa, Okl., on the brief), for appellant.

William F. Tucker, of Tulsa, Okl. (Hulette F. Aby, of Tulsa, Okl., on the brief), for appellee.

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

AMIDON, District Judge. This is a suit in equity brought by Cline, as trustee in bankruptcy against Scott, seeking a decree declaring that Scott holds the legal title to three parcels of real estate in trust, and ordering him to convey the same to the trustee. The trial court found in favor of the trustee, and entered a decree accordingly, which this appeal seeks to review.

Scott was the owner of the Grove Lumber Company. He and his family held all its stock. For some time prior to May, 1917, he had been engaged in purchasing lots, taking the title in his own name, erecting houses thereon out of the proceeds of a mortgage placed on the property, and out of materials furnished by the Grove Lumber Company. Some of the evidence indicates that these houses were built for a specific purpose under contract with parties to furnish them a home. A distinctive feature of the scheme was that the purchaser could pay off the mortgage in monthly installments instead of paying rent. Each property was carried in a separate account on the books of the Grove Lumber Company, and the materials and labor which went into the house were charged against it in this account. The project seems to have worked well enough until the war came on. Then the great increase in the cost of material and labor made it impossible to complete houses that were in process of erection, for the price that had been agreed upon. This involved the Grove Lumber Company heavily in debt.

In January, 1917, the situation was so critical that Scott had a conference with his largest creditor, the Longbell Lumber Company, and at the instance of that company he signed a written contract scheduling all the real property standing in his name, and stating that the same was held in trust for the Grove Lumber Company; also turning over all the accounts receivable of the Grove Lumber Company. As a part of this transaction he agreed that if the creditors would give him until June 1, 1917, he would undertake personally to pay their claims in full. The consideration for the entire agreement was the extension of time upon the debts of his company, so that he could make collections of outstanding accounts and marshal its resources. It was upon this basis that he signed the document. The very next day after the document was signed, a petition in involuntary bankruptcy was filed against the company, its property seized by a receiver, and an adjudication obtained in due course. It is not claimed that any cred-

itor extended a dollar's credit on the faith of his declaration that he held the parcels of land which he scheduled in trust for his company. On the contrary, the evidence plainly shows that all its indebtedness was incurred prior to that time, so there is no estoppel here. Cline was at first appointed receiver, and afterwards trustee in bankruptcy, and has been in possession of the entire property of the Grove Lumber Company.

The trial court dealt with the case in a rather sweeping way. We do not think that can be done. The different parcels here involved each stand upon a separate basis, and in order to do justice in the case the evidence as to each property must be considered. Acting upon that basis, we will take up the separate properties.

1. Lot 6, block 4, of Kirkpatrick Heights addition to the city of Tulsa: This property was purchased by Mr. Scott as a home. In making the purchase he used $250 of Grove Lumber Company money, and $200 in the form of a note which he held against the party from whom he purchased. The balance of the purchase price, $550, consisted of a second mortgage on the property which the purchasers assumed. A mortgage for $3,000 was given on the property, and the erection of a house started. Out of this mortgage the Grove Lumber Company was paid in full the $250, and for all material which it supplied for the house. The note and mortgages were both signed by Mr. Scott and his wife. The house was not completed at the time of the adjudication in bankruptcy. Subsequent to that date Scott paid out $1,600 of his own money for putting a heating plant into the property, wiring it, putting in a plumbing system, and constructing sidewalks adjacent to it. He moved into the house as a home in May, 1917, and has continuously resided there ever since. He has paid the monthly payments due on the mortgage out of his own private funds. These have amounted to something like $1,000. The decree of the trial court takes all this private investment by Scott in property which from the beginning he intended as his home, and turns it over to the trustee in bankruptcy, and thereby not only applies these personal funds to the payment of the debts of the Grove Lumber Company, but likewise deprives Scott of a home. The decree as to this lot is clearly wrong and should be reversed.

2. Lots 5 and 6 in block 5, Orchard's addition: This property was paid for by an automobile, but the automobile business was carried on as a branch of the business of the Grove Lumber Company. The house on this property had been completed some time before Mr. Scott bought it. It was listed, however, upon the books of the Grove Lumber Company as the property of the company, and was constantly so treated by Scott. For that reason the decree should be affirmed as to this property.

3. Lot 1, block 9, East Lynne addition: That was purchased in July, 1916, by a check of the Grove Lumber Company for $225. Mr. Scott testified, however, that the check was charged to him in the accounts of his company, and, as he owned the company, it would not be unnatural that he should draw checks upon the account for a small private investment like this. He was receiving a salary of

$250 a month from his company. The distinctive feature in regard to this East Lynne property is this: There was no building on it at the time it was purchased, and no building was put on it until after the proceedings in bankruptcy had been started, and Mr. Cline had taken possession of all of the lumber company's effects. The building was contracted for in May, 1917, and erected by a man by the name of Tubbs. It was paid for out of a mortgage on the property. Some of the material that went into the building was purchased at the yards of the Grove Lumber Company from Mr. Cline as trustee in bankruptcy, but all such purchases were paid in full. These purchases were small. Most of the material for the building was purchased of other concerns, and was paid for out of the mortgage. Scott testifies that neither the lot nor the building which he erected on it after the appointment of the trustee in bankruptcy were intended as a part of the assets of the company. He sold this property November 30, 1917. It will therefore be impossible for him to perform the decree by conveyance to the trustee. We think the evidence, as a whole, especially the fact that the building was erected after the proceedings in bankruptcy had been instituted, and all the property of the Lumber Company was in Cline's possession, shows that this property never belonged to the Lumber Company, and the decree as to it is erroneous.

The decree of the trial court is modified, being reversed as to Cline's homestead and the East Lynne property, and affirmed as to the other property, without costs to either party.

B. V. D. CO. v. ISAAC et al.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1919.)

No. 3197.

1. INJUNCTION ⊜34—RIGHTS OF SELLER—INJUNCTION AGAINST REMOVAL OF MARKS.

A manufacturer of underwear, despite its claim of preservation of good will, could not restrain a jobber who purchased the goods from others from removing secret marks on each carton, placed there by the manufacturer to enable it to detect those of its selected list of jobbers to whom it sold who were cutting prices, since the manufacturer parted with all control over the merchandise and cartons by absolute sale.

2. CONTRACTS ⊜116(1)—RESTRAINT OF TRADE—INJUNCTION AGAINST REMOVAL OF SECRET MARKS.

A manufacturer of underwear, which sold only to selected jobbers, could not restrain a jobber, unable to buy directly from it, and who bought from others, from removing certain secret marks on the bottom of each carton of goods, where one of the purposes of the manufacturer in so marking the cartons was to enable it to determine which of its wholesalers cut prices, so that such wholesalers might be stricken from the selected list of jobbers, an unlawful restraint of trade which equity will not aid.

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

Suit in equity by the B. V. D. Company against Morris Isaac and others. From decree dismissing the bill, plaintiff appeals. Affirmed.

Hans v. Briesen, of New York City, and Murray Seasongood, of Cincinnati, Ohio, for appellant.

James N. Ramsey, of Cincinnati, Ohio, for appellees.

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

KNAPPEN, Circuit Judge. Plaintiff manufactures the so-called "B. V. D." underwear, consisting of two-piece suits not protected by patent, as well as union suits, as to which rights under patent are claimed. It sells only to a selected list of jobbers, about 350 in number out of about 850 applicants. Previous to the decision of the Sanatogen Case, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, it sold its union suits under a strict price maintenance agreement. As to the two-piece suits there was no such agreement. Since December 7, 1916 (more than three years after the Sanatogen decision), plaintiff's acknowledgments of receipts from jobbers of orders for goods, both union and two-piece suits, have been accompanied by a form letter expressly designed to secure price maintenance in fact. The statement not only says:

"We consider it important that in the distribution of these goods the prices to be received therefor shall not be either greater or less than those which are fairly reasonable to all concerned. A schedule of prices which we deem fair to all under present conditions is herein set forth"

—but also:

"Any B. V. D. goods which shall be shipped to you should not therefore be sold at prices greater or less than our latest retailers' prices."

Defendant is a jobber at Cincinnati. It had been unable to buy directly from plaintiff, although it had offered complete assurance that prices would not be cut. It was thus compelled to buy from others. Several years before the Sanatogen decision plaintiff inaugurated a system of placing a selected serial number upon the bottom of each carton contained in a given case. This secret mark, being entered on plaintiff's books, furnished means of identifying the jobber to whom the box had been shipped and plaintiff claims this enabled it to prevent fraudulent substitution. Defendant claimed and exercised the right to remove these secret marks from cartons containing plaintiff's goods. It was to enjoin this action that the bill was filed. Defendant justifies its action as necessary to protect the jobbers from whom it has bought against the consequences of selling below plaintiff's prescribed prices.

The District Court dismissed the bill on the grounds, first, that plaintiff parted with the title to its goods and their enclosing cartons when it sold them, and that it had no concern with defendant's treatment of the cartons after the latter had acquired full ownership; and, second, that one of the purposes, if not the real purpose, of plaintiff in putting the secret mark on the cartons is to enable it to determine which of its wholesalers is cutting prices, with a view of striking the offender from the selected list of jobbers.

[1, 2] The District Court was clearly right in dismissing the bill.

The broad rule that the seller of merchandise outright parts with all control over it is no longer open to question. While the decisions to this effect have been for the most part in suits where the protection with respect to price maintenance was claimed under patent, copyright or trade-mark, yet the rule stated was applied, not because of such features, but in spite of them, and upon the fundamental ground that the control of the owner over the article sold ended with the complete passing of title. Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; The Sanatogen Case, supra; Straus v. Victor Talking Mach. Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955; Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959; Boston Store v. Amer. Graphophone Co., 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 551, Ann. Cas. 1918C, 447.

The question of price restriction apart, there is no merit in the claim that plaintiff has retained such an interest in preserving its own good will as will support its claimed right to relief. The sale of its goods was absolute, and completely passed title, not only to the goods themselves, but to their inclosing cartons. No authorities are cited, nor have we found any, which, since the line of decisions above referred to, lend support to plaintiff's claim. In Coca-Cola Co. v. Bennett, 238 Fed. 513, 151 C. C. A. 449 (so far as material here), it was merely held unfair competition for the purchaser of plaintiff's goods in bulk to sell them in bottles bearing plaintiff's name and trade-mark when plaintiff had already sold to others the sole bottling privilege. Ingersoll v. Doyle (D. C.) 247 Fed. 620, was a case of trade-mark infringement. The recent "Associated Press" decisions seem to us not at all in point. Neither is there application in cases like Wells, etc., Co. v. Abraham (C. C.) 146 Fed. 190 (s. c., 149 Fed. 408, 79 C. C. A. 228); and Miles Medical Co. v. Goldthwaite (C. C.) 133 Fed. 794, where (before the Sanatogen decision) provisions expressly designed to enforce price restrictions were sustained.

The case of B. V. D. Co. v. Kommel, 200 Fed. 559, 119 C. C. A. 39, specially relied upon by plaintiff, is not persuasive of its contention. Not only was that case decided several years before the Sanatogen Case, but what was there said favorable to plaintiff is merely obiter, and apparently not even the unanimously accepted view of the court. Manifestly, cases involving protection of marks on articles still belonging to a plaintiff have no application. Conceding that plaintiff's secret system is susceptible of entirely legitimate and proper use, and even that it was not used illegitimately in the present case, the action below was nevertheless right. There was here no invasion of trade-mark, and no breach or attempted breach of any legitimate trust relation on the part of either defendants or their vendors.

The suggestion that the erasure of the serial number will enable the sale of former season goods as if put out during the current season, and thus affect plaintiff's good will, relates to a condition too remote and unsubstantial to justify the attempted restriction, especially as the purchasers from the plaintiff's jobbers were under no obligation

even to retain or use the boxes in which the goods were originally sold, and sales of past season goods were not forbidden.

It cannot, however, be said that the conclusion of the District Court that plaintiff's reason for using its secret marking system embraced at least the enforcement of its price maintenance system, and thus was an unlawful restraint of trade, is without justification. To say the least, equity will not lend its aid to an attempt of that nature. True, the testimony of plaintiff's president denied such purpose, but in view of all the other testimony in the case, the court was not bound to accept that statement at its face value. The District Judge heard and saw the witnesses, and his conclusions should not be disturbed.

The decree of the District Court is affirmed.

THE ITALIER.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 20.

1. SEAMEN ⟸23—WAGES—PAYMENTS AT INTERMEDIATE PORTS.
   Advance wages paid seamen on a foreign ship, who signed in a foreign port, where such payment was legal, are to be deducted in computing the half wages due at an intermediate port, under Seamen's Act, § 4 (Comp. St. § 8322).
2. SEAMEN ⟸4, 21—FORFEITURE OF WAGES—DESERTION—SEAMEN'S ACT.
   The offense of desertion in the mercantile marine is not abolished by Seamen's Act, § 4 (Comp. St. § 8322), and such desertion entails a forfeiture of all wages due.
3. SEAMEN ⟸34—"DESERTION."
   "Desertion," in the sense of the maritime law, is a quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Desertion.]
4. SEAMEN ⟸24—WAGES—PART PAYMENT AT INTERMEDIATE PORTS.
   A demand is essential to the right to half wages at an intermediate port, under Seamen's Act, § 4 (Comp. St. § 8322), and such demand must be made while the seaman is still in the ship's service.
5. SEAMEN ⟸24—HALF WAGES—PAYMENT AT INTERMEDIATE PORTS.
   As seamen on foreign vessels have no rights under Seamen's Act, § 4 (Comp. St. § 8322), until they arrive within a harbor of the United States, the five-day period which must elapse before demand for half wages may be made thereunder begins to run on the arrival of the ship in such harbor.

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

Suit in admiralty by Constant Janssens and others against the steamship Italier; Vital Delgoffe, claimant. Decree for libelants, and claimant appeals. Reversed.

This action was brought by 11 seamen and firemen on the Belgian steamship Italier, to recover wages and damages for waiting time under R. S. §§ 4529 and 4530, as amended by the Seamen's Act of March 4, 1915 (38 Stat. 1164, 1165, c. 153, §§ 3, 4 [Comp. St. §§ 8320, 8322]).

Libelants had shipped on this Belgian vessel at English and Italian ports for a voyage which had not expired when the Italier put into New York on October 6, 1916. On October 10th, 6 of the libelants caused to be served on the master a written notice as follows: "I hereby demand one-half my wages earned in accordance with section 4530 of the United States Revised Statutes." This notice was dated October 9th, but not served until the day following, for reasons which appear immaterial.

Prior to the service of this paper all the libelants who testified had either left the ship or formed the intention of so doing, and had ceased to work. Some said they went back at night, and to sleep. One man who did not sign the written notice remained aboard until the 10th, when he disappeared without making any proven demand under the statute.

Janssens petitioned for an order allowing proceedings in forma pauperis on October 10th, and on the same day the libel herein was filed, stating that he, "together with the other members of the crew who wished to be joined as colibelants in this action," made demand under section 4530. The verification of the libel then enumerates the names of the 11 libelants. The record contains no evidence that New York was a port where the Italier either loaded or delivered cargo.

The court below gave a decree in favor of some of the libelants (without making any explanation as to why all should not recover, if any did) and directed that in computing the amounts due "the advance notes advanced to the" libelants in England "should not be regarded as a credit to the ship." Claimant appeals.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter and John M. Woolsey, both of New York City, of counsel), for appellant.

L. C. Boehm, of New York City, for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] 1. The Italier is a foreign vessel, and libelants shipped elsewhere than in the United States. Therefore, under The Talus, 248 Fed. 670, 160 C. C. A. 570 (affirmed 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. —, December 23, 1918) the court below erred in directing that no credit should be given to the ship in respect of advances made to the libelants beyond the boundaries of the United States.

[2] 2. It seems to be thought (judging from the tenor of argument in this and similar causes) that the Seamen's Act of 1915 has abolished the offense of desertion in the mercantile marine. While it is true that arrest for desertion, the bodily return of a deserter to his ship, and generally the holding of a seaman to his shipping contract by physical force, are things of the past, even in respect of foreign vessels so far as the United States is concerned (sections 16–18), desertion is still an offense on American vessels, entailing (inter alia) forfeiture of "all or any part of the wages or emoluments which the [deserter] has then earned" (R. S. § 4596, as amended).

"Desertion" is not defined by any act of Congress. Quite possibly the definition of desertion varies in different countries. This record does not inform us whether Belgium defines desertion in any special way. Although the Belgian law would control, if proven (The Nigretia, 255 Fed. 56, — C. C. A. —), we may, in the absence of such evidence, apply the general maritime law.

[3] The definition of desertion "in the sense of the maritime law" is settled, and consists in "a quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty." Cloutman v. Tunison, 1 Sumn. 373, Fed. Cas. No. 2,907, where the subsequent cases are collated. Within this definition we have no doubt on the evidence that all the libelants who made demand for half wages deserted before the presentation of such demand.

[4] 3. It seems, also, to be thought that the demand for half wages under R. S. § 4530, as amended, is a ceremony of no moment, and may be made (as it was made in this case) after the seaman leaves his ship (in Judge Story's phrase) animo dereliquendi. Such is not the case. The seaman's is a lawful engagement and its propriety is to be judged primarily by the law of the ship's flag. But Congress has plainly declared that, when foreign vessels are in harbors of the United States, R. S. § 4530, as amended, shall apply to seamen on such vessels. Therefore such seamen are entitled to one-half of the wages earned down to the time of demand made, and such demand must be made within the territorial jurisdiction of the United States, and at a port where said vessel "shall load or deliver cargo."

[5] But no such demand can be made "before the expiration of nor oftener than once in five days." As seamen on foreign vessels have no rights under this statute until they arrive within a harbor of the United States, it is, we think, evident that the five-day period begins to run upon arrival in such harbor. The intimation to the contrary in The Delagoa (D. C.) 244 Fed. 835, is disapproved.

But, since a deserter may forfeit all his wages, it is also a prerequisite to recovery under the statute that there should be wages due him when he makes demand, and there are no wages due to a deserter.

4. The decision below was therefore wholly erroneous in not finding that those libelants to whom awards were made had either deserted before demand made under the statute, or had never made a demand pursuant to the statute.

5. The defense that there was no evidence that New York was for the Italier a port of either loading or discharging, and that on October 10th five days had not elapsed after arrival in the harbor, is not pleaded, but has been argued. Our view of the point, therefore, is stated rather for future guidance than as dispositive of the present cause.

Decree reversed, and cause remanded, with directions to dismiss the libel.

HANSON v. ROYAL INS. CO.

(Circuit Court of Appeals, Sixth Circuit. December 3, 1919.)

No. 3131.

1. INSURANCE ⟸177—FIRE INSURANCE—POLICY—CONSTRUCTION—"EXPIRATION."
Where fire policy provided that if at the expiration of the policy, or if it should be canceled by the assured, the average time cotton under liability has been at risk shall exceed two days, the assured should pay an additional premium, and the insurer treated the policy at an end because the receiver was appointed for the assured, the insurer's claim to the additional premium can be sustained only on the ground that the receivership was equivalent to a cancellation of the policy by the assured; the term "expiration" in such a contract meaning expiration by lapse of time.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Expiration.]

2. INSURANCE ⟸146(3)—FIRE POLICY—AMBIGUITY.
Where, under a fire policy, it was questionable whether the insurer was entitled to the additional premium claimed, the provisions creating an ambiguity, insurer has the burden of explaining the same.

3. INSURANCE ⟸232—FIRE POLICY—ADDITIONAL PREMIUM—"CANCELLATION."
Where a fire policy provided that it should be void if any change other than by death of assured should take place in the interest, title, or possession of the subject of the insurance, and on a receiver being appointed for the assured the insurer declared the policy void, *held*, that such termination of the policy did not amount to a cancellation of the policy by the assured, so as to entitle the insurer to certain additional premiums.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cancellation.]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

The claim of the Royal Insurance Company was allowed in receivership proceedings against the Gulf Compress Company, and C. C. Hanson, the receiver, appeals. Order reversed, and cause remanded, with directions.

D. H. Bynum, of Indianapolis, Ind., for appellant.
Edward B. Klewer, of Memphis, Tenn., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. The case, shortly stated is this: On September 1, 1907, the insurance company, by a series of policies, insured the compress company, during one year from that date, on account of its liability to carriers for loss or damage by fire upon cotton in bales at certain locations stated in the respective policies. The initial premiums were payable monthly at the rate of 1¼ cents for each bale passing through the compress, as shown by certain monthly statements required from the compress company. On May 30, 1908, while the policies were still in force, the compress company's property passed into the possession of a receiver appointed by the court below

in a creditor's suit. Each policy contained an agreement that, "unless otherwise provided by agreement indorsed hereon or added thereto," it "shall be void if * * * any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise, or if this policy be assigned before a loss."

[1] On June 8, 1908, the insurance company gave notice to the carriers that—

"The Gulf Compress Company having been placed in the hands of a receiver, the policies * * * are null and void from and after the appointment of the receiver, and such action itself avoided the policies."

The premium agreement provided that—

"If at the expiration of the policy, or if the policy be canceled by the assured, the average time cotton under liability has been at risk shall exceed two days, the assured agrees to pay to the insurance company an additional premium of one-half cent per bale for each day or fraction thereof in excess of two days, on each bale of cotton for which the assured has been liable to the transportation lines."

The claim of the insurance company for this additional premium was allowed in the receivership proceeding. The propriety of this allowance is the only question here.

The only ground on which it can even plausibly be contended that the insurer is entitled to the additional premium is that what was done amounted to a cancellation of the policy "by the assured." That the receivership did not work an "expiration" of the policy within the meaning of that contract is clear. The term "expiration," as ordinarily understod in insurance contracts, and where not otherwise defined, means expiration by lapse of time. The policy contains nothing varying this ordinary meaning. Indeed, in the premium agreement quoted the expiration and cancellation of the policy are treated as wholly distinct from each other.

[2, 3] The insurer's actual contention is that the appointment of a receiver, and the latter's possession and operation of the compress company's plant effected a "change * * * in the interest, title, or possession of the subject of insurance," and that such avoidance of the policy, occurring as it did, through no fault of the insurer, amounted to a cancellation "by the assured." But were we to assume, for the purposes of this opinion, that the receivership did avoid the policies, we yet would be unable to agree with the contention that such avoidance amounted to a cancellation by the assured within the meaning of the premium provision; that is to say, within the intention of the parties. The additional premium is provided in either of but two contingencies—"expiration" of the policy or its cancellation "by the assured." The contingency of avoidance by the existence or occurrence of any one of the dozen or more conditions which in this, as in all modern fire insurance policies, effect avoidance, or the "ceasing" of the policy under another provision, are wholly omitted, although the natural course would have been to mention them if meant to be included. Such omission, in the view most favorable to the insurer, created an

ambiguity, the burden of explaining which was on the insurer, as the one who prepared and put out the contract. This burden has not been sustained.

The other provisions of the policy lend no support to the insurer's construction of the expression "canceled by the assured." So far as pertinent, they are opposed to it. The policy provides for its own cancellation in but one of two ways, viz. "at the request of the assured" at any time or "by the company" on five days' notice. Moreover, the return premium provision recognizes a distinction between cancellation and avoidance of a policy in the words:

"If this policy shall be canceled as herein provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned."

For if the three contingencies named were, in the minds of the parties, one and the same thing, there was no occasion to mention but one.

The omission from the premium provision of the contingency of the policy becoming "void" for any of the numerous causes declared to produce that effect is significant. We are constrained to the opinion that cancellation "by the assured" means a cancellation "at the request of the assured" in fact. The latter, so far from requesting cancellation, in fact tried to prevent it by assigning the policies to its receiver, consent to which was refused by the insurer, unless the receiver would guarantee payment of certain claimed premiums accruing before the receivership.

So far as authority for these views may be thought necessary, Davison v. Insurance Co., 189 Pa. 132, 136, 42 Atl. 2, is more or less in point. The conclusion we have reached makes it unnecessary to consider the other defenses urged by the receiver.

The order of the District Court is reversed, and the record remanded to that court, with directions to disallow the claims, so far as involved in this appeal.

WATTS et al. v. CRABB et al.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3207.

1. EQUITY ⇐345—EVIDENCE—VERIFIED ANSWER.
The doctrine that, where an answer under oath is not waived in the bill, the denials in a verified answer as to all matters within the personal knowledge of the party answering must be overcome by the evidence of witnesses, or by one witness corroborated by circumstances equivalent in weight to another witness, did not rest upon any specific rule promulgated by the Supreme Court, but upon the general equity practice.

2. EQUITY ⇐345—VERIFIED ANSWER—EVIDENCE TO OVERCOME.
Regardless of any change which the new equity rules of 1912 might have had on a sworn answer, a decree for complainants in a suit to set aside deeds on the ground that grantor was old and feeble and unduly influenced *held* not open to attack on the theory that a verified answer was filed and such decree could not be based on the testimony of a single wit-

ness; it appearing that the testimony was adequate to support the decree, though more than one witness, or one witness corroborated by circumstances equivalent in weight to another witness, be deemed required.

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Bill by Jerusha Crabb and John Crabb against Homer I. Watts and others. From a decree for complainants (249 Fed. 357), defendants appeal. Affirmed.

The appellee Jerusha Crabb was the daughter of Thomas Watts, who died intestate on April 20, 1914. The appellants Homer I. Watts and Marvel Watts were her half-brothers, and they and she were the only heirs at law of the estate of Thomas Watts. The appellees brought suit in the court below to set aside two deeds purported to have been executed by Thomas Watts on April 14th, four days before his death, by one of which deeds 120 acres of land were conveyed to Jennie Anderson Watts, wife of said Marvel Watts, and by the other deed 320 acres were conveyed to Vernita Watts, the daughter of Marvel Watts, which deeds were not recorded until after the death of Thomas Watts. The complaint alleged that Thomas Watts, at the time of the execution of the deeds, was very old and feeble in mind and body, and incapable of doing business or of making a conscious or intelligent disposition of his property, and that the deeds were without consideration, and were obtained by fraud and undue influence upon the part of the appellants, while said Thomas Watts was sick in bed at the home of Homer Watts; that the only estate of the decedent, aside from the land so deeded, consisted of 80 acres of incumbered land, the value of which was barely sufficient to pay the mortgage thereon and the expenses of the funeral and the administration of the estate of Thomas Watts. The answer denied that Thomas Watts was so feeble in mind or body as to be incapable of doing business or disposing of his estate, and denied the allegation of undue influence, or of any influence, upon him to induce the execution of the deeds. The court, upon the issues and the evidence, sustained the allegations of the complaint, and decreed that the conveyances be set aside.

Will M. Peterson and James H. Raley, both of Pendleton, Or., for appellants.

Alfred S. Bennett, of Salem, Or., and James A. Fee, of Pendleton, Or., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellants point to the fact that the bill of the appellees called for an answer under oath, and that the appellees answered under oath, and they invoke the rule that either two witnesses or one witness with corroborating circumstances are required to outweigh an answer asserting a fact responsive to the bill. The new equity rules of 1912 (198 Fed. xix, 115 C. C. A. xix), which were in effect after February 1, 1913, abrogated all prior equity rules. They contain no provision that an answer shall be verified, and they make no reference to the probative effect of an answer under oath, where the oath is not waived. Campbell v. Northwest Eckington Co., 229 U. S. 561, 33 Sup. Ct. 796, 57 L. Ed. 1330, cited by the appellants, is a case in which the issues were made and the cause was tried and decided before the new equity rules were promulgated. The doctrine that where an answer under oath is not waived in the bill, the denials in a verified answer as to all matters within the personal knowledge of the party answer-

ing must be overcome by the evidence of two witnesses, or by one witness corroborated by circumstances equivalent in weight to another witness, did not rest upon any specific rule promulgated by the Supreme Court, but upon a general rule of equity practice, as stated in 2 Story's Equity, § 1528.

[2] In the present case it is not necessary to decide whether the new equity rules have abrogated that rule of practice, for here the essential facts to establish the appellees' case do not rest upon the testimony of any single witness. Thus the allegation that Thomas Watts was old and feeble in mind, and sick and mentally weak and easily influenced, was sustained by the testimony of several witnesses for the appellees, and the finding of fact indicating undue influence on the part of the appellants is deducible from the testimony of witnesses and the surrounding circumstances. The allegation to which the appellants refer, that "Homer I. Watts and his brother have some arrangement between themselves by which they are to be the real owners and receive the benefits from such land," although it was not proven, is not a material allegation to the relief which is sought in the bill.

About four years before his death, Thomas Watts had executed a will in which he bequeathed $200 to his daughter Jerusha, and divided the remainder of his estate between his two sons. About the 16th of March, 1914, he visited his daughter at her home, and remained there until April 10, 1914. While he was there he sent for his will. After having it in his possession a few days, he destroyed it, and stated to his daughter and his granddaughter, "Now it is done, and they will all share equally." Thereafter he was taken seriously ill, and on April 10th Marvel Watts came and carried him to Homer's house, and there he remained in charge of a nurse and the physician attending him until his death, and there he executed the deeds which are the subject of the suit. Jerusha, her husband, and her daughter all testified in substance that, when Marvel Watts came to take his father away, the latter said:

"If you have come after me to take me down to make any papers, or sign any papers, I won't go e'er a step."

To which Marvel answered:

"Father, we have no such intention as that. It shall be divided equal. I won't influence you to sign anything."

Marvel denied this conversation, but the court below was convinced of the truthfulness of the appellees' testimony. The court below heard all of the testimony in open court. That careful consideration was given to the testimony is evidenced by the opinion which is found in the record. The court found, in the testimony of the nurse and the testimony as to Watts' physical and mental condition, together with the testimony of the defendants, that the deeds were procured from Thomas Watts by fraud and deception and undue influence, and by taking advantage of his enfeebled mental and physical condition, that the deeds were not the voluntary and intelligent act of Thomas Watts, and that in equity and good conscience the deeds were fraudulent and void. We find in the record no ground to disturb that conclusion.

The decree is affirmed.

THE GANOGA.

THE BESSIE.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 177.

TOWAGE ⊂=11(10)—LIABILITY FOR INJURY TO TOW—INSECURE MOORING.

A tug, which left a number of boats in tow fastened to a pier by a slip line over a pile, while she went after others, *held* in fault for injury to one of the boats by collision with another pier after the tow had gone adrift on the rising tide and in a high wind, which caused the line to slip over the top of the pile, on the ground that under the circumstances she should have seen that the tow was more securely fastened.

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

Suit by the Red Star Towing & Transportation Company against the steam tug Ganoga, the Lehigh Valley Transportation Company, claimant, with the boat Bessie, McWilliams Bros., Incorporated, claimant, impleaded. Decree for claimants, and libelant appeals. Reversed.

Burlingham, Veeder, Masten & Fearey, and Chauncey I. Clark, all of New York City (Charles E. Wythe, of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (Dix W. Noel, of New York City, of counsel), for the Ganoga.

Herbert Green, of New York City, for the Bessie.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. February 3, 1917, the tug Ganoga hung up a flotilla of eight light canal boats on a pile at the lower corner of the river end of the Gamecock Pier, Jersey City, to become a part of a larger tow to be subsequently taken to Perth Amboy. The master of the tug ordered the captain of the port hawser boat Bessie, which was nearest the pier, to make his line fast from her bow to the pile, and this was done; the eye of one end of the line being fast to the boat's bitts, the other end, after passing around the pile, being brought back to the bitts and made fast. This is called a slip line, and is generally used because it can be easily let go from the boat without any help from the pier when the tow is ready to start. The tug then left to get more boats, and when she returned found that the whole flotilla had gone adrift and had collided with Pier 1, North River, the boat Red Star No. 19 sustaining damage, for which this libel was filed against the tug. The tug brought in the boat Bessie under the fifty-ninth rule, charging her with fault in the manner of making fast, and charging both her and the Red Star No. 19 with fault for not having anchors.

The time of the arrival of the flotilla at the Gamecock Pier and the time of the return of the tug, when she discovered the drifting, are important with reference to the stage of the tide and the force of the wind. The master of the tug says he arrived at 10:30 p. m. of Feb-

ruary 3d on half flood and upon his return at 1 a. m. of the 4th he found the boats had got adrift. As it was not low water until midnight of the 3d, he could not have arrived at any stage of the flood tide until after midnight. A record of the times of the tug's movements being kept, the claimant could have proved them exactly, if it had chosen to do so. Therefore we adopt the testimony of the master of the Red Star No. 19 that the flotilla arrived at midnight of the 3d and got adrift about two hours afterwards on the rising tide.

The testimony is uncontradicted that when the flotilla was made fast a high wind was blowing it out into the stream, and the weather report shows that at midnight of February 3d the wind was blowing from the southwest at 39, and at 2 a. m. of the 4th at 36, miles an hour, a moderate gale by the Beaufort scale. It is also uncontradicted that the deck of the Bessie was above the top of the pile around which her line was passed, and that the line did not part. The captain of the Bessie testified that the deckhand of the tug passed this line around the pile, and that he saw him pass it under the line of another boat lying at the pier, whose line had a bight around the pile, and that when the tow was brought back he saw that the other boat had merely a slip fast. To accomplish such a thing it would be necessary for those on the other boat to let go their own line and for some person or persons on the pier to get the bight of the line free from the pile and hold the boat against the wind and sea until some other people lifted the Bessie's line from the pile and held the eight boats against the wind and sea until the line of the other boat had been slipped around the pile and the line of the Bessie replaced above it.

The District Judge held that it was physically impossible for the Bessie's line to have slipped over the pile; i. e., that it must have been removed by human agency and replaced in the manner above described. If he was right in this, then neither the Bessie nor the tug would have been at fault. We reject, however, what seems to us to be an extraordinary, motiveless, and almost incredible explanation, in favor of the very natural one, viz. that the Bessie's line led down to the pile and around it, over the line of the other boat, and the Bessie, by tossing and surging on the rising tide, passed it over the top of the pile.

It is quite true that the flotilla was made fast in the usual way by the Bessie and that her line did not part; also that the tug was not an insurer of the tow, but only owed it ordinary care. If the Bessie was at fault in making fast, the tug would not be responsible for any damage caused to her thereby, though it might be to the other boats. McWilliams v. P. & R. Co., 203 Fed. 859, 122 C. C. A. 84. The Bessie's line was good, did not part, and was made fast in the usual way. The negligence, if any, was in the failure to foresee that the Bessie, tossing and surging in such wind and weather, with her deck higher than the top of the pile, would be likely on the rising tide to slip the line over the pile. Under these circumstances we think ordinary care required that a better fast than the usual slip fast should have been made, and that the tug was at fault for not seeing to it, whereas boatmen could not be held at fault for want of such nautical skill.

The claimant of the tug does not press the charge that the Bessie had no anchor, and Red Star No. 19 had none which could be used, so that we need not consider the question.

The decree is reversed, and the court below directed to enter the usual decree in favor of the libelant.

In re HUDFORD CO. OF NEW YORK, Inc.

Petition of ZALKIN.

(Circuit Court of Appeals, Second Circuit. April 16, 1919.)

No. 213.

BANKRUPTCY ⊂=172—PROPERTY PASSING TO TRUSTEE—ASSIGNMENT OF CLAIMS AGAINST UNITED STATES.

Under Rev. St. § 3477 (Comp. St. § 6383), making void any assignment or transfer of an unallowed claim against the United States, a contract under which petitioner furnished automobile parts to bankrupt, to be used in filling a contract with the government, and which provided that all warrants received by bankrupt under its contract should be indorsed by it as agent and delivered to petitioner, *held* void, and such warrants received by the trustee *held* to inure to the benefit of general creditors.

Petition for Revision of Order of the District Court of the United States for the Southern District of New York.

In the matter of the Hudford Company of New York, Incorporated, bankrupt. Petition by Harry Zalkin, trustee, to revise order of District Court. Reversed.

Nathan Friedman, of New York City, for trustee.

Edwards, O'Loughlin & George, of New York City (David G. George and Charles H. Edwards, both of New York City, of counsel), for H. H. Babcock Co.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a reclamation proceeding in bankruptcy. The petition of the H. H. Babcock Company to the referee alleges that on August 28, 1917, it agreed to furnish to the Hudford Company certain automobile bodies and fenders to be used by it in carrying out a contract with the United States government; the Hudford Company agreeing that title to the bodies and fenders should remain in the petitioner until delivery to the government, the warrants to be issued therefor to become the property of the petitioner and to be collected, indorsed and forwarded by the Hudford Company to the petitioner as its agent, any sum over the contract price of the bodies and fenders to be applied to the payment of any balance then due by the Hudford Company to the petitioner, the Hudford Company assigning to the petitioner all its right, title, and interest in its contract with the government and agreeing to give such further assurance to the petitioner as it might deem necessary to carry out the agreement.

The petitioner thereupon furnished 56 automobile bodies and 26

pairs of fenders to the Hudford Company, which it delivered to the government. October 26, 1917, the Hudford Company was adjudicated a bankrupt and its trustee came into possession of government warrants to its order for the sum of $4,370, which he has collected and out of which he has refused to turn over the sum of $4,002.95, due to the petitioner under the contract of August 28, 1917. The prayer of the petition was that the trustee be required to turn over the said amount with interest to the petitioner.

The referee denied the petition, with costs, on the ground that the agreement of August 28, 1917, made before allowance by the government of the Hudford Company's claims and before issue of any warrants, was in contravention of section 3477, Rev. St. U. S., which reads as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

The H. H. Babcock Company having filed a petition for review in the District Court, the District Judge held that although the agreement of August 28, 1917, was forbidden by section 3477, nevertheless it constituted a conditional sale, binding the proceeds of the warrants for the goods in the hands of the trustee, and as the property belonged to the petitioner, and not to the bankrupt, the transfer within four months of the filing of the petition in bankruptcy was not a preference under section 60b of the Bankruptcy Act.[1] Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. We think the learned judge erred. The Babcock Company knew that its title to the bodies, etc., could not be reserved, and was not intended to be reserved, as against the government, and that the only security it could expect was in the claim when allowed, and in the warrants to be issued by the government to the Hudford Company. But the Supreme Court has in the most explicit and unmistakable terms pronounced all such agreements, direct or indirect, absolutely void under section 3477. National Bank of Commerce v. Downie, 218 U. S. 345, 31 Sup. Ct. 89, 54 L. Ed. 1065, 20 Ann. Cas. 1116. In that case the bank had advanced money to the bankrupt upon the security of 16 claims against the United States for materials furnished by the bankrupt, none of which claims had been allowed, and for none of which warrants had been issued. The court held that the assignments were absolutely void, and the bankrupts were still the owners of the claims, which passed, not to the bank, but to their general creditors, as if no assignments had been made. In view of this decision

[1] Act July 1, 1898, c. 541, 30 Stat. 562 (Comp. St. § 9644).

the Court of Appeals of New York in Manhattan Co. v. Paul, 216 N. Y. 481, 111 N. E. 76, overruled its former decision to the contrary in York v. Conde, 147 N. Y. 486, 42 N. E. 193, and held that the plaintiff could not recover against the defendant for conversion under the following circumstances: The plaintiff advanced moneys to a corporation upon the security of an assignment by it of claims against the United States government which the defendant, the corporation's treasurer, agreed, as agent of the plaintiff, to collect, indorsing the warrants to it, instead of which he indorsed and deposited them in the borrower's bank. This was not even a case of bankruptcy, involving a preference of the lender over general creditors. Such results may appear inequitable, but the act of Congress as interpreted by the Supreme Court make them ineluctable.

The decree is reversed.

SHILTER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3252.

1. INDICTMENT AND INFORMATION ⟸202(2, 5)—DEFECTS—CURE BY VERDICT.
A defendant who waits until after verdict before making objection to the sufficiency of the indictment, waives all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn; but defects in substance, or failure of the indictment to state facts to constitute an offense, are not cured by verdict.

2. ARMY AND NAVY ⟸40—ESPIONAGE ACT—INDICTMENT—SUFFICIENCY.
An indictment charging that defendant, in a named city and between January and May, made seditious statements with intent denounced by the Espionage Act (Comp. St. 1918, § 10212a et seq.), and thereby willfully, unlawfully, and knowingly attempted to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States, is insufficient, where there was nothing to connect the acts of defendant directly or indirectly with such military or naval forces.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Edward S. Farrington, Judge.

Karl Shilter was convicted of attempting to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States, in violation of the Espionage Act, and he brings error. Reversed and remanded, with instructions to discharge defendant.

Arnold W. Liechti, of San Francisco, Cal., for plaintiff in error.

Annetta A. Adams, U. S. Atty., of San Francisco, Cal., and John W. Preston, Sp. Asst. Atty. Gen., and P. H. Johnson, Asst. U. S. Atty., of Sacramento, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted under an indictment which charged that on "divers dates between the

1st day of January, 1918, and the 6th day of May, 1918," at Sacramento, Cal., he did "then and there unlawfully, willfully, and knowingly attempt to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States, with the intent on the part of him, the said defendant, to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies; that is to say, the said defendant did then and there make the following seditious statements, to wit." Then follow the statements. There was no demurrer to the indictment, no exceptions were taken at the trial, and no motion in arrest of judgment was made.

[1] The plaintiff in error raises in this court for the first time the objection that the indictment is fatally defective for want of averments setting forth the circumstances under which the seditious utterances were made and the persons to whom they were made. Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390, is authority for the proposition that a defendant who waits until after verdict before taking an objection to the sufficiency of the indictment waives all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn. We take that decision as expressing in full the nature of the objections to an indictment which may be waived by nonaction in a trial court, objections to the form in which the elements of the crime are stated, and objections to the fact that the indictment is inartificially drawn; and it follows that objections which affect the substantial rights of the defendant are not thus waived, and they may be presented for the first time on writ of error. "Defects in substance are not cured by verdict" (22 Cyc. 485), nor is a failure to state facts sufficient to constitute an offense cured by verdict (22 Cyc. 487). The most that can be claimed in the way of waiver is that it is too late to urge an objection in an appellate court, "unless it is apparent that it affected the substantial rights of the accused." Holmgren v. United States, 217 U. S. 509, 523, 30 Sup. Ct. 588, 591 (54 L. Ed. 861, 19 Ann. Cas. 778); United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; Morris v. United States, 168 Fed. 682, 94 C. C. A. 168. In Oesting v. United States, 234 Fed. 304, 148 C. C. A. 206, this court said:

"By the defendant's failure to demur to an indictment, or to enter a motion to quash, or a motion in arrest of judgment after verdict, he waives his right to object in an appellate court to any matter which goes to the form in which the offense is stated; but he does not waive the right to raise the objection that the indictment is lacking in some essential element to constitute the offense which is charged."

[2] There is nothing in the indictment here to connect the acts of the accused directly or indirectly or in any way with the military or naval forces of the United States, and therefore there is nothing to advise a court that an offense has been committed against the United States. All that the indictment charges is that the defendant in a named city and at some time between January and May made certain seditious statements, with the intent denounced by the Espionage Act

(Act June 15, 1917, c. 30, 40 Stat. 217 [Comp. St. 1918, § 10212a, et seq.]), and thereby unlawfully, willfully, and knowingly attempted to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States. Such an indictment is insufficient, we think, to sustain a judgment of conviction.

The judgment is reversed, and the cause is remanded to the court below, with instructions to discharge the plaintiff in error.

WESTINGHOUSE ELECTRIC & MFG. CO. v. BINGHAMTON RY. CO.

In re PHELPS et al.

(Circuit Court of Appeals, Second Circuit. April 29, 1919.)

No. 238.

JUDGMENT ⊂⊃713(1)—PERSONS CONCLUDED—ORDER INSTRUCTING RECEIVER.

Findings of fact and law, stated in an order of a federal court directing its receiver for an electric railway company, operating under franchises from different municipalities, to apply to the state Public Service Commission for an increase of rates of fare, *held* not an adjudication binding upon the municipalities.

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

Suit in equity by the Westinghouse Electric & Manufacturing Company against the Binghamton Railway Company. The City of Binghamton and Town of Union appeal from an order made on application of William G. Phelps, receiver. Appeal dismissed.

For opinion below, see 255 Fed. 378.

John Marcy, Jr., Corp. Counsel, and Neil G. Harrison, Asst. Corp. Counsel, both of Binghamton, N. Y., for appellant city of Binghamton.

Edwin H. Moody, of Binghamton, N. Y. (Douglas V. Ashley, of Binghamton, N. Y., of counsel), for appellant town of Union.

Curtiss, Keenan & Tuthill, of Binghamton, N. Y. (Abram J. Rose, of New York City, of counsel), for receiver.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. The receiver of the Binghamton Railway Company applied to the District Court for the Northern District of New York, which appointed him, for an order authorizing him to apply to the Public Service Commission of the state of New York, Second District, for an increase of rates of fare from 5 cents to 7 cents per passenger and an order holding that the consents of the city of Binghamton, village of Port Dickinson, Johnson City, Endicott, Union, and town of Union were not necessary to the validity of such an increase, and that they show cause why the prayer of the petition should not be granted.

The municipalities appeared specially on the return day to object to the jurisdiction of the court, on the ground that the question of

raising rates must be submitted to and determined by the Public Service Commission primarily, and that the railway company was under contract with the municipalities to carry at 5 cents per passenger, which contract rate could not be changed by any one without their consent, in accordance with the decision of the Court of Appeals in the Quinby Case, 223 N. Y. 244, 119 N. E. 433. The District Judge overruled these objections and granted the order to show cause, whereupon the municipalities thereafter took part in the proceedings before him. This was, under the circumstances, no waiver of their objections to the jurisdiction.

In considering the prayer of the petition, the District Judge would naturally need to satisfy himself: First, that an increase in rates was proper and necessary; second, that the relations between the railway company and the municipalities were such that the Public Service Commission, if applied to, would have jurisdiction consistently with the decision of the Court of Appeals of the state of New York in the Quinby Case, supra.

January 22, 1919, after a hearing, the District Judge entered an order, from which the city of Binghamton and the town of Union take this appeal.

The order departs from the requirements of equity rule 71 (198 Fed. xxxviii, 115 C. C. A. xxxviii), in that it begins by the recital of all the procedural steps taken in the proceeding, follows this with a statement of the evidence and a finding of fact thereon as to the cost of carrying passengers, followed by a conclusion of fact that the rate ought to be increased, followed by a conclusion of law that the company's franchises, properly construed, do not constitute a contract fixing the rates of fare.

We think the Public Service Commission, if applied to by the receiver, would have jurisdiction to decide independently these findings of fact and law set forth in the order, and that they can only be regarded as enabling the court to intelligently instruct its receiver in respect to an application to be made to the Public Service Commission. The order in these respects does not constitute res adjudicata as to the municipalities at all.

The only part of the order which we think material on this appeal is article 8, which reads:

"Eighth. That in view of the facts and existing conditions, which are liable to continue, and so far as human foresight can determine will continue for at least two years without substantial change, the receiver, William G. Phelps, is therefore hereby ordered and directed to apply to the Public Service Commission, Second District, of the state of New York, for an order authorizing an increase in the rate of fare to be charged by the Binghamton Railway Company from five cents to six cents, to be in operation during the continuance of the war and for two years thereafter, and to incur the necessary expense of such application."

This being purely discretionary, the appeal is dismissed, with costs.

THE THOMAS J. O'BRIEN.

THE PERTH AMBOY.

(Circuit Court of Appeals, Second Circuit. May 14, 1919.)

Nos. 220, 221.

COLLISION ⇐95(2)—MEETING TOWS—FAULTS.

Two tugs, with tows, meeting and passing at Throgg's Neck at the same time as the passing of another tow, both *held* in fault for a collision between the tows; one for failing to give more room for the other tows to pass, and the other for not slowing when it was apparent that the space between the other tows was not wide enough for safe passage.

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

Suits for collision by the Lehigh Valley Transportation Company and by Lewis J. Schussler against the steam tug Thomas J. O'Brien, O'Brien Bros., claimants, with the steam tug Perth Amboy impleaded. Decree holding the Perth Amboy solely in fault, and her claimant appeals. Modified.

On a March evening, after running lights were lit, but before night had really set in, with the tide flood and the wind strong from the northwest, the ocean-going tug Perth Amboy, bound into New York Harbor, was approaching Throgg's Neck with a tow whose length from bow of tug to stern of last boat was approximately 900 feet. At the same time the tug Gallagher was also approaching Throgg's Neck from New York. She had in tow five light sand scows arranged tandem in such wise that from the bow of the tug to the end of the last boat was not over 700 feet. Simultaneously the tug O'Brien, with one boat on a hawser (length of tow measured as above not over 300 feet), was traveling in the same direction as the Gallagher, slightly astern of that tug's tow, and overtaking the Gallagher rather rapidly.

For the heaviest vessels of this flotilla the channel off Throgg's Neck is upwards of three-eighths of a mile wide, and all boats either entering or leaving Long Island Sound and following the customary channel must round the red buoy off Throgg's Neck. The Gallagher and Perth Amboy saw each other timely and agreed to pass starboard to starboard. Consequently the Gallagher kept as close to the Throgg's Neck side of the channel as was proper and rounded the red buoy close to; but the Perth Amboy scarcely changed her course. She did go slightly to port, but substantially navigated as she would have done, had neither the Gallagher nor the O'Brien been about to pass her. Some time after the exchange of whistles between Perth Amboy and Gallagher, similar whistles were blown by the Perth Amboy and O'Brien.

While rounding the red buoy aforesaid, the wind naturally caused the light tow of the Gallagher to stream over toward the Perth Amboy's course, while the same wind, acting on the Perth Amboy's tow before she rounded the buoy, tended to keep that tow in line with its own tug. Thus, while the tugs Perth Amboy and Gallagher passed each other with a good clearance, their tows were bound to pass by a comparatively small margin, and there was nothing to prevent the O'Brien perceiving that such would be the case. Nevertheless the O'Brien did not keep behind the Gallagher, but continued into the narrow, and probably narrowing, channel way between the two tows. In result her tow came in collision with one of the boats in charge of the Perth Amboy, both vessels were injured, and these libels were filed to recover damages therefor.

The Perth Amboy and her tow are owned by the same corporation. The court below held the Perth Amboy solely at fault, and dismissed the libel of

her owners, and sustained that of the owner of the O'Brien's tow against the Perth Amboy alone. Thereupon the owner of the latter tug took these appeals.

Harrington, Bigham & Englar, of New York City (George E. Hargrave, of New York City, of counsel), for the Lehigh Valley Transportation Co.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for The Thomas J. O'Brien.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. We agree with the court below that the Perth Amboy was at fault. She sought and understood the intention of both the Gallagher and O'Brien. There was no reason why she should not have given them both room to make a starboard to starboard passage; there was plenty of water and plenty of time. A majority of this court, however, are also of opinion that the O'Brien was at fault, because she saw, or ought to have seen, that the Perth Amboy was not giving her as much room as she needed under existing conditions of wind and tide, there was no reason for her endeavoring to pass the Gallagher while rounding Throgg's Neck, and she therefore navigated negligently under the circumstances in endeavoring to pass between the two other tows. It is a case of close shaving, and The Volunteer, 242 Fed. 921, 155 C. C. A. 509, is applicable.

The decrees appealed from are modified, so as to hold the O'Brien also at fault, and the causes remitted, with directions to enter decrees not inconsistent with this opinion. The appellant will recover the costs of this court.

FIRST NAT. BANK OF CINCINNATI v. BEAMAN et al.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1918.)

No. 3165.

TAXATION ⟸11—BANK STOCK—EXCLUSION FROM ASSETS OF FEDERAL RESERVE BANK STOCK—STATUTE.

Despite Federal Reserve Act Dec. 23, 1913 (Comp. St. §§ 9785–9805), under Rev. St. § 5219 (Comp. St. § 9784), stockholders of a national bank were not entitled, for purposes of the assessment of state, county, and municipal taxes, to any deduction of the value of their holdings on account of the bank's holdings of Federal Reserve Bank stock.

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

Suit in equity by the First National Bank of Cincinnati against Edmund S. Beaman, Auditor, and Charles Cooper, Treasurer, of Hamilton County, Ohio. From a judgment for defendants (First Nat. Bank of Cincinnati v. Durr, 246 Fed. 163), plaintiff appeals. Affirmed.

John C. Healy, of Cincinnati, Ohio, for appellant.

W. M. Locke and Smith Hickenlooper, both of Cincinnati, Ohio, for appellees.

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

PER CURIAM. Plaintiff in error brought suit to restrain the collection of state, county, and municipal taxes assessed by the taxing authorities of Hamilton county, Ohio, under sections 5407 and following of the General Code of Ohio, against the stockholders of plaintiff bank upon the shares of the capital stock of that bank held by such stockholders, respectively, upon the contention that the assessments were unlawful, in that, in valuing the shareholdings there had not been excluded from the assets of the bank the stock held by it in the Federal Reserve Bank, under the provisions of Federal Reserve Act Dec. 23, 1913, c. 6, 38 Stat. 251 (U. S. Comp. St. 1916, §§ 9785–9805).

The crucial question presented is whether such exclusion is required by section 7 of the Federal Reserve Act, which in terms exempts Federal Reserve Banks, including the capital stock and surplus therein, and the income derived therefrom, from federal, state, and local taxation, except taxes upon real estate, and section 26 of that act, which repeals all provisions of law inconsistent with or superseded by any of the provisions of that act, to the extent of such inconsistency or superseding, or whether, on the other hand, the power of taxation is governed by section 5219 of the Revised Statutes of the United States (U. S. Comp. Stat. 1916, § 9784), which, as construed by the Supreme Court, expressly authorizes taxation by the states of the value of shares of national bank stock held by stockholders therein, without deduction on account of the fact that the bank's assets include securities of the United States which are declared by the statute authorizing them to be exempt from taxation by or under state authority. Act Feb. 25, 1862, 12 Stat. c. 33, pp. 345, 346; Rev. Stat. § 3701 (U. S. Comp. Stat. 1916, § 6816).

Judge Sater, who presided in the District Court, in the course of a well-reasoned opinion (First Nat. Bank of Cincinnati v. Dorr, 246 Fed. 163) reached the conclusion that section 5219 of the Revised Statutes governed, and thus that the bank's stockholders were not entitled for purposes of tax assessment, to any deduction from the value of their stockholdings on account of the bank's holding of Federal Reserve Bank stock. The bill was accordingly dismissed.

We are satisfied, not only with the correctness of this conclusion, but with the reasoning of the opinion on which the conclusion is based, and are content to affirm the judgment upon that opinion. We think it clear that Congress intended to place a national bank's holdings of Federal Reserve Bank stock upon precisely the same basis as its holdings of government bonds, so far as exemption from taxation is concerned, and thus not to extend such exemption to the taxation of shares of national bank stock held by stockholders therein.

RIETZ v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 13, 1919.)

No. 5212.

ARMY AND NAVY ⇐40—VIOLATION OF ESPIONAGE ACT—SUFFICIENCY OF EVIDENCE.

Evidence *held* to sustain a conviction for violation of the Espionage Act (Comp. St. 1918, § 10212c), by using language with intent to obstruct recruiting and enlistment.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Criminal prosecution by the United States against Edwin Rietz. Judgment of conviction, and defendant brings error. Affirmed.

Norman B. Bartlett and Lester T. Van Slyke, both of Aberdeen, S. D., for plaintiff in error.

Robert P. Stewart, U. S. Atty., of Deadwood, S. D. (Edmund W. Fiske, Asst. U. S. Atty., of Sioux Falls, S. D., and George Philip, Asst. U. S. Atty., of Rapid City, S. D., on the brief), for the United States.

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

AMIDON, District Judge. The defendant was convicted upon an indictment charging him with violating the second and third clauses of section 3 of the Espionage Act (Act June 15, 1917, c. 30, tit. 1, 40 Stat. 219 [Comp. St. 1918, § 10212c]). Counts 2 and 5 charge the use of certain language for the purpose of causing disloyalty, insubordination, mutiny, and refusal of duty in the military forces, in violation of clause 2 of the section referred to; counts 3 and 6 charge the use of the same language with intent to willfully obstruct the recruiting and enlistment service, in violation of clause 3. As some of the language is offensive, we do not deem it necessary to set it out. Both the language and the circumstance under which it was used were, in our judgment, of a character to justify the court in submitting the case to the jury under counts 3 and 6 of the indictment. As the punishment was not greater than that permitted upon either count, and the sentences run concurrently, we do not express any opinion as to counts 2 and 5.

The errors relied upon have all been ruled, in decisions filed since the writ was sued out in the present case, adversely to the defendant, both by this court and the Supreme Court. Doe v. United States, 253 Fed. 903, — C. C. A. —, O'Hare v. United States, 253 Fed. 539, — C. C. A. —; Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. —; Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. —; Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. —.

The judgment is affirmed.

TAMA MIYAKE v. UNITED STATES et al.

(Circuit Court of Appeals, Ninth Circuit. May 12, 1919.)

No. 3268.

1. ALIENS ⟸54—DEPORTATION—DISMISSAL OF PROCEEDINGS IN TERRITORIAL COURT.

Dismissal of proceedings in the district court of Honolulu under the laws of Hawaii against a Japanese woman on the charge she was keeping a house of ill fame, resorted to for the purpose of prostitution, was not necessary to give the immigration officials the right to proceed against the woman for her deportation, and her acquittal by a jury, had she been tried, would have been no obstacle to her deportation, so that dismissal of the proceedings in the territorial court did not deprive her of her constitutional right to trial by jury.

2. ALIENS ⟸51—DEPORTATION—"ENTER."

A Japanese prostitute, a resident of Hawaii before the treaty of annexation, was not immune from deportation under the statute on any ground that she did not "enter" the United States, within its purview.

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

Appeal from the District Court of the United States for the District of Hawaii; Horace W. Vaughan, Judge.

Petition for writ of habeas corpus by Tama (or Taka) Miyake against the United States and Richard L. Halsey, Inspector in Charge of the Immigration Station of the United States for the Port of Honolulu. From an order denying the writ and dismissing the petition, petitioner appeals. Judgment affirmed.

Charles Carroll Bitting, of Honolulu, T. H., for appellant.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., and Ben F. Geis, Asst. U. S. Atty., of Willow, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellant, a Japanese alien, was ordered deported from the United States by the immigration authorities at Honolulu, Hawaii, on the ground that she was found receiving, sharing in, and deriving benefit from the earnings of a prostitute or prostitutes, and that she had been found connected with the management of a house of prostitution. On appeal to the Department of Commerce and Labor, the order of deportation was affirmed.

At the time when the deportation proceedings were begun against her, the appellant was under arrest and was about to be tried in the district court of Honolulu under the laws of Hawaii on the charge that she was keeping and maintaining a house of ill fame used or resorted to for the purpose of prostitution. Those proceedings were dismissed, and on the same day the immigration authorities proceeded against her for deportation. She filed a petition for a writ of habeas corpus in the United States District Court for Hawaii, on which an order was issued to show cause, and on the hearing on the return to the writ it

was ordered that the writ be denied and that the petition be dismissed. From that order the appeal is taken.

[1] It is contended that by the dismissal of the proceedings in the territorial court the appellant was deprived of her constitutional right to a trial by jury. We agree with the court below that the dismissal of those proceedings was not necessary to give the immigration officials the right to proceed against the appellant as they did, and that an acquittal of the appellant by a jury, if she had been thus tried and acquitted, would have been no obstacle to the deportation proceeding. Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967.

[2] The second contention is that the appellant was not subject to deportation under the statute, since she was a resident of Hawaii before the treaty of annexation, and did not "enter" the United States within the purview of the statute. That contention was made in United States v. Kimi Yamamoto, 240 Fed. 390, 153 C. C. A. 316, and United States v. Sui Joy, 240 Fed. 392, 153 C. C. A. 318, and adversely decided by this court.

The judgment is affirmed.

MILLER RUBBER CO. v. DE LASKI & THROPP CIRCULAR WOVEN TIRE CO.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1919.)

No. 3220.

1. PATENTS ⊂=328—TIRE-WRAPPING MACHINE—INFRINGEMENT.
The DeLaski and Thropp patent, No. 1,011,450, relating to a tire-wrapping machine, claims 1, 2, 3, 4, 7, 8, 10, 11, 13, and 20, *held* infringed by defendant by the use of a machine purchased by, and of two machines built for, it.

2. PATENTS ⊂=317—INFRINGEMENT—INJUNCTION.
Where the evidence warrants the conclusion that the infringement of patent involved in the construction and use of machines by defendant was purposeful and inexcusable, and committed under circumstances calculated to arouse just apprehension that it would be persisted in, the remedy is to be found in equity and injunction.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit in equity by the De Laski & Thropp Circular Woven Tire Company against the Miller Rubber Company. From a decree for plaintiff, defendant appeals. Affirmed.

Wm. F. Hall, of Washington, D. C., for appellant.

E. Clarkson Seward, of New York City, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This suit grew out of alleged infringement of letters patent No. 1,011,450, issued December 12, 1911, to Albert De Laski and Peter D. Thropp, assignors to the De Laski &

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

Thropp Circular Woven Tire Company, plaintiff appellee. The Miller Rubber Company, defendant appellant, denies both invention and infringement. A preliminary injunction was granted, and later the cause was tried in open court upon its merits. This resulted in an opinion and decree adjudging validity of the patent as to the claims in suit (1, 2, 3, 4, 7, 8, 10, 11, 12, 13, and 20), and their infringement, and also in the present appeal.

The invention relates to a tire-wrapping machine; and in the Third Circuit the same claims of the patent as are in issue here were held valid and infringed. De Laski & Thropp Circular Woven Tire Co. v. William R. Thropp & Sons Co. (D. C.) 218 Fed. 458, affirmed upon appeal of Thropp & Sons Co. in 226 Fed. 941, 141 C. C. A. 545 (C. C. A. 3). Before the instant suit was commenced, appellant had purchased of appellee one of its make of tire-wrapping machines and is still operating it. Appellant had also purchased of the William R. Thropp & Sons Company a tire-wrapping machine which appellee claims was like the infringing device involved in the Third Circuit suit before cited; and appellant had also caused to be constructed, and it is still using, two tire-wrapping machines which appellee maintains were built in accordance with the patent in suit. The last three machines are the basis of the charge of infringement. We thus come to the question of validity of the patent in suit.

We cannot think it necessary or appropriate to discuss the question of invention. The devices alleged to be infringements in the instant case are so nearly related in form and substance to the device condemned as an infringement in the case passed on in the Third Circuit, and the opinions there rendered by the District Court and the Court of Appeals alike are so full and so well considered, as to persuade us that another opinion on the subject of validity of the patent could serve no useful purpose. The present case is "peculiarly one for the application of the doctrine of comity." Courtney v. Croxton, 239 Fed. 251, 152 C. C. A. 239 (C. C. A. 6). It is true, as regards the prior art, that appellant relies on some patents that do not appear in the opinions of the Third Circuit case. Assuming that appellant's new citations are all relevant and that the excluded Midgley patent was admissible, we are unable to find in them anything of present importance in view of the patents considered in those opinions.

The infringement depends upon whether the use of the machines which appellant admittedly operated, in addition to the one it purchased of appellee, included the pressure head or its equivalent of the patent in suit. The pressure head is composed of mechanism disposed above and below the apex of an arch frame extending upwardly from the surface of the table carrying the tire and its assembled parts during the wrapping operation. The mechanism comprises (1) a tripod suspended within the arch, having rollers mounted on its lower ends, and designed to transmit heavy pressure to the mold and the mold rings and through them to the tire, in order to prevent dislodgement and expansion of the tire in the wrapping process; and (2) appliances for exerting and releasing such pressure and consisting either of a screw engaging the top of the tripod and operated by a wheel, or of a cylinder and piston

disposed at the top of the tripod and operated by compressed air or steam. The pressure heads in dispute here are all of this latter type.

There are several remarkable features touching the use of this pressure head. After appellant put into operation the machine it had bought of appellee, it purchased and used the Thropp & Sons Company machine; later, although it had meanwhile been notified by appellee that it was infringing the patent in suit, appellant employed another manufacturer to construct two machines substantially like the machine it had acquired of appellee, and put them into operation. We think the evidence fairly shows that the machine so acquired of Thropp & Sons Company and the machines so constructed each contained this pressure head; indeed this is scarcely open to doubt in view of two corroborating circumstances: First, that after March, 1915, possibly after the Third Circuit case was ultimately decided (August 9, 1915), Thropp & Sons Company notified appellant to remove the pressure head from the machine purchased of it, if the machine was still in use; and, second, some months before the instant suit was begun, appellant was advised by its own counsel to remove the pressure heads from the two machines it had caused to be constructed. It is not necessary to state the inferences to which this situation gives rise. However, appellant seeks in several ways to show that what happened did not amount to material infringement; and it insists that the appellee should be denied the right to maintain its present action in equity, and be remitted to an action at law.

It was sought to show, for example, that the machine obtained from Thropp & Sons Company was never used in a commercial sense; that is, it was only used for wrapping a small number of tires, and this "experimentally." The machine was purchased in May, 1913, and appellant's witnesses differ as to the length of time it was in use; its superintendent saying that it was not used after September of that year, and its assistant engineer saying that he knew it was not used after January, 1914. It seems to have been kept in the tire-wrapping room for about two years, when it is said it was "scrapped"—i. e., placed in the salvage department—the superintendent testifying:

"At the time this suit was brought the machine was in the salvage department. I cannot tell you why we did not send it back and ask the return of our money, when we found it was not satisfactory. I think that just slipped my mind; if I had thought of it earlier, I might have sent it back, don't you know. The machine cost $1,500."

Whatever else might be said of such a showing, it is inconsistent with the practically admitted length of time the machine was kept in use, and moreover, it is observable that no claim is made that the pressure head was ever removed.

The showing made as to the two machines appellant caused to be constructed is different. Admittedly they were installed and put into use in March, 1915. Appellant offered testimony to the effect that the pressure heads of the machines were removed before the instant suit was commenced (September 17, 1915); but its testimony is indefinite as to the time of removal, ranging from two weeks after the machines were placed in the tire-wrapping room, until the "summer" of 1915.

It is enough to say of this that appellee presented testimony which in our view is convincing that the machines were regularly operated with their pressure heads until at least October, 1915—something like a month after this suit was begun.

Appellant seeks in another way, however, to meet the charge of infringement as respects the two machines so constructed for it. It insists that the valves of these machines must be presumed to have been like those of the machine it had purchased of appellee in 1911; and it offered testimony to the effect that the valves within the pressure-head mechanism of the original machine do not admit of downward pressure but only of upward pressure, claiming that they are three-way, instead of two-way, valves. This is to urge that appellee manufactured and sold to appellant a machine which was not constructed in accordance with the patent in suit; yet it is shown in appellee's opening brief, and is not contradicted, that the secretary and general manager of appellant stated, in an affidavit filed under the motion for preliminary injunction in this cause, that appellee had represented that it "was manufacturing under" the patent in suit, and that the affiant further said:

"In general construction, such machine [the one purchased of appellee] is substantially like the machine of the patent as defined by the claims in suit. * * * This machine was installed in the tire-wrapping department of" appellant "and has been used continuously since about the 1st of January, 1912, in the commercial production of automobile tires."

The patent in suit—in specification, drawings, and claims alike—clearly shows, and nothing to the contrary is suggested, that its pressure-head mechanism provides for both downward and upward pressure largely in excess of the mass weight of the tripod. It appears that many machines of appellee's make have been sold and put into operation. Appellee's expert testified that he had examined and tested some of these machines with great care, and had found that where a five-inch piston was used the pressure exerted on the tire was something like 1,700 pounds; and the pressure mechanism of the machine appellant bought of appellee has a five-inch piston. The natural inference then—indeed, the presumption—is that the pressure capacity of this machine was the same as that of the other machines produced by appellee; and any claim that appellant's particular machine was not constructed according to the patent, that it was exceptional in this regard, ought to be supported by clear and convincing testimony. There is not the slightest showing that appellee ever built or sold any other machine with this exceptional feature, and we are not satisfied that it did so in this instance.

What is shown touching the presence of three-way valves in the machine obtained from appellee is that Mr. Brucker, appellant's assistant mechanical engineer, discovered them, and was "surprised" by the discovery, just before the trial of this cause in the court below, some six years after appellant had put the machine into operation; but, upon pure hearsay, he stated that "at one time on this original Thropp machine * * * there had been such [three-way] valves with one of the ports plugged up with lead, and that the lead would blow out sometimes." It is to be inferred that this reference to "Thropp machine"

meant the machine obtained of appellee, and it is clear that the valves alluded to were in practical effect two-way valves, since the statement is only that the "lead would blow out sometimes"; and this implies that each port so filled with lead was closed again in the same way, and also is suggestive of what a simple matter it would have been to replace the three-way valves with two-way valves. The witness illustrated his understanding of the valves by a sketch which appears in the record, and stated that "when the air was turned on * * * there was no pressure forcing this tripod down." Another witness in substance testified to the same result, though not with the particularity of the first one.

It will be observed that according to these witnesses the effect of the introduction of compressed air into the cylinder was to exert upward, but not downward, pressure. This would seem to signify that no compressed air was ever introduced into the cylinder through its upper port, and hence that compressed air was not used to cushion the action of the piston in its upward movement. Mr. Waterman, appellee's expert witness, testified:

"If plaintiff's [appellant's] machine had a three-way valve arranged as per Mr. Brucker's sketch, there would be nothing to bring this head down gradually. At the time of going up the action would be to raise the head, but there would be nothing to prevent knocking the head out when it got up. It would hit the top of the cylinder like a hammer, if it had force enough to push it up, and in coming down with the valves arranged as Mr. Brucker has shown them in his sketch there is complete equalization of pressure. Consequently there is nothing to prevent it from literally falling down. * * * Such action as here shown is entirely impracticable."

We think this interpretation of the conditions described by appellant's witnesses is manifestly right. It hardly is conceivable that such conditions could ever have existed save only for the time necessary to rectify them; and the only possible explanation of their existence, assuming that they did exist, is to be found in the hearsay testimony before pointed out. On that theory any port, the lead filling of which had been "blown out," could readily be refilled and the valve restored in effect to a two-way valve. Upon any rational view, then, of the evidence, it must result that the machine obtained of appellee was built and substantially maintained in accordance with the patent in suit. We may therefore concede the presumption claimed by appellant that the valves of the two new machines were like those of the old machine; but we must add that the clear tendency of the evidence is that the new machines were built according to the showing of the patent, and the fact already stated that appellant was advised by its own counsel to remove the heads of these machines is of itself a contradiction of its present contention that they were equipped with three-way valves. If the views thus expressed in relation to the valves of the old machine and those of the two new machines are at all correct, they are a complete answer to a claim urged by appellant that the pressure-head mechanism of the patent in suit is not necessary to the wrapping of its particular type of tire. Argument is not necessary to show the inconsistency of this claim with the years of use appellant has actually made of the old machine, not to speak of the use made of the new machines.

[1, 2] It results that appellant's testimony fails to avoid the effect of its use alike of the Thropp & Sons Company machine and the two machines built for it; and we regard such use, particularly of the last-mentioned machines, as amounting to material infringement. This conclusion is strengthened by that of the trial judge, who saw and heard the witnesses while they were testifying. We are constrained to say, moreover, that the evidence warrants the conclusion that the infringement involved in the construction and use of the two new machines was purposeful and inexcusable, and was committed under circumstances calculated to arouse just apprehension that it would be persisted in. Whatever, then, the extent of infringement may ultimately prove to be, we agree with Judge Westenhaver that in the circumstances here shown the remedy is to be found in equity and through process of injunction. General Electric Co. v. New England Electric Mfg. Co., 128 Fed. 738, 740, 63 C. C. A. 448 (C. C. A. 2); Woodworth v. Stone, 3 Story, 749, 752, Fed. Cas. No. 18,021, opinion by Mr. Justice Story; Johnson v. Foos Mfg. Co., 141 Fed. 73, 79, 72 C. C. A. 105 (C. C. A. 6); Westinghouse Mach. Co. v. Press Pub. Co., 127 Fed. 822, 827 (C. C.).

The decree must be affirmed.

NELSON v. LLOYD MFG. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 9, 1919.)

No. 3206.

1. PATENTS ⟸328—VALIDITY—TANK HEATER.
The Nelson patent, No. 836,526, for a tank heater, *held* void for anticipation and lack of invention.

2. COSTS ⟸13—DISCRETION OF COURT IN EQUITY.
Costs in equity cases are within the sound discretion of the court.

Appeal from the District Court of the United States for the Northern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by Nels M. Nelson against the Lloyd Manufacturing Company and Ira W. Rowell. Decree for defendants, and complainant appeals. Affirmed.

C. B. Gillson and Louis K. Gillson, both of Chicago, Ill., for appellant.

Arthur Wm. Nelson and Wallace R. Lane, both of Chicago, Ill., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Action for infringement of patent No. 836,526, issued to Nels M. Nelson, November 20, 1906, for a tank heater. Under stipulation the complaint of infringement was confined to claim 2. This

claim was held invalid and the bill was dismissed for want of equity. Nelson appeals.

[1] The patented device is described in the specification thus:

"The invention relates to a heating stove adapted to be placed in tanks of water for the purpose of warming their contents and being particularly useful for warming the supply of drinking water provided for live stock."

Our consideration of the patent in suit in connection with related patents of the prior art, particularly those commented on in the opinion below, convinces us that Judge Sessions was right in concluding that the claim relied on was void for anticipation and lack of invention. We approve also the reasons upon which this conclusion was based. The opinion of the trial judge is consequently adopted and set out below.

[2] We may add that error is assigned to the overruling of a motion made by appellant under equity rule 58 to require appellee, Lloyd Manufacturing Company, to reimburse him for the expense he incurred in taking certain depositions. The object was to show that the Lloyd Company had falsely denied responsibility for the publication of a particular newspaper article. The reason for denying the motion is stated in the last paragraph of the District Judge's opinion. The recovery thus sought is at last but part of the costs accruing in the case. The rule is that costs in equity cases are within the sound discretion of the court, and we cannot say, under the facts disclosed, that denial of the motion amounted to an abuse of discretion. Du Bois v. Kirk, 158 U. S. 58, 67, 15 Sup. Ct. 729, 39 L. Ed. 895; Wagner v. Meccano Limited, 246 Fed. 603, 609, 158 C. C. A. 573 (C. C. A. 6).

The decree is affirmed.

SESSIONS, District Judge. A most careful and painstaking examination of this record, including the documentary and mechanical exhibits, compels the conclusion that Nelson has not taken even the short advance step which sometimes constitutes patentable invention and hence that his patent is invalid. The field was crowded when he entered it. The second claim of the patent is the only one here in controversy and the combination of elements therein set forth, so far as it is not a mere aggregation, was completely anticipated by devices upon which patents had been granted to others.

In his specification, Nelson thus sets forth the object of his invention:

"The invention has for its object to provide a heater of this class of simple and durable construction, efficient in operation and presenting a convenient opening for obtaining access to its interior for attending the fire or removing ashes.

"A detail of the invention provides a fire grate of improved construction for supporting a fire of wood, charcoal, or other solid fuel within the body of the heater in such a manner that it may be removed intact when it is necessary to clean the interior of the heater."

Claim 2 of the patent is in the following language:

"In a tank heater having a horizontal body section and a fire section inclined upwardly therefrom, in combination, a fire grate in basket form, means for removably securing the fire grate within the upwardly inclined fire section, and a flue leading out of the body section."

It thus appears that the essential elements of the claim are (1) a horizontal body section; (2) a fire section inclined upwardly therefrom (the two sections being combined); (3) a fire grate within the fire section; (4) means for removably securing the fire grate within the fire section; and (5) a flue leading out of the body section. The invention, if any, does not reside in the mere form of the fire grate, nor in the angle of upward inclination of

the fire section. If these unessential matters of form be disregarded, Nelson's specification fairly described and his claim 2 literally reads upon several patented structures found in the prior art and designed and intended to accomplish the purpose and object sought by him.

Hamilton (patent No. 721,368, issued February 24, 1903) shows a structure which is aptly described by the language found in Nelson's specification: "The device takes, therefore, a U-shape, the fire for heating being in one leg of the U and the draft therefrom down through the horizontal portion and out at the other leg." Hamilton says:

"A further object is to so construct said heater that any desired fuel, such as wood or coal, may be used therewith, while the ashes may be removed therefrom without interfering with the burning of the fuel. * * * Within said tank [water tank] is placed my improved heater, which consists of a bent or elbow-shaped structure having a main body *c* [Nelson fire section] * * * and a subsidiary portion *d* [Nelson body section] connecting therewith and forming a part thereof, the two being arranged to converge, as shown, at any desired angle to each other, the converging portion extending to, at or near the bottom of the tank, while the extremities extend upwardly and project outwardly therefrom. * * * The part *c* (fire section) is provided with a hinged cover *e*, having suitable perforations *f* therein to provide a draft for said heater, while upon the outer end of the part *d* [body section] is placed a removable cover *g*. * * * Connecting with the part *d* [body section] and extending vertically therefrom is a smoke pipe *h* [Nelson flue] which may be of any desired length. * * * In Fig. 3, I have shown a construction adapted for burning coal. Within the part *c* [fire section], near the bottom and preferably above the part *d* [body section], I attach a support or ledge *i* [Nelson means for removably securing the fire grate within the upwardly inclined fire section] upon which is placed a removable grate *j* [Nelson fire grate, necessarily with openings to form down shaft]."

A more complete anticipation of Nelson's device, in form, construction, purpose and claimed combination of elements could scarcely be conceived.

Just (patent No. 395,980, issued January 8, 1889) shows a structure comparable, in all essential respects, with that of Nelson. In his specification Just says: "When it is desired to heat water in shallow troughs [an advantage specially urged by plaintiff] we prefer to construct the apparatus as shown in Fig. 4 of the drawings, wherein is represented a horizontal cylindrical body portion, *A* [body section], from one end of which projects an upwardly and outwardly inclined similarly made feeding end portion, *B* [fire section]. To the upper side of the body portion *A*, at the opposite end thereof, is applied the smokestack *H* [flue]."

The specification calls for a removable grate supported upon suitable legs within the fire pot or heater, and also for a removable cover, with damper opening therein, for the fire pot or heater. Just does not definitely locate his fire grate within and across the upwardly inclined section of his heater illustrated in Fig. 4 of the drawings, but impliedly he does so locate the grate, because the fire heater section is the one provided with a cover and damper opening. At any rate, to so locate the fire grate would not constitute invention.

In Wedean (patent No. 713,821, issued November 18, 1902) a heater is shown which is substantially like that of Nelson in all respects, except that the fire section is vertical instead of inclined and the down draft is through the sides instead of the bottom of the fire basket. The operation of the Wedean heater is identical with that of the Nelson structure. No patentable difference exists.

The heater illustrated and described in Cardarelli patent, No. 506,810, issued October 17, 1893, closely approaches Nelson's device, but differs therefrom in that the fire grate does not extend entirely across the fire section and the fire section is not provided with a cover. It may well be doubted that a modification of the Cardarelli structure in these respects would constitute patentable invention.

None of the patents above mentioned, except the one to Hamilton, was cited upon Nelson in the Patent Office proceedings. This fact greatly weakens the presumption ordinarily arising from the issuance of a patent.

If claim 2 of the Nelson patent could be sustained, no debatable doubt would exist as to defendants' infringement. Their heater is none the less sectional because the sections thereof are connected by permanent welding instead of detachable joints.

Defendants' counterclaim is not of such character that it can be litigated in a suit in equity and the damages, if any, determined in an accounting.

Plaintiff's motion for costs upon the taking of depositions will be denied. If interrogatory No. 16 be so narrowed as to distinguish it from interrogatory No. 20, objection to which was sustained, the answer to the former, while unsatisfactory, was not so evasive as to call for the imposition of a penalty.

A decree will be entered, dismissing plaintiff's bill of complaint, with costs to the defendants to be taxed.

BERGER MFG. CO. v TRUSSED CONCRETE STEEL CO.

(Circuit Court of Appeals, Sixth Circuit. October 10, 1918.)

No. 3057.

PATENTS ⊜328—VALIDITY—STUDDING AND METAL LATH COMBINATION.

The Caldwell patent, No. 682,316, for a studding and metal lath combination, *held* invalid, as involving elements developed in the prior art.

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

Suit in equity for the infringement of a patent by the Berger Manufacturing Company against the Trussed Concrete Steel Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Harry Frease, of Canton, Ohio, for appellant.

W. F. Guthrie, of Youngstown, Ohio, for appellee.

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

PER CURIAM. The District Court held invalid, for lack of invention, the patent issued September 10, 1901, to Caldwell, for a studding and metal lath combination, No. 682,316, and dismissed the bill which the Berger Company, the owner of the patent, had brought against the defendant. Plaintiff appeals.

The patented structure is sufficiently indicated by the claim in suit:

"A building construction comprising perforate metallic lathing and a stud of malleable metal with flat prongs formed thereon and therefrom by making perforations in the flat portion of the metal strip so that the prongs are supported at one end and have metal on each side of them, projecting through perforations in the lathing and bent over the latter so as to clench same."

It must be conceded that the complete combination specified in the claim is not precisely anticipated, that it possessed commercial utility, that it has gone into considerable use, and—more important than all—that metallic studs or supports and metal lath had been used in combination for a number of years and fastened together in different ways without adoption by any one of the specific methods of fastening here disclosed. These considerations make strongly in favor of patentabil-

ity; but we are compelled to think that they are not sufficient to overcome the conclusions necessarily resulting from the state of the art.

It is clear that sheet metal supports in the form of studding or furring had been used to carry perforate metal lathing long before Caldwell's alleged invention. The two had been fastened together by separate wire fastenings and by several other different methods. It is clear, also, from the record that it was a common expedient to attach things to be carried by sheet metal support to that support by cutting out and striking up a prong from the support and then bending it back over the part carried. The record shows that this expedient had been used under a great variety of conditions. One of the older instances of such use of this attachment was to make the fastening between a tubular sheet metal fence post and the supported fence wire. To use this same method of fastening to carry one or two strands of a metal lathing, instead of to carry one fence wire, we think cannot be considered to involve invention. It is as if common wooden lath had always been attached to wooden studding by screws, and some one observed that to nail them on as fence boards are nailed to a fence post made a quicker and better method of fastening. The fact that Caldwell used a support with a flat surface, and thereby got a little better binding effect on both sides of his prong than when the surface was round cannot turn the scale in favor of the patentee's contention.

The principles involved and the controlling conditions are so familiar and their application is so wholly a matter of judgment that it seems unnecessary to go into the question more fully.

The decree is affirmed.

ESTA CO. v. BURKE.

(District Court, E. D. Pennsylvania. May 8, 1919.)

No. 1861.

1. PATENTS ⟸294—TRADE-MARKS AND TRADE-NAMES ⟸95(1)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
A preliminary injunction will not be granted, in a suit for infringement of a patent or trade-mark, where both validity and infringement are doubtful.

2. COURTS ⟸292—JURISDICTION OF FEDERAL COURTS—SUIT FOR UNFAIR COMPETITION.
Jurisdiction of a suit for unfair competition is not conferred upon a federal court by joining with it a separate cause of action for infringement of a patent or trade-mark.

In Equity. Suit by the Esta Company against Alfred W. Burke, trading as the Automobile Devices Company. On motion for preliminary injunction. Denied.

James S. Williams, of Philadelphia, Pa., and Samuel E. Darby, of New York City, for plaintiff.
Carl A. Richmond, of New York City, for defendant.

THOMPSON, District Judge. The plaintiff is a corporation of the state of Massachusetts, having offices and doing business at Boston, Mass., and the defendant is a citizen and an inhabitant of Philadelphia, Pa., in the Eastern district of Pennsylvania.

The bill sets up that the plaintiff is the owner, through assignments, of patent No. 1,167,619, issued to Esten Beeler January 11, 1916, upon an application filed June 27, 1914. for improvements in bubble-making machines. The object of the invention is to produce bubbles in large quantities of a very dry nature in any size desired for display and theatrical illusions or other purposes. The single claim is for:

"The combination in a bubble-making machine of a tank or suitable container having a false bottom with a plurality of small holes therein, means for introducing compressed air beneath said false bottom, and a solution of bubble-making properties maintained above such false bottom, all substantially as set forth."

The plaintiff has used the invention embodied in the letters patent in a device or apparatus for humidifying the air supply to internal combustion engines, marketed under the name "Esta water auxiliator."

The plaintiff is also the owner by assignment of a trade-mark for humidifiers for internal combustion engines, registered September 25, 1917, consisting of the word "Auxiliator."

The bill charges infringement of the plaintiff's patent, and of its registered trade-mark, and unfair competition in trade, in that, as alleged, the defendant has made, used, and sold humidifiers for internal combustion engines, made according to and employing and containing the plaintiff's patented invention and improvement, and used in con-

nection therewith the word "Ox-Iliator," which the plaintiff claims is in such near resemblance to its trade-mark "Auxiliator" as to be calculated to deceive the purchasing public, and to cause confusion in the trade, and to lead the public, which had become familiar with the plaintiff's trade-mark in connection with the same character and quality of devices, to believe that, in purchasing the alleged infringing devices of the defendant, it was really purchasing devices manufactured and sold by the plaintiff, and that the defendant is continuing his unlawful acts, and threatens to make, use, and sell infringing devices in large quantities, and to use thereon and in connection therewith its simulation of plaintiff's trade-mark, and to take advantage of and benefit by the trade, reputation, and standing of the plaintiff.

The bill charges more specifically that the defendant has employed and used extracts from a certificate of test made by the technical committee of the Automobile Club of America of the plaintiff's "Esta water auxiliator" in connection with his advertisements of his alleged infringing device; that for the purpose of unfairly competing with and injuring the business of the plaintiff he has copied in the printed leaflet of instructions, which he supplies to his customers, the printed leaflet of instructions to users of the plaintiff's devices, which it had prepared with great care and expense; that the defendant, prior to his alleged career of infringement of the patent and of the trade-mark, and of methods of unfair business competition, had negotiations with the plaintiff in the endeavor to secure the sales agency for the plaintiff's devices, and is taking advantage of information disclosed by the plaintiff, in seeking to employ the plaintiff's agents, dealers, and distributors, and is unlawfully interfering with and injuring plaintiff's business; That he is marketing, and threatens to continue to market an inferior article in the infringing device complained of, employing poor workmanship and material, and at a lower price than that at which plaintiff is able to sell its product.

The plaintiff moves for a preliminary injunction upon each of the three grounds set out in its bill, namely, infringement of its patent, infringement of its registered trade-mark, and unfair competition in trade.

From the injunction affidavits, and the exhibits of plaintiff's device and the defendant's device, it is apparent that the two devices are practically identical in their means of supplying humidified air for internal combustion engines for automobiles.

The plaintiff is met at the outset of his case, however, with the claim of the defendant that neither the Esta water auxiliator nor the Burke air moistener, or ox-iliator, is made or operated in accordance with the Beeler patent, and that the Beeler claim is anticipated by devices of the prior art.

[1] Without going into detail in discussing the defenses as to the patent in suit, it is sufficient to say that the prior patents cited by the defendant raise such reasonable doubt of the validity of the patent in suit, and that the application of the patent to either the Esta water auxiliator or the Burke ox-iliator is sufficiently doubtful, to deny the plaintiff the right to a preliminary injunction. Long Arm System Co. v.

New York Shipbuilding Co. (C. C.) 207 Fed. 955; Williams v. Breitling Metal-Ware Mfg. Co., 77 Fed. 285, 23 C. C. A. 171.

This rule applies with greater force because the application of the invention to humidifiers for internal combustion engines is of but recent date, and its validity as an invention for soap bubble making machines has, as far as appears, never been adjudicated, nor had such continued public acquiescence as to raise a presumption of validity.

The plaintiff's right to a preliminary injunction for infringement of the Beeler patent was not asserted with apparent confidence at the argument, nor in the plaintiff's brief, although its counsel strongly urged its right to a preliminary injunction to restrain infringement of its trade-mark and unfair competition. Under the charge of infringement of the registered trade-mark "Auxiliator," the affidavits present a strong case of the intentional use by the defendant of a close imitation in adopting for his device the word "Ox-Iliator." The relations of the parties prior to the commencement of the defendant's manufacture and sale of his device, through which he gained inside confidential knowledge of the plaintiff's business methods, its sales agencies, and the merits of its device, his reference in his advertising to and his quotation of the official test of the technical committee of the Automobile Club of America, known as "Certified Test No. 36," and, in a less degree, his copying in extenso the plaintiff's printed leaflet of instructions to users of the plaintiff's device, point to an intention upon his part to unfairly appropriate to himself the merits of the plaintiff's device and the advantages of what the plaintiff had accomplished in its business.

[2] As to unfair competition, however, the plaintiff has neither set up in its bill nor proved the jurisdictional facts necessary for relief. While it has set up and shown diversity of citizenship, jurisdiction in a case of unfair competition is further conditioned upon the matter in controversy exceeding the value of $3,000, and the plaintiff has neither alleged in the bill nor proved that jurisdictional fact. The requisite amount in controversy is as essential as diversity of citizenship, and not having been averred, in accordance with equity rule 25, nor proved in the moving affidavits, the court, under section 24 of the Judicial Code, is without jurisdiction to pass upon the question. Neither charges of infringement of a patent nor a registered trade-mark are sufficient to confer jurisdiction in matters which are the subject of separate causes of action, distinct in their nature, at least until validity and infringement are established. Postal v. Netter (C. C.) 102 Fed. 691; Unit Construction Co. v. Huskey Mfg. Co. (D. C.) 241 Fed. 129; Mecky v. Grabowski (C. C.) 177 Fed. 591; Planten v. Gedney, 224 Fed. 382, 140 C. C. A. 68; Detroit Showcase Co. v. Kawneer Mfg. Co., 250 Fed. 234, 162 C. C. A. 370.

Coming to the charge of infringement of the registered trade-mark, has the plaintiff made out a case of such reasonable certainty as to justify the court in restraining the defendant from the use of the word "Ox-Iliator"?

There is not the slightest resemblance in appearance between the plaintiff's device and that of the defendant's. No one who had seen

the plaintiff's device could be deceived through similarity of appearance into purchasing one of the defendant's. The defendant's mark consists of the words "Burke Ox-Iliator," so that, in the absence of any evidence of the public, or even of a single purchaser, being deceived, the determination of the question, if the plaintiff has establishd its right to a trade-mark, would, depend upon whether the word "Ox-Iliator," in connection with the defendant's name, is in itself sufficient to mislead and deceive. Assuming, however, that, being idem sonans, it would tend to deceive and mislead, the plaintiff must make out a case of registration of a symbol or a word indicating origin or ownership, rather than a word descriptive of the thing sold. From the proofs, it appears that the plaintiff has registered two separate trademarks—the word "Esta" and the word "Auxiliator." Without the word "Esta," it is not free from doubt that the proofs show that the word "Auxiliator" indicates the origin or ownership of the plaintiff's device.

It appears, from the evidence contained in the affidavits, the plaintiff's device is intended to aid in the combustion of the fuel going into the cylinders of the automobile engine, preventing the accumulation of carbon, cleaning from the cylinders that already deposited, and aiding in reduced consumption of fuel and the power and efficiency of the motor.

In the plaintiff's advertisements and in the label upon its device the words "Esta Water Auxiliator" indicate that the thing sold is described as an auxiliator. The word "auxiliator" is a Latin word, meaning "helper; assistant." It is closely related, as the defendant's counsel has pointed out, to the familiar English noun "auxiliary," meaning "helper; assistant." In the Italian the word is "Ausiliatore"; in the Spanish and Portuguese, "Auxiliador"—both meaning "helper." Inasmuch as the word "Esta" really indicates origin, and the word "Auxiliator" is used in describing the thing the plaintiff is making and marketing, there is at least sufficient doubt of the right of the appropriation of the word "Auxiliator" as a trade-mark to preclude the granting of an injunction upon the ground of the defendant's use of an imitative mark upon his device. Thermogene v. Thermozine, 234 Fed. 69, 148 C. C. A. 85; Detroit Showcase Co. v. Kawneer Mfg. Co., 250 Fed. 234, 162 C. C. A. 370; Postal v. Netter (C. C.) 102 Fed. 691.

The motion for a preliminary injunction is denied.

STEELE et al. v. D. L. WARD CO. et al.

(District Court, E. D. Pennsylvania. May 29, 1919.)

No. 1833.

1. TRADE-MARKS AND TRADE-NAMES ⟸93(3)—UNFAIR COMPETITION.
Evidence *held* not to sustain a claim of unfair competition by defendant in the manufacture and sale of desk stationery boxes; it not appearing that there was any intention to deceive purchasers, or that there was such resemblance as in fact resulted in deception.

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—STATIONERY BOX.
The Ehmling patent, No. 1,014,581, for a stationery box, *held* valid, and infringed by defendant by one style of box made by it, which was discontinued on notice by complainant but not infringed by a later style.

In Equity. Suit by John D. Steele and Frederick A. Strong, Jr., against the D. L. Ward Company and Charles T. Ehmling. Decree for complainants.

Robert M. Barr, of Philadelphia, Pa., for plaintiffs.
Howson & Howson, of Philadelphia, Pa., for defendants.

DICKINSON District Judge. It may contribute somewhat to a clear view of the real questions involved in this case if a preliminary outline statement of the situation of the parties, their respective claims of right, and how far these claims have a legal basis is first given. We may then proceed to consider which of the claims to legal rights are well founded.

A man by the name of Alexander Ehmling conceived the thought of a letter stationery box which would make its appeal to purchasers through having certain features of convenience of use. Without enumerating all these features, one of them was to have the box so constructed as that it would in itself answer to the purposes of a writing desk. This was an important, if not the chief, feature, and gave to the box the designation of a "desk box." Another feature was the division of the box into compartments, so that the lid, when opened, might hold the writing paper as a pad, and the body of it the envelopes, separated by a partition, which made a tray for holding pens. This required, or at least suggested, such a construction as would permit of the lid, with its pad of writing paper, folding down over the body containing the tray and envelope space, with other features of what may be termed the mechanical construction of the box. It was found that the average user required more letter sheets than envelopes, and the box was supplied with them in the proportion of 24 to 21.

It would be readily recognized that all and any one of these features have a value of convenience, but that the purchaser who buys boxes of stationery for home use would be so well supplied with desk and other facilities that having them supplied along with the box would make no very great appeal to him.

The attempt to build up a business met at first with only a modest success. The first type of box was known as the Dutch Girl. The

business was that of the "Twin Company." Alexander Ehmling was himself the chief, if not the only salesman. As such, he was efficient and quite successful. He had patented his box, and thus secured rights, which will later be discussed. Naturally he laid strong emphasis upon the fact that the box he was selling was his make of box, and protected by letters patent issued to him. He was also president of the company, and his name appeared as such. The box was not, however identified by the trade with his name, so as to be known in the trade as the "Ehmling box," but was known under other trade-names. Although the efforts to secure a trade met, as has been said, with a fair measure of success, and stationery put up as the Twin Company put it up in their boxes came, in a limited way, to be recognized to be in a class by itself, the business as a commercial venture was not a complete success.

This lack of success was probably, at least, in large measure, due to other things than any failure on the part of users of the box to appreciate its merits. There was need, however, to reorganize the business. This brought the present plaintiffs into it, and Ehmling, the patentee, dropped out. His brother, Charles T. Ehmling was also in the employ of the company, and learned of the box and the details of the business. The brother also severed his connection with what became the business of the plaintiffs.

Then came the establishment of military camps, first on the Mexican border, and afterwards officers' training camps and cantonments in a number of places, as well as an increase in the number of ships and naval stations. The sale of letter-writing facilities, such as these boxes afforded, was greatly stimulated, and the business expanded eightfold or more. Soon the salesmen of the plaintiffs, on their visits to camps and to naval and military officers, who were purchasers of navy and army supplies, found there were competitors in what the plaintiffs looked upon as their special field. Among these competitors was the defendant. It had been led, or induced to go, into the trade under the following circumstances:

The defendant, who had long been and was largely engaged in the same general line as a manufacturer, was approached by Charles T. Ehmling with the project of making for and supplying to him letter boxes for which he thought he could build up a trade. Ehmling had no capital and no credit. The project in consequence did not appeal to the defendant. The insistence of Ehmling resulted, however, in an arrangement being made by which he was to be provided with facilities for the manufacture of his make of boxes, which were to be put upon the market and sold. Ehmling's compensation was to be determined by the defendant after the success of the venture became known. The defendant had at the time no knowledge of the plaintiffs' box as patented or otherwise, or of their claims upon the trade in their special field. A box was put out under the trade-name of "Ehmling's Linen," and is the box known to this record as defendant's "first box." It possessed all the features of plaintiffs' box, and was substantially like it; the most noticeable variance being in the location of the pen tray. Notice of the trade competition thus introduced sent

the plaintiffs to the defendant, with a complaint of a trespass upon plaintiffs' rights, and a warning of the consequences of infringement. The parties, with their counsel, met in conference. No bill of complaint had at that time been filed, although one had been prepared, ready to be filed. The attitude of the defendant as declared by it (and its sincerity is found) was one of willingness to meet the demands of the plaintiffs.

The business of the defendant with Ehmling had not turned out to be profitable, so that, aside from other matters which entered into consideration, the defendant had no selfish motive in a continued trespass upon plaintiffs' rights. In consequence, the defendant, without any formal admission of plaintiffs' proprietary right to the tray form of box, agreed to discontinue the use of this form, and to take the tray feature out of its make of box. This was done, and the defendant thereafter put out what is known to this record as the defendant's "second box." This is substantially the same box, with the tray feature eliminated, making of it a box with the envelope compartment larger in one direction than that called for by the size of the envelopes. The practical result is, when the envelopes slide (as, of course, they do) to one side, there is what the plaintiffs call a "pen tray space" provided, or at least ready at hand for use. The efforts of the parties and their counsel to adjust all their differences, at first thought to have succeeded, were finally unsuccessful, and the bill now before us was filed.

There is in the mind of the plaintiffs the natural, although unavowed, because untenable, claim to an exclusive right, if not to the special sales field of army cantonments, at least to the sale of "desk boxes." We have characterized this claim as natural, because, as often before observed, the one who is the discoverer or the creator of a special field of demand resents as an intrusion the entry upon it of any one else. The claim of an exclusive right (as to any monopoly) cannot be given judicial sanction or support, unless it reaches the dignity of a legal right.

This brings us, after an overlong prelude, to the averments of the bill of complaint, the answer, and the proofs disclosed by the evidence. The complaint may be summarized as one of unfair competition, and of infringement of the patent rights to which the plaintiffs have succeeded. The answer is a denial of all acts of unfairness and of all unfair dealing in competing for a share in the trade—a denial of infringement and of the validity of the patents.

The right of the defendant to compete for trade in the special field which plaintiffs had marked out for their own is, of course, asserted. This special field may be delimited as the supply of the needs of those who were in need, not of stationery alone, but of a desk and writing facilities along with it. The expression "desk box," by which plaintiffs designated what they were offering for sale, emphasizes this feature of their real complaint.

The complaint of unfair competition may be first given attention. It has two bases in the facts as asserted by the plaintiffs. One is the like general make-up and consequent like general appearance of the two makes of boxes. The other fact is the plaintiffs' make of box was

that of Alexander Ehmling, who patented it. Alexander Ehmling was also the president of the company, which manufactured and sold his make of box. When the defendant manufactured boxes designed by Charles T. Ehmling and sold them as boxes of "Ehmling's Linen," or made other use of the Ehmling name, the result intended, but whether intended or not, was to impose upon the purchasing public the defendant's make of box for that of the plaintiffs.

With respect to the first fact, we are unable to find that it has the significance attributed to it by the plaintiffs. The fact of likeness in appearance is found, so far as general similarity is involved. The familiar distinction, however, between likeness which functional features common to two things lends to their appearance and likeness in features not functional, presents itself. The latter justifies giving to such likeness a deceiving significance. The former forbids it, or at least does not warrant it.

[1] Our finding is that there is nothing, either in the general likeness or in any of the appearance features (including the seal fastener) or in all combined, which leads to the conclusion that there was either the attempt to palm off one make for the other, or the result of having one mistaken for the other. The fact that defendant's make of box was given the name of "Ehmling's box" might, and would, under some circumstances, have a bad significance. Here, again, however, there is suggested the two points which were brought out in the opinion of Judge Magill in the Suburban Life publication case. Unfairness may be found in the selection of a name like that of a competitive product, if intended to deceive. It may also be found if the mistake of one for the other will result, although such result may not have been the motive for the choice of name. The use of the name "Ehmling" did not have a deceptive purpose. The defendant has nothing to gain from its use. The only value it had was to preserve to Ehmling any good will which he might build up, if he afterwards withdrew his business from the defendant. The use of the name did not result in any mistake of one make for that of the other. The plaintiffs' make of boxes was never known by that name, but by other trade-names which had been chosen for them.

The use of the name could not have been prompted by any thought that it would or could aid in the palming off of the defendant's boxes as those of the plaintiffs. Its use would not, therefore, justify a finding either of intended or resulting deception. The bill of complaint, so far as it avers unfair competition, is not sustained by the proofs.

[2] With respect to the patent rights claimed by plaintiffs, they show the award to them of such rights by letters patent No. 1,014,581. Prima facie this patent is valid. There is a general denial of validity, but this is in effect more a refusal to admit validity than a denial of it. There is, on the other hand, a very substantial acquiescence in the assertion of the rights claimed by plaintiffs, so far as embodied in the defendant's first make of box. As against the defendant we may find both validity and infringement to this extent. As defendant discontinued the manufacture of this make of box, and has disavowed any claim of a right to resume its manufacture, the finding made is of lit-

tle practical value. What we are now concerned with is the scope of the claims of the patent, and more particularly whether they include defendant's second make of box. The right to make this they assert and stand upon. If they cannot make it, then, as they view it, a box cannot be made of larger dimensions than the size of the envelope contents demands. As already indicated, the real right claimed by the plaintiffs is a trade right, rather than a patent right. Given the conception of a stationery box, with the desk box and tray features added, and any variations would seem to involve only details of mechanical construction and convenience in arrangement of compartments. If this be true, it follows that, when the plaintiffs are allowed a patent upon their make of box because of a combination of features, including the tray, they get all which the patent laws can give them, unless they have the right, also, to the desk box feature. The latter is the feature of real value. Unfortunately for them, we cannot allow such claim of right, for the reason that this feature has not been patented, and this because, in view of the state of the prior art, it is not patentable.

The doctrine of the law which stands in the way of the plaintiffs is not that of estoppel or of waiver, but the doctrine that the plaintiffs cannot have a monopoly of the right to make and vend, unless the patent laws give it, and the award of a patent makes the gift effective. No matter how broad the right given by the law, if the patentee secures the allowance of letters patent, at the cost of his right being limited and restricted to a particular construction as the embodiment of what he claims, and all he claims, he gets no more than the rights awarded him, notwithstanding the fact that he was entitled to more than was awarded him. If the limitations exacted of him as the price of any grant make the price excessive, he may refuse to pay the price and have his right to all he claims determined. He cannot accept what is awarded him and claim more. The grant of letters patent alone gives him whatever right he may claim. The patent granted is prima facie valid. He may not get all or any part of what is granted, but without the patent he gets nothing, no matter how great his deserts.

Without unduly expanding this opinion by going into a discussion of the scope of the patent claim, we content ourselves with a statement of the conclusions reached. These are that the claim in issue is valid and infringed by defendant's first box, that defendant's second box is not an infringement, and that there has been no infringement by defendant after notice in fact of plaintiffs' patent rights.

The plaintiffs are entitled to a decree embodying these findings, and to an injunction against the making, using, or vending of a desk box with the tray feature. The averments of the bill charging unfair competition are not sustained.

WHITLOCK COIL PIPE CO. v. MAYO RADIATOR CO.

(District Court, D. Connecticut. May 26, 1919.)

PATENTS ⇐328—INFRINGEMENT—APPARATUS FOR COOLING WATER—CIRCULATING SYSTEM.

The Brinkman patent, No. 843,864, for apparatus for cooling one fluid by another, particularly the cooling of water pipes by means of air passages between them, *held* not infringed.

In Equity. Suit by the Whitlock Coil Pipe Company against the Mayo Radiator Company. Decree for defendant.

Harrie E. Hart, of Hartford, Conn., for plaintiff.
Franklin G. Neal, of New Haven, Conn., for defendant.
Darby & Darby, of New York City, for Virginius S. Mayo.

MANTON, Circuit Judge. The application was filed the 29th of January, 1903. Letters patent were granted February 12, 1907. The pleadings raised the issue of noninfringement and invalidity. The patent refers to the invention as an apparatus for effecting the cooling of one fluid by the application of another and cooler fluid, such as a cooling of air by water, or of water by air; the condensation of steam by either air or water. In the patent, the patentee says:

"That portion of the apparatus to which my invention relates, in common with other and similar apparatus, comprises a series of air tubes surrounded with water passages forming part of a water-circulating system, by which the water which has become heated by its contact with the cylinder will lose its heat, and by its contact with the air tubes, through which, in order to increase the efficiency of the apparatus, the currents of air are caused to move."

By this the patentee acknowledges that there was in the prior art cooling apparatus, comprising air tubes which are surrounded with water passages forming a part of the water-circulating system, the water of which has become heated, and which loses its heat by contact with air tubes; the cooling action being rendered more efficient by causing air currents to move through the tubes. The patentee further says that his invention simplifies the construction, decreases the weight, and reduces the cost of this class of refrigerating apparatus, and at the same time increases its efficiency. These are the objects he wishes to accomplish, and he asserts that he succeeds by constructing the section from a continuous strip of sheet metal, and the metal is crimped or corrugated, so that, when the corrugated sheet is bent or returned upon itself at regular intervals, the corrugations will match and form the opposite sides of a tubular space for the passage of air. He says:

"I corrugate the sheet at every alternate interval in opposite directions, in order that every alternate fold of the sheet will produce a narrow continuous serpentine passage, through which water may flow in a thin layer, in contact on both sides with the walls of the air tubes."

The method of construction, as stated in the specifications, would indicate one continuous corrugated metal sheet, avoiding corners, and

having a serpentine passage for the water. The series of air tubes arranged in a vertical row are formed by and between adjacent water space units by reason of the contacts at intervals of the oppositely disposed corrugations and the opposite surfaces of adjacent units. The construction of plaintiff's device consists of corrugating or crimping a continuous sheet, which is bent sharply and returned upon itself, with the corrugations of the two legs or plies of the fold coinciding with each other, thereby forming the first serpentine water passage as a physical unitary portion of the structure. These plies, when there are a sufficient number as required, make up the first unit portion of the structure. The plies form folds or bends in a continuous sheet, and are brought into contact and soldered together; the tips of the bent sheet embracing this member are soldered at the bottom of the upper water chamber, and likewise the lower end of the section, into the lower water chamber.

The plaintiff sues on all its claims. Claim 1 defines a combination of three elements, the upper water chamber, the lower water chamber, and the interposed refrigerating section. The refrigerating section consists of a continuous sheet of metal doubled upon itself in a series of folds, with the ends of the folded sections attached to the water chambers and inclosing a series of restricted water chambers, which connect at the ends of the folds with the water chambers.

Claim 2 refers to the same structural features and specifies a continuous strip having offset edges; the one corrugated fold being separated from its companion ply by the offset edges to thereby form the serpentine passage between them.

Claim 3 contains the same structural features, but does not require the sheet of metal to be a continuous strip. It does require the air passages to be formed by the contacts of the inclosing walls of the air passage units.

The defendant's device does not construct its water passages as structural units. The air passage columns constitute the structural units of its radiators. The water passages are incident to the assembly of the air space column. The defendant's structure embodies a greater number of strips, and greater number of joints to form the strips; they form the refrigerating section. It does not employ a continuous strip of corrugated sheet metal, doubled upon itself in a series of folds, with the ends of folded sections attached to the water columns, to make up the refrigerating sections. The folded sections are referred to by the plaintiff as sections of a continuous strip of sheet metal. The defendant's water passages are unrestricted, in that they are of equal cross-section from top to bottom, at the inlet and at the outlet. The water passages are not so shaped as to retard or restrict the flow of water, as the plaintiff's water passages are.

The defendant's structure does not employ the feature of the claim found in the words of the patent in the series of parallel air passages between the water passages and transversely thereto and therefrom by the contact of such inclosing walls. The defendant's structure forms water passages as straight walls from the top to the bottom; that is, vertical and parallel. If the inclosing walls of the defendant's

structure were brought in contact, they would close up all the air passages; but, to form the air passage, it has means to space the vertical straight inclosing walls of the water passage apart. They do not contact. Therefore the fins, comprising metal, in addition to the straight inclosing wall, are provided, as shown in defendant's structure. These fins permit a distinct mode of operation, and the heat exchange between fluids. The radiation is referred to in defendant's device as half direct and half indirect, for the fins are not in contact with the water, nor are they inclosing walls. They, in defendant's device, form the air passages. In practice and in construction, the complainant does not make a continuous sheet, but makes a series of sheets, which, when put together, might be considered a continuous sheet.

In other words, there has never been made, with any commercial success, a structure which conforms to the specifications and claims in suit. It would be unfair to claim that the defendant's device infringes the plaintiff's device, when the latter has added no substantial value to the art. To sustain the claim of infringement would be to interpret the language of the claim as broad enough to include a successful structure. Claims should cover what the patentee has invented, and nothing more. Lovell v. Seybold Machine Co., 169 Fed. 288, 94 C. C. A. 578.

The general combination of an upper and lower water chamber in a refrigerating section, interposed between, and connecting at its ends with, the chambers, were common in the art of coolers, condensers, and radiators prior to the date of the Brinkman patent. All that may be said to be invention by the Brinkman patent was in the intermediate refrigerating section. But Brinkman does not claim as his invention the refrigerating section, but claims the combination of elements of which the refrigerating section is only one. Therefore, so far as the claimed combination is concerned, it makes no difference whether one of its elements is new or old; the combination remains the same. The plaintiff has failed to establish infringement.

Decree for defendant.

ROSS v. EAST SIDE MILL & LUMBER CO. et al.

(District Court, D. Oregon. May 19, 1919.)

No. 7850.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—MOTOR TRUCKS.

The Ross patent, No. 1,209,209, for a motor truck for picking up and moving piles of lumber, *held* valid, but not infringed.

In Equity. Suit by Harry B. Ross against the East Side Mill & Lumber Company, William S. Overlin, and Miles D. Jameson. Decree for defendants.

Walter M. Fuller, of Chicago, Ill., and Alfred P. Dobson, of Portland, Or., for plaintiff.

William R. Litzenberg, of Los Angeles, Cal., and Clark, Middleton & Clark, of Portland, Or., for defendants.

WOLVERTON, District Judge. Complainant sues to enjoin infringement of his patent No. 1,209,209, for improvement in motor trucks.

Complainant's motor truck is adapted more particularly for picking up lumber disposed in piles, and transporting it in and about sawmill and lumber yards, and depositing it at places of destination. The process is to drive over or straddle a lumber pile, pick it up, or raise it, by means of the motor used for propelling the motor truck, and, thus suspended beneath the frame of the truck, carry the same and deposit it where needed.

The defendant Overlin has devised a motor truck of somewhat similar construction, designed to perform the same service as the complainant's invention, and has secured a patent, also, on his machine.

Complainant alleges infringement of claims Nos. 2, 5, 6, 7, and 8 of his patent, and the question for determination is whether Overlin's device infringes these claims.

I have concluded, after a detailed consideration of complainant's machine and patent, including the claims set forth, and of Overlin's device, that there is no infringement, for the reason that Overlin's structure is not susceptible of being read upon the claims of complainant's patent. I will not attempt to set out the claims, but only to denote the difference, both structural and functional, between the two devices, as it relates to the claims in question.

First, nothing can be claimed by complainant on account of the frame of his motor truck being of substantially an inverted U-shape, except in combination, because the concept is very old. Its place in the prior art is illustrated by the Sheldon patent, as far back as September, 1863, and by numerous patents obtained since then.

Second, a frame comprising longitudinal girder members and transverse beam members, relatively secured as in the claim indicated, may be conceded to be new; and—

Third, a combination of such frame with traction wheels supporting the rear end of the frame or body, and steering wheels supporting the forward end of the body, may also be conceded to be new or novel.

The function to be performed by the girders is to sustain the load of lumber in transportation; that to be performed by the crosss-beam members is to hold the girders or side frames in place, so that there is constructed a boxlike mechanism, having the form of an inverted U. This boxlike mechanism is carried by traction wheels at its rear end, and by steering wheels at the front, thus completing the structure for carrying lumber. In further explanation, the load of lumber is sustained by means of contrivances, one upon each side of the frame, which are attached directly to the girder members; the front ends somewhat near the center of the distance between the traction and the steering wheels, and the aft ends to the rear of the traction wheels. Thus, as I have said, the load is carried directly by the girder members.

The frame of Overlin's device is in form somewhat similar to that of complainant. It has the side members and transverse beam members. The end transverse beam members are arched, and are of construction to directly sustain the load, thus wholly relieving the side

or girder members of that function. The wheels, both traction and steering, are yieldingly attached to the standards, which support the transverse beam members at each end of the frame, and are not made or pivoted into the body of the frame, as is the case with complainant's device. The mechanism for lifting and sustaining the load, as it relates to Overlin's device, is so contrived by its bearings as to carry the weight of the load, at the rear and front, on the standards of the transverse beam members, or perhaps more correctly speaking by the transverse beam members. The utility of both devices has been adequately demonstrated.

Now, the side members of Overlin's device are not girder members. If it may be said that his device has girder members at all, those members are such of the transverse beam members as constitute the end members of their frame. A girder is defined by the Standard Dictionary as:

"A principal horizontal beam, or a compound structure acting as a beam, receiving vertical load, and bearing vertically upon its supports."

So that it may readily be seen that the side members of Overlin's device do not perform the same function, or act in substantially the same way, as the girder members of the plaintiff's motor truck. Nor can it be said that the transverse beam members of Overlin's device, if they may be regarded as girder members, constitute mere mechanical contrivances to avoid the claims of complainant's motor truck. It required inventive skill to produce them. So that, considering the whole, it is not possible to read the structure of Overlin's frame upon the claims of complainant's patent.

As it respects the traction and steering wheels, those of complainant's device are pivoted into the frame itself, while those of Overlin's truck have their axle bearings on the standards supporting the transverse beam sections. Obviously this is more than a mere mechanical difference.

While as a whole Overlin's machine performs the same function, namely, that of lifting, carrying, and depositing piles of lumber, it is clear that it does not perform it by the same novel mechanism as the complainant's truck. For these reasons, I hold that Overlin's truck does not infringe complainant's patent.

Complainant's bill of complaint will therefore be dismissed, with costs to defendants.

JOHNSON v. McADOO, Director General of Railroads, et al.

(District Court, E. D. Louisiana, New Orleans Division. May 8, 1919.)

No. 15938.

1. RAILROADS ⊂⊃5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—SUITS —STATUTES.
Under Act March 21, 1918 (Comp. St. 1918, §§ 3115¾a–3115¾p), litigants could sue railroad companies under federal direction, just as they had previously been able to do and in such courts as had jurisdiction under the general law.

2. RAILROADS ⊂⊃5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—STIPULATION BY DIRECTOR GENERAL—JURISDICTION FOR SUIT.
It was competent for the federal Director General of Railroads to stipulate in what jurisdiction he might be sued, but his authority to make rules and regulations did not authorize the setting aside of the plain provisions of Act March 21, 1918 (Comp. St. 1918, §§ 3115¾a–3115¾p), as to the railroad companies.

3. RAILROADS ⊂⊃5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—DEFENSE BY DIRECTOR GENERAL—PAYMENT OF RECOVERY.
Under section 12 of Act March 21, 1918 (Comp. St. 1918, § 3115¾*l*), providing for the federal control of railroads, it is incumbent on the Director General to defend a suit against a road, and to make payment in the event of recovery out of his receipts; question of adjustment as between government and the railroad being for settlement when the roads shall be returned to their owners or otherwise disposed of.

At Law. Action by Mrs. W. C. Johnson against William G. McAdoo, Director General of Railroads, and the Morgan's Louisiana & Texas Railroad & Steamship Company. On the company's exception to the petition of no cause of action. Exception overruled, and defendant company allowed time in which to file answer.

C. W. Howth, of Beaumont, Tex., and John P. Sullivan and David Sessler, all of New Orleans, La., for plaintiff.

Denegre, Leovy & Chaffe, of New Orleans, La., for excepting defendant.

FOSTER, District Judge. In this case plaintiff brought an action for damages against the Director General of Railroads and the Morgan's Louisiana & Texas Railroad & Steamship Company. An exception to the venue of the court as to the Director General was maintained. Thereupon the plaintiff dismissed the suit as to him. A similar exception of the railroad company was overruled. The railroad company has now filed an exception of no cause of action to the petition. It is contended by the exceptor that no action will lie against the railroad company while it is under the control of the Director General of Railroads; that the word "carriers," in section 10 of the Act of March 21, 1918, c. 25, 40 Stat. 451 (Comp. St. 1918, §§ 3115¾a–3115¾p), does not mean the railroad companies but refers to the federal administration.

[1] I do not agree with this contention. I think it was the purpose of Congress in adopting the act to allow litigants to sue the railroad

companies, just as they had theretofore been able to do, and in such courts as have jurisdiction under the general law. See Postal Tel. & Cable Co. v. Call, Dist. Judge, 255 Fed. 850, — C. C. A. —; Jensen v. Lehigh Valley R. R., 255 Fed. 795.

[2, 3] I think it competent for the Director General to stipulate in what jurisdictions he might be sued, but his authority to make rules and regulations would not authorize the setting aside of the plain provisions of the statute as to the companies. No harm can come to the railroad corporation. It will be incumbent upon the Director General to defend the suit, and to make payment, in the event of a recovery, out of his receipts. Section 12 of the act provides that the moneys received by the Director General shall not be covered into the treasury of the United States, but shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner, as before federal control. Under the orders of the Interstate Commerce Commission judgments for damages are chargeable to the operation of the roads and are payable out of the general receipts. There is no doubt that the same action will follow in the event of recovery in this case as if the roads were not under government control, and the question of an adjustment as between the government and the railroad is one that will come up and be settled when the roads are turned back to their owners, or other disposition made of them. In the meantime, should a recovery be had, no execution can issue against the physical property of the road under the plain terms of the act.

The exception will be overruled, and the defendant allowed 10 days in which to file an answer.

C. F. WITHERSPOON & SONS v. POSTAL TELEGRAPH & CABLE CO.

(District Court, E. D. Louisiana, New Orleans Division. May 8, 1919.)

No. 15993.

TELEGRAPHS AND TELEPHONES ⊂=26¾ New, vol. 7A Key-No. Series—FEDERAL CONTROL—ESTABLISHMENT OF LIABILITY FOR DELAY.

Under the joint resolution of Congress of July 16, 1918, authorizing the President to take over telephone and telegraph systems, a suit for damages was maintainable against a telegraph and cable company for delay in delivering a cable while the company was under federal control; it being proper that plaintiff be allowed to establish his liability against the company despite federal control.

At Law. Action by C. F. Witherspoon & Sons against the Postal Telegraph & Cable Company. On exception of no cause of action to the petition. Exception overruled, and defendant allowed time in which to answer.

D. B. H. Chaffe and Ross E. Breazeale, both of New Orleans, La., for plaintiffs.

Farrar, Goldberg & Dufour and Alfred C. Kammer, all of New Orleans, La., for defendant.

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

FOSTER, District Judge. This is a suit for damages alleged to have been caused by delay in delivering a cable. The message was accepted by the company October 30, 1918, at which time, of course, its lines were being operated by the Postmaster General on behalf of the United States. On that ground defendant has filed an exception of no cause of action.

The Postal telegraph lines were taken over by the President, under authority of the joint resolution of Congress of July 16, 1918, by his proclamation of July 22, 1918. The proclamation directs that the supervision, possession, control, and operation of the telegraph and telephone systems shall be exercised by and through the Postmaster General, and that the said Postmaster General may perform his duties through the owners, managers, board of directors, receivers, officers, and employés of said telegraph and telephone systems. The proclamation further provides that the—

"employés 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."

Neither in the joint resolution nor the proclamation of the President is there a provision similar to section 10 of the Act of March 21, 1918, c. 25, 40 Stat. 456 (Comp. St. 1918, § 3115¾j), taking over the railroad systems of the country. It seems to me, however, that it was the intention of Congress, in authorizing the President to take over the lines, that the companies should go ahead with private business the same as theretofore. This would contemplate the institution and defense of suits. If the company is allowed to take and send private messages, there should be some method of holding it liable for damages occasioned through negligence, notwithstanding the Postmaster General had the direction and control of the company. See Postal Tel. & Cable Co. v. Call, Dist. Judge, 255 Fed. 850, — C. C. A. —.

The joint resolution provides for just compensation to the companies and the method of settling disputes as to same between them and the government. If the companies are held for damages occasioned while under government control, compensation will certainly extend to reimbursement. In the meantime litigants should not be delayed in liquidating their claims. Therefore I think it proper that the plaintiff in this case should be allowed to establish his liability against the company, if there is any. Delay in the trial of the case may result in hardship to either side.

The exception will be overruled, and the defendant allowed 10 days in which to answer.

UNITED STATES v. JACOBSON. *

In re FIDELITY & CASUALTY CO. OF NEW YORK.

(District Court, E. D. Pennsylvania. March 20, 1919.)

No. 60.

BAIL ⇐79(1)—FORFEITED RECOGNIZANCE—REMISSION OF PENALTY.

A court will not remit the penalty of a forfeited recognizance under Rev. St. § 1020 (Comp. St. § 1684), where it cannot find that there has been no willful default, and it further appears probable that the penalty will ultimately fall on parties who were indirectly responsible for the offense charged.

Criminal prosecution by the United States against Rose Jacobson. On petition of surety for remission of penalty of forfeited recognizance. Dismissed.

William G. Wright, for petitioner.

Robert J. Sterrett, Asst. U. S. Atty., of Philadelphia, Pa.

DICKINSON, District Judge. The conditions which surround this application and seem to us to call for a denial of the prayer of the petition also call for a statement of what they are.

The defendant was indicted for the offense of the keeping of a house of a prohibited character within one of the military districts. The conviction cannot be resisted that in doing what she did she was financed by, if not in fact acting for, others. The inference is a fair one that these unknown parties provided her bail, and as the surety is what is known as a bonding company, it is further fair inference that the surety is protected from loss, and that the payment of the bail bond will fall upon the parties to whom reference has been made. Section 1020 of the Revised Statutes (Comp. St. § 1684) empowers the court to remit the forfeiture whenever the finding may be made, among others, that there has been no willful default on the part of the defendant. This finding we are not satisfied to make, and the further fact is found that the nonappearance of the defendant obstructed and delayed the work of the court and subjected the United States to a not inconsiderable expense, the sum total of which could not very definitely be estimated.

We would, of course, make the finding that the surety had been guilty of no willful default, and if the loss fell upon it the appeal for relief would be strong. We have carefully read the petition, however, and find in it no averment of loss, and all the circumstances surrounding the case negative the thought of such loss.

In the absence of the findings upon which the exercise of the discretion of the court in remitting such forfeitures is based, we decline to remit forfeiture of this bond, and the prayer of the petition is accordingly denied.

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

*Order affirmed 258 Fed. 444, — C. C. A. —.

DALY v. PENNSYLVANIA R. CO.

(District Court, E. D. New York. March 11, 1919.)

TOWAGE ⇐11(4)—INJURY OF TOW BY ICE—LIABILITY OF TUGS.

Tugs, which on their own initiative took a tow of light barges, two in a tier, through ice in the Kills *held* liable for injury of one of the front tier by the ice.

In Admiralty. Suit by Bartle Daly against the Pennsylvania Railroad Company. Decree for libelant.

Macklin, Brown, Purdy & Van Wyck, of New York City, for libelant.

Burlingham, Veeder, Masten & Fearey, of New York City, for claimant.

CHATFIELD, District Judge. The barge Emma B. Gray was injured while in the front tier of a tow taken through the ice in the Kills on the way to South Amboy, N. J., on January 1, 1918, by Pennsylvania tug 32, assisted by Pennsylvania tug 35. The temperature was several degrees below zero. The Kills were full of ice, which was broken and floating as far as the Baltimore & Ohio bridge,, and below that was solid, except for a channel through the middle of the Kills. Tug 35 was ahead of tug 32, towing tandem, and the barges were arranged two in a tier.

The testimony of the experts who examined the boat shows plainly a deep gouge along the starboard side of the boat just above the water line, which could have been caused by nothing but contact with ice. This tow of seven light boats, with two powerful tugs, was unable to make more than one mile an hour; the obstruction from the ice must have been very great, and the damage to the boat must have been caused by proceeding under such circumstances.

There is no reason to hold the owner of the boat responsible for having consented to the use of his boat under such conditions, for she had been moved around the harbor and taken to the stake boat the day before. The trip through the Kills was entirely in the control of the tugs and not a joint venture by the owner of the barge. See The Phœnix (D. C.) 143 Fed. 350.

The case at bar resembles Monk v. Cornell Steamboat Co., 198 Fed. 472, 117 C. C. A. 232, The Rambler (D. C.) 66 Fed. 355, and The Packer (C. C.) 28 Fed. 156, rather than The Hercules, 213 Fed. 615, 130 C. A. 207, and the tugs in the present case were plainly negligent in attempting the passage under such circumstances, without towing side by side so as to break a sufficiently wide channel for the passage of the boats, or without dropping the barges back so as to tail one behind the other.

The libelant may have a decree.

THE STIMSON.

THE NORTH LAND.

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

1. COLLISION ⟸45—STEAM AND SAILING VESSELS CROSSING—FAULT.
A collision at sea on a clear night, between a schooner, which showed regulation lights and properly kept her course and speed, and a steamship on a crossing course, *held* due solely to the fault of the steamship in failing to sooner see the schooner's lights, and in proceeding thereafter without change of course at full speed of 17 miles an hour until 2½ minutes before collision.

2. COLLISION ⟸22—LIABILITY—INEVITABLE ACCIDENT.
A steamship *held* not exonerated from liability for a collision, on the ground of inevitable accident, because of the breaking of the connecting shaft of the steering gear, immediately before collision, although from a latent defect, where she was the burdened vessel and should have acted sooner to avoid risk.

In Admiralty. Suit for collision by W. A. Bodden, master of the schooner Stimson, against the steamship North Land. Decree for libelant.

Hughes, Vandeventer & Eggleston, of Norfolk, Va., for libelant.

Haight, Sanford & Smith and Henry M. Hewitt, of New York City, and Loyall, Taylor & White, of Norfolk, Va., for respondent.

WADDILL, District Judge. The collision, the subject of this litigation, occurred on the Atlantic Ocean, on the early morning of the 13th of October, 1918, between 4 and 4:30 o'clock, some 13 miles southeast of Hog Island Light, between the Stimson, a four-masted schooner of the burden of 693 tons, and the steamship North Land an ocean-going passenger ship of 3,282 gross tons. The vessels were en route from New York to Norfolk; the schooner on a course southeast half east, and the North Land on a course southwest three-quarters south, with the weather good, wind moderate, sea smooth, and the night clear.

[1] The schooner's case briefly is: That while on the starboard tack, in the vicinity in question, and proceeding at about 2½ knots an hour, she observed the masthead light of the steamship some 8 to 10 miles away, bearing aft of her port beam, and subsequently, and when more than 2 miles away, she saw the steamship's green light. That at the time the schooner was provided with a skilled and competent crew, in charge of an experienced master, all at their proper stations, and efficiently performing their respective duties, with her running lights properly set and brightly burning. That upon observing the steamship's white light, being partly in the position of an overtaken vessel, she at once caused her regulation riding light for approaching vessels to be put out, placing the same in the most conspicuous position on the companionway of the after cabin, which was the best position in which it could be placed, and was in full view of the approaching steamship, and should have been seen 6 to 8 miles away. That in addition, as the steamship continued to approach, the schooner caused an electric

light to be waved, and its light flashed upon her sails, to further attract the attention of the approaching steamship, and she kept her course and speed. That notwithstanding the plain obligation imposed upon the North Land, the burdened vessel, to avoid collision, as well as the risk thereof, with the overtaken vessel, the schooner, she continued to approach her at a rapid rate of speed, claimed to be 17 miles an hour, and ran into and collided with the Stimson, striking her about 30 feet aft of her stem on the port bow, seriously cutting into and crushing through the schooner from her rail down below to her water line, causing great damage, for the recovery of which this libel was filed.

The schooner further charges that the steamship was without a lookout properly stationed; that she was in charge of incompetent and unskillful navigators; that she failed to keep out of the way of the schooner, or to shape her course so as to avoid crossing ahead of her and pass under her stern; that she failed to slacken her speed, stop and reverse, and proceeded at a too rapid rate of speed; and that she, being the overtaking vessel, should not have collided with the schooner at all, but have avoided her by a wide margin.

The respondent in the main admits the circumstances of the two vessels approaching and coming together, as above stated, but contends: (1) That the collision was the result of inevitable accident, in that, when it was too late to avoid the consequences thereof, the connecting shaft of the steering gear broke and parted, through a latent defect, causing the injury. (2) That the Stimson was in command of an incompetent navigator, without a proper lookout, and that she omitted to exhibit her white or stern light in sufficient time to enable the navigators of the steamship to make the proper maneuver to avoid the collision.

The court will first consider the navigation of the Stimson, as bearing upon her fault, or participation in the causes which brought about the disaster. She was the favored vessel, as between herself and the steamship, and unless she was guilty of some fault in navigation, or in some way misled those directing the movement of the steamship, she cannot be held liable. In the view taken by the court of the testimony, the Stimson was in command of competent and efficient officers and crew, and before and at the time of the collision they were properly discharging their duties. They had properly set and burning brightly the regulation lights required by law, and there was no reason that the same should not have been seen and observed in ample time to have enabled the steamship to avoid either collision or the risk thereof with the Stimson, which the evidence shows maintained its course and speed. That the lights of the schooner were set and burning is abundantly established by the testimony, and besides the steamer admits seeing the lights in ample time to have avoided the collision, with the exercise of proper care on the part of her navigators, but for the defect in the steering gear. She also admits seeing the stern or white light on the schooner, from half to three-quarters of a mile away, and the red light for at least half a mile. This establishes the existence and sufficiency of the lights, and why the same were not

seen earlier is most probably attributable to the inefficiency of the steamship's lookout. The steamship's navigator states they should have been seen for 2 miles, though he says he did not see them over half a mile, and there seems to be no good reason why they should not have been seen. They were observed from 2 to 2½ minutes before the collision, and in time to have avoided the disaster, but for the parting of the steering gear.

[2] This solves the question of liability against the steamship, since she was the burdened vessel and required to keep out of the way of the schooner (The Richmond [D. C.] 114 Fed. 210, and cases cited), and especially so as an overtaking vessel, unless she can be excused because of the giving way of her steering apparatus from a latent defect therein, when too late to avoid colliding with the schooner. This presents the question of inevitable accident, which, in order for the steamship to avail herself of, must herself be shown to be free from fault. Union S. S. Co. v. New York-Virginia S. S. Co., 24 How. 307, 313, 16 L. Ed. 699; The Colorado, 91 U. S. 692, 763, 23 L. Ed. 379; The Severn (D. C.) 113 Fed. 578; The Maryland (D. C.) 182 Fed. 829, 831; The Richard F. Young (D. C.) 245 Fed. 499, 502, 503; The Reichert Towing Line (C. C. A.) 251 Fed. 214.

The court thinks that the respondent has established its case of the breaking or giving way of the connecting rod of the steamship's steering gear because of latent defects therein, and has proven the exercise of prudence and precaution in procuring the machinery and material for her steering apparatus; but it is not entirely clear when the gear gave way, or when the rod broke. It seemed to have been in operation up to the moment of and after the accident, and there was no signal given, nor indication made, of the existence of the defect until some 2 hours after the accident, during which time there was considerable movement and maneuvering on the part of the steamship. Her master, as testified to by the schooner's master, stated that he had encountered a wreck, which caused the gear to break. The respondent's evidence was to the effect that such a break might occur from a sudden strain or hard jerk placed upon the machinery, and that, when the order was given to port, the ship failed to respond, and, upon a further order to hard aport, she still failed to respond, when the engines were ordered full speed astern. The wheelsman testified that he felt a jolt while turning the wheel to port, and as he gave three or four turns of the same.

It seems hardly probable that the steering gear would have given way from the mere porting or hard aporting the wheel, and it is more likely, assuming it to have parted as now claimed by the respondent, that it did so either when the ship's engines were reversed, immediately preceding the collision, or from the impact when the vessels came together. However this may be, the court does not feel that the North Land can avail herself of the defense of inevitable accident under the circumstances of this case, not being sufficiently free from fault herself. She was charged with the duty of keeping out of the way of the schooner. She was proceeding at 17 miles an hour within 2½ minutes run of the schooner, which was only making about 2½ miles an hour,

the vessels being on crossing courses, and she cannot escape liability for the collision, by having proceeded at full speed ahead first porting and then hard aporting. She should have done more. She was admonished of the danger the moment her navigators saw the white light on the schooner three-quarters of a mile, and the red light, half a mile away, which accentuated the peril, and she should not have placed her wheel hard aport upon the failure of the ship to respond to her helm when placed to port, but should immediately have slackened her speed, stopped, and reversed, if, indeed, she should not have done so the moment the lights were first seen, and given appropriate signals of her maneuver.

There was no excuse for the failure to see the lights earlier, and in time to avoid the collision, as her navigators admit they did; and hence, having taken no timely steps to avert the same, the respondent cannot escape liability for the damage that followed. She should have anticipated just what occurred, and at all events made due allowance for this and such like occurrences, arising incident to the navigation of steam vessels, and losses caused thereby should fall upon those responsible therefor, and not the innocent ship, having no part or parcel in the selection of the steamship's appliances, or seeing to the safe operation of the same. Authorities to sustain this view might be cited almost without number, but only a few need be mentioned. The Carroll, 8 Wall. 302, 305, 19 L. Ed. 392; The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; Steamship Co. v. Low, 112 Fed. 161, 166, 171, 50 C. C. A. 473; The Richmond, supra, 114 Fed. 208, 213; The Job H. Jackson (D. C.) 144 Fed. 896, 899; same case, 152 Fed. 1021, 82 C. C. A. 332.

The respondent further seeks to escape responsibility by throwing doubt upon the schooner's navigation, suggesting that the stern light should have been put up earlier, and that perhaps her lookout was inefficient, and that the schooner should have departed from the accustomed rule of keeping her course and speed, having regard to the prudential rule which the steamship invokes. They say the schooner should not have continued at full speed on her course, but should have luffed, to avoid the steamer.

The court feels entirely clear that the schooner would not have been warranted in changing her course and speed under the circumstances. While such a thing is sometimes permissible, it would have been a grave act of imprudence to have attempted it on this occasion, and would almost certainly have failed in its object. Nor do the facts, in the court's view, warrant either the contention that those on the schooner, including the lookout, were not efficiently engaged about her navigation, or that the schooner did not properly place its stern light (The John Bossert [D. C.] 148 Fed. 903, 905, affirmed 168 Fed. 1021, 93 C. C. A. 671), and give timely warning to the approaching steamship of her presence.

This defense, or suggestion by the steamship, of dereliction on the part of the schooner, will not suffice to relieve her from liability for the accident, when the testimony shows that the steamship, the burdened vessel, had been guilty of faults amply accounting for, and which

do account for, bringing about the collision. The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84; The Victory and The Plymouthian, 168 U. S. 410, 423, 18 Sup. Ct. 149, 42 L. Ed. 519; Foster v. Merchants' & Miners' Transp. Co. (D. C.) 134 Fed. 964, 969; The Kirnwood (D. C.) 201 Fed. 428, 433.

It follows, from what has been said, that the North Land is solely responsible for causing the collision in question, and a decree may be entered so ascertaining.

In re DEVON MANOR CORPORATION.

(District Court, E. D. Pennsylvania. February 11, 1919. On Hearing on Additional Testimony on Certificate of Review, June 30, 1919.)

No. 6320.

BANKRUPTCY ⟸140(1)—SALES ⟸90—PROPERTY PASSING TO TRUSTEE—CONVERSION OF EXECUTORY SALE CONTRACT INTO BAILMENT.

Where an order for machinery to be delivered to a common carrier under a conditional sale contract was so modified by the seller, with the acquiescence of the purchaser, as to retain possession in the seller as consignee after shipment until a lease was executed by the purchaser, under which delivery was made, the bailment superseded the executory contract of sale, and the rights of a trustee in bankruptcy of the purchaser are subject to the terms of such bailment.

In Bankruptcy. In the matter of Devon Manor Corporation, bankrupt. On review of order of referee. Affirmed on rehearing.

James J. O'Brien and Fox & Rothschild, all of Philadelphia, Pa., for petitioner.

Reber & Granger, of Philadelphia, Pa., for trustee.

THOMPSON, District Judge. The learned referee was of the opinion that the contract dated November 26, 1917, tested by all the requirements of the law expressed in the Pennsylvania decisions, constitutes on its face a valid contract of bailment for the leasing or hiring of the machinery claimed. He was also of the opinion that the order, dated September 22, 1917, of the Devon Manor Corporation, signed in its behalf by its president, is, standing alone, a contract of conditional sale.

There is no dispute that that is the proper construction to be put upon those written instruments. The order of September 22d is in form as follows:

"Order No. 193. Form 10.
"To the Troy Laundry Machinery Co., Ltd.:
"Please ship, subject to the conditions printed on the back hereof, to the undersigned: Name of Laundry, Devon Manor Corporation. Street and No., ———. City or town, Devon. County, Chester. State, Pa. Via. ———, f. o. b. New York, the chattels below mentioned, for which ——— hereby agrees to pay you $———, $——— cash, and the balance as follows: $50.00 on the 10th of October, and the balance in 12 equal monthly payments, with lease, interest-bearing notes, and insurance."

A description of the machinery, stating the price, amounting to $2,145, follows. The pertinent part of the conditions printed on the back is as follows:

"That all of the machinery ordered shall remain the property of the seller until the purchase price thereof has been fully paid in cash, and in case of any default in the payment of any part of said price the seller may enter upon the premises of the purchaser, and retake possession of such machinery."

The referee held, however, that:

"After the execution of the conditional sale contract of September 22, 1917, the parties entered into the lease contract of November 26, 1917, and that at the time of the execution of the lease contract the machinery was still in the possession and control of the claimant, and was installed about two weeks later in the building of the lessee by the claimant's servants."

It is upon the question whether delivery to the Devon Manor Corporation had been made prior to the time of the execution of the lease agreement that the case turns, if the latter is to be construed as supplanting the terms of the contract of sale.

With due regard to the rule that a finding of fact by a referee will not be disturbed, unless clearly and manifestly erroneous or unsupported by evidence, the question as to when the delivery took place became, under the evidence, a question of law.

The evidence consists of the contract of September 22, 1917, under which the machinery was to be shipped to the Devon Manor Corporation, at Devon, Chester county, Pa., f. o. b. New York, and the testimony of Mr. Ryan, the sales agent of the claimant, to the effect that the machinery had been sold to the Devon Manor Corporation, and that it was in the freight depot at Devon at the time of the signing of the agreement of November 26, 1917, that it was installed by the servants of the claimant after the lease was signed, and that $500 in cash was paid at that time.

Mr. Ryan's testimony alone is not sufficient to support a finding that the machinery was then in the possession of the claimant. The question of delivery, therefore, depends upon the intention of the parties, as shown by the terms of the order contract of September 22, 1917, providing for shipment f. o. b. New York. Under all the authorities, in the absence of a stipulation to the contrary, delivery to a common carrier at a distant point constitutes a delivery to the vendee, so that title, conditioned only upon payment of the purchase price, had passed to the Devon Manor Corporation prior to the arrival of the machinery at Devon freight station. Dannemiller v. Kirkpatrick, 201 Pa. 218, 50 Atl. 928; Pittsburgh P. & P. Co. v. Cudahy P. Co., 260 Pa. 135, 103 Atl. 548; Philadelphia & Reading Ry. Co. v. Parry, 66 Pa. Super. Ct. 49; General Electric Co. v. Richardson, 233 Fed. 84, 147 C. C. A. 154; Dentzel v. Island Park Association, 229 Pa. 403, 78 Atl. 935.

The title, according to the terms of the contract, was conditioned upon the purchase price being paid as therein set out, "$50.00 on the 10th of October, and the balance in 12 equal monthly payments, with lease, interest-bearing notes, and insurance;" but there is nothing in its terms to defer delivery to the vendee beyond the delivery to the

common carrier. Had the contract of conditional sale remained executory by postponement of delivery, no doubt, under the doctrine of Stiles v. Seaton, 200 Pa. 114, 49 Atl. 774, and Goss v. Jordan, 171 Pa. 474, 32 Atl. 1031, the parties could have entered into a contract of bailment to supplant the terms of an executory contract of sale; but upon delivery to the common carrier the sale was no longer executory, and title had passed to the Devon Manor Coporation as purchaser, conditioned upon payment of the purchase price. In the interim between delivery and November 26, 1917, therefore, a creditor could have successfully attacked the claim of title by the present claimant. When the conditional title passed, there was, as against creditors, no ownership in the vendor upon which to base a lease, and the entire transaction is to be construed in accordance with the contract of September 22, 1917. That was a contract of conditional sale, under which title was not to pass until the purchase price was fully paid, and the payments were to be made through a "lease," providing for interest-bearing notes and insurance upon the machinery. The conditional sale having been consummated by delivery, the subsequent lease or hiring agreement merely evidenced the manner in which the purchase price was to be paid after the title had fully passed to the purchaser.

As it is held that the contract was one of conditional sale and not of bailment, the condition is not effectual to retain title in the vendor as against the trustee in bankruptcy. Further, the property having been attached to the real estate without the instrument being recorded, or drawn in accordance with the Pennsylvania Act of June 7, 1915 (P. L. 866), the condition that title remain in the vendor is void under that statute.

The order of the referee of November 12, 1918, is therefore reversed.

On Hearing on Additional Testimony on Certificate of Review.

After the opinion of February 11, 1919, was filed, upon application of counsel for the claimant based upon sufficient affidavits, after argument, the case was referred back to the referee to take further testimony concerning the shipment and delivery of the machinery and the terms of acceptance of the order of September 22, 1917. When the case was originally argued upon the certificate for review, the construction of the contract between the parties depended upon the order given by the Devon Manor Corporation to the claimant for the machinery. It appears by the additional testimony taken that the order in question was mailed to the home office of the claimant at New York, and that the manager of the sales department signed the acceptance of the order as follows:

"Accepted: Troy Laundry Machinery Co., Ltd., by I. Kettle."

On the same day the claimant by letter acknowledged receipt of the order, concluding:

"Thanking you for favoring our Mr. Ryan with your order, and assuring you that same will have our prompt attention, we are very truly yours, Troy Laundry Machinery Company, Ltd., per C. H. Granberg, Sales Department."

Before any steps were taken to carry out the terms of the contract, it was marked with rubber stamps across the name of the Troy Laundry Company, "Order of" and "Notify," and further at the foot of the order "Security—Ship 'to Order.'"

It is not disputed that the stamps on the face of the order indicate that the machinery was to be shipped to the order of the Troy Laundry Machinery Company, Limited, the consignee, and notice on arrival at destination to be given to the Devon Manor Corporation. Shipment of the machinery was then directed, and on October 4th the lease contract was mailed to the Devon Manor Corporation, with the request that it be signed and returned. Three shipments were made, one from Syracuse, N. Y., upon a bill of lading dated October 2, 1917, naming the Troy Laundry Machinery Company as consignee, with notice to the Devon Manor Corporation, the other two dated November 1 and November 21, 1917, from Brooklyn, N. Y., upon bills of lading containing the same designation as to consignee and notice. The first bill of lading was mailed to the Devon Manor Corporation October 16, 1917. The other two were sent to a Philadelphia representative of the plaintiff, and held by him until the lease was executed November 26, 1917, and the first payment of $500 made. Thereafter delivery under all three bills of lading was made by the railroad company to the Devon Manor Corporation. It thus appears that, while the order of September 22d called for delivery f. o. b. New York, the terms which were actually carried out were those modifying the original order, so as to hold the property in the possession of the carrier, subject to the order of the claimant as consignee, until the contract of lease was executed. If there was a contract of conditional sale, accepted by any one duly authorized to accept it for the claimant, that contract remained executory, because there was no delivery until after the execution of the lease, and, under the authority of Stiles v. Seaton, 200 Pa. 114, 49 Atl. 774, and Goss v. Jordan, 171 Pa. 474, 32 Atl. 1031, the executory contract of sale was supplanted before delivery by the contract of bailment. But whatever modifications were made to the original order upon acceptance by the claimant were acquiesced in by the Devon Manor Corporation, as is evidenced by their conduct. The rights which pass to the trustee, therefore, arise under the bailment contract of November 26, 1917, and not under the order of September 22, 1917.

The order contained in the opinion of February 11, 1919, reversing the order of the referee, is therefore vacated, and the order of the referee affirmed, and the petition for review dismissed.

EMPIRE ENGINEERING CO. v. REID WRECKING CO.

(District Court, W. D. New York. January 25, 1919.)

No. 979.

1. COLLISION ⟹134—SUIT FOR DAMAGES—RULE OF DAMAGES.
The measure of damages for injury to a vessel in collision is the amount necessary to restore the vessel to the condition in which she was at the time of collision, regardless of enhancement in value.

2. SHIPPING ⟹58(2)—DAMAGES—BURDEN OF PROOF—LIABILITY OF BAILEE.
Where a vessel is injured in collision through the negligence of a bailee, who has it in his custody, he has the burden of showing that the damage sustained was not the result of his fault.

3. NAVIGABLE WATERS ⟹26(3)—DAMAGES—VESSEL STRIKING SUNKEN DREDGE.
Report of a commissioner upon damages recoverable for injury of a sunken dredge in collision with a passing vessel reviewed and revised.

In Admiralty. Suit by the Empire Engineering Company against the Reid Wrecking Company. On exceptions to report of commissioner. Modified.

Harrington, Bigham & Englar, of New York City, for libelant.

Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, for respondent.

HAZEL, District Judge. The steamer Wissahickon, on June 11, 1913, collided with the sunken steel dredge Pocantico in Lake Erie, because of the failure of the Reid Wrecking Company, in the possession of which the dredge then was, to use ordinary care to mark the place where she lay in deep water in the path of steamers. The Wissahickon (D. C.) 226 Fed. 345.

In the event of an extraordinary occurrence, or in case of failure to skillfully perform work, by reason of which a bailor sustains loss, the burden ordinarily is no doubt on the bailee to prove that the loss was not caused by his negligence or want of care and precaution; and in estimating the damage, in case of bailee's negligence, it is necessary for the bailor to show that the article was in good condition when delivered to the bailee (6 Corpus Juris, 1157–1162, § 165); the measure of damage being the difference between the value of the article at the time of delivery and its value at the time of return.

[1] In admiralty, however, the rule of restitutio in integrum is applied as the measure of damage for injury to vessels from collision; that is, sufficient damages are allowed to restore the vessel to the condition in which she was at the time of the collision, regardless of enhancement in value. The Baltimore, 8 Wall. 377, 19 L. Ed. 463. In The Providence, 98 Fed. 137, 38 C. C. A. 674, Judge Putnam said:

"The rule of restitutio in integrum is a profitable one, in almost any view of it, to the owner of the injured vessel, and, ordinarily, on its fullest application, it ought not to be practically extended beyond what the necessity of the case requires. There may be instances where adjacent parts which are unsound are so closely connected with the parts directly injured by the collision that they cannot be distinguished in making repairs, so that repairs

of all the parts amount only to repairs of a single whole; but in order to establish a proposition of that kind, and thus enlarge the field of application of the rule restitutio in integrum, the facts should be very clear and strong."

In a case of this kind it has been held that payments by the owner for repairs, certified by the master who superintended the work, were "primary proof of the expenditure, and of its purpose and its necessity, and, unless answered by counterproof, was altogether sufficient to justify the allowance of such payments." Orhanovich v. Steam Tug America (C. C.) 4 Fed. 337; The Bratsberg (D. C.) 127 Fed. 1005.

[2] Although these cases were for collision, in which the element of bailment did not enter, still I think that, where a vessel is injured through the negligence of a bailee who has the vessel in his custody at the time of the damage, he has the burden of showing that the damage to the vessel was not sustained through his fault (Swenson v. Snare & Triest Co., 160 Fed. 459, 87 C. C. A. 443; Terry & Tench Co. v. Merritt & Chapman Derrick & Wrecking Co., 168 Fed. 533, 93 C. C. A. 613), and that in the ascertainment of the loss upon a prima facie showing that the repairs were necessary, and caused by the fault of the bailee, a case for recovery is made out unless there is contrary evidence of a more reliable character.

It is, of course, necessary that the condition and serviceableness of the injured vessel or parts, prior to the collision, be shown with reasonable certainty. If it appeared in this case, for instance, that the parts of the dredge, or any of them, were injured by the act of sinking, or because the bad weather shifted the dredge while at the bottom, or incidentally from the wrecking operations, then there could be no recovery herein; but there was satisfactory evidence to show injury to parts of the dredge from the collision.

[3] Libelant contended at the outstart that the entire cost of repairing the dredge ($23,169.10) should be recovered from the respondent; but concededly there was inadequate evidence to support any such claim, and the commissioner made an allowance of $11,689 to cover parts of the dredge injured in the collision, as follows:

Turntable	$4,422
A-frame	2,967
Truss or girder	376
Spud casing	2,684
Deck plates	840
Surveyors' fees	400
	$11,689

It appeared that two competent divers made examinations of the sunken dredge at different times, and reported as to the character of the injuries she had sustained, and that surveyors gave testimony as to the estimated cost of repairs of some of the parts, while the actual cost price of replacement of others was given.

It is shown that on June 15, 1913, two days after the dredge sunk, a diver in the employ of libelant made an examination of her, and reported that she was resting on the bottom, in about 35 feet of water; that she was in good condition, except that her anchor was broken on

the port side, and was settling on the end of the dredge; that her port spud was straight in the casing, with only its end under the boat broken off, while her starboard spud was lying over the top of the dredge; and that her deckhouses, sister sheaves, boom, A-frame, and turntable or quadrant were intact and all right.

In July, before the collision, a diver (Meyers) in the employ of the respondent examined the Pocantico for the purpose of preparing to raise her. He testified that the casting under the turntable or quadrant was broken; that the houses were off the deck, the beam over to port, the dipper on the bottom, the A-frame hard aport, and the spuds fastened in the casings with throw bolts; and that the starboard spud could be unshipped entirely, although there was difficulty in unshipping the port spud, as it was listed more to port than was the dredge. At the trial he stated that the casting marked on the blue print was the only one broken up to the time of the collision, so far as he observed, while after the collision he found the tops of the spud casings crushed in. Another diver (Baker) in the employ of respondent partially examined the dredge in July and found her lying in 42 feet of water, her boom swung to port, her after guys, which had been connected to the A-frame, carried away, and the port spud broken off. From such testimony, and from the exhibit photograph in evidence, taken after the boat was raised, libelant contended that the prima facie evidence showed that the turntable and A-frame, together with the spud casing (except the gates and truss), were in good condition prior to the collision, while respondent insisted that in foundering, the dredge in all probability struck the bottom with sufficient force to produce nearly all such injuries.

The repairs to the turntable resulted in practically a new turntable in place of one used for approximately seven years; but usage does not always affect cost of replacement, which is the controlling factor. The question is: Was there evidence to show that the turntable and appliances were broken in consequence of the collision? To establish such breaking there is the testimony of the witness Allen to the effect that he found a groove one-fourth of an inch deep across the top of the sheaves and casting of the turntable, and there was testimony showing that the draft of the steamer Wissahickon, the width of her shoe, the height of the sister sheaves of the dredge from the deck, as well as the depth of the dredge at the time of the collision, together with the depth of the water over her at such time, supported the deduction that the shoe of the Wissahickon at the lowest part, in passing over the dredge, would come in contact with the sheaves of the dredge.

There was dispute with reference to the depth of the water where the dredge lay; the witness Learmann testifying to a depth of 35 feet, and the respondent's witness Meyers to a depth of about 42 feet. This dispute the commissioner correctly decided adverse to the respondent. The expert witnesses, Smith and Weisbeck, substantially testified that the damage to the turntable and its appliances was in their opinion caused by the truss falling thereon, and that the contact of the Wissahickon with the A-frame would be of such force as to fracture the turntable. In falling, the truss, as contended, might have struck

the casing of the boom and broken it; but for this part no allowance was made by the commissioner. Indeed, no damage to the boom was claimed; it being conceded that the evidence to establish the cost of repairing such item was insufficient. The allowance for repairing the turntable is approved, except the sum of $600 included for patterns, since I think the evidence as to the cost of such patterns was insufficient; although it appears that new patterns for parts were actually obtained, there is nothing to show what part of the total was required for the turntable pattern.

The A-frame was intact when the divers examined the dredge, but respondent contends that the cost of replacing it was not sufficiently shown. The surveyors testified that the cost of such repairs was taken from the bills of the dry dock company, although the cost of different items was not kept separately. The expert witnesses, however, in my opinion, fairly estimated such cost; but, as they included therein $600 for patterns for making a new A-frame, the same criticism is made as was made in connection with turntable patterns. Deducting this amount, $2,367 is left for the A-frame.

The commissioner allowed $376 for the truss, but according to the evidence, as I view it, the estimated price thereof was $300, and the latter amount is therefore allowed.

The allowance for spud casings was $2,684, which included both the port and starboard casings. The port casing was injured at the top, while the starboard casing was twisted a little. The witness Allen seemed uncertain as to the character of the damage, and I am in doubt as to whether the injury to the starboard casing was due to the collision. It may have been driven into the bottom when the dredge went down, as the evidence shows, bow first, and to port. Meyers testified that the tops of the spud casings were not broken until the collision; but the evidence in relation to the extent of the injury, and necessity for new casings in their entirety, and to the cost price, is not as clear as it should be, and the amount of $2,684 for spud casings is therefore disallowed.

The cost of deck plates, which it is believed were injured because of the breaking of the turntable, is allowed at $420. The cost of replacing the deck plates was $840, but as to such parts the repairs should be most closely scrutinized; nor do I think the rule of restitutio in integrum should be strictly applied thereto, especially as such plates had been subjected to severe strains for a number of years—severer strains than had any of the other parts with which we are herein concerned.

A charge for services of one surveyor only will be allowed, since one of the surveyors was in the employ of the Buffalo Dry Dock Company and his services related to the entire damage, including items for which respondent was not liable.

On account of the delay in presenting the case for hearing, interest will be computed on the amount allowed herein only from the date of the commissioner's report.

Report of commissioner modified as herein specified.

WORCESTER POST CO. v. W. H. PARSONS & CO.

HARRINGTON v. SAME.

(District Court, D. Massachusetts. May 1, 1919.)

Nos. 779, 780.

1. SALES ⟸54—CONSTRUCTION OF CONTRACT.
In the construction of written contract of sale, deliveries under which were to be made during a series of months, the subject-matter of the contract, its purpose, and the situation of the parties are material, to determine their intention, the meaning of the words used, and in interpreting their conduct during the time of deliveries.

2. SALES ⟸71(4)—DELIVERY IN INSTALLMENTS—EFFECT OF ORDERS FOR LESS THAN INSTALLMENT DUE.
A contract between a newspaper publisher and a paper manufacturer for the purchase and sale of 900 tons of paper, to be delivered within 20 months, approximately 45 tons per month, construed to be in effect one to supply the purchaser's monthly needs, within the limit of 900 tons, and his action in ordering usually less than 45 tons monthly, which was furnished without objection, *held* a waiver as to the remainder, and not to entitle him to demand delivery of the remainder of the 900 tons during the last month.

3. CONTRACTS ⟸247—MODIFICATION—INFERENCE FROM CONDUCT OF PARTIES.
Modifications of a written contract ought not to be inferred from conduct of doubtful significance.

At Law. Actions by the Worcester Post Company and by John H. Harrington against W. H. Parsons & Co. Judgments for defendant.

Dunbar, Nutter & McClennan, of Boston, Mass., for plaintiff Worcester Post Co.

Edward Fisher, of Lowell, Mass., for plaintiff Harrington.

Ropes, Gray, Boyden & Perkins and Albert A. Schaefer, all of Boston, Mass., and Shattuck, Glenn, Huse & Ganter and Garrard Glenn, all of New York City, for defendant.

MORTON, District Judge. These are two actions at law, by separate plaintiffs against the same defendant, to recover damages in each case for failure to deliver paper which the plaintiffs claim the defendant sold to them. The basic facts were similar in the two cases, and by agreement—trial by jury having been waived—they were heard together by the court; certain facts being stipulated, and oral and written evidence being introduced.

The material facts are as follows:

The contracts of sale were in writing on printed forms, and were alike, except in details not significant in the present controversy. Both were dated November 11, 1914. The first clause, which is the important one, reads as follows:

"First. The manufacturer hereby agrees to sell and furnish to the purchaser, and the purchaser hereby agrees to purchase and take from the manufacturer, for use in the publication of the Worcester Post, a newspaper published in the city of Worcester, Mass., 900 tons of newspaper to be taken

at approximately 45 tons per month; but the purchaser shall be required to take not less than ——— tons and the manufacturer agrees to furnish not more than ——— tons in any one month, during the period from December 1, 1914, to August 1, 1916, at the price and upon the terms hereinafter particularly stated. And this contract shall not be assignable."

Other provisions of the contract specify certain details as to the sort of paper, obligate the purchaser to pay, provide against strikes, etc., and give the right of termination for failure to pay. No questions arise on any of these points.

The last clause reads:

"This agreement shall commence on the 1st day of December, 1914, and shall terminate on the 1st day of August, 1916."

The Lowell Sun contract was the same mutatis mutandis.

After the contracts took effect, each plaintiff sent, from month to month, delivery orders to the defendant for paper. These orders specified the sizes and details of what was wanted; and they were duly filled by the defendant. During the first 2 months of its contract the Post took only 46 tons in all, in but 3 months of the 20 covered by the contract did it take as much as 45 tons, and it never took more than 48.5 tons in a month. The deliveries called for under the Sun contract were very irregular, ranging from 19 tons to 63. No explanations were offered by the buyers for their failure to take the full monthly amounts, and no suggestion was made by the seller that they were in default for not doing so. There was no reference by either party to such nondelivery until the contracts were about to expire, when the buyers made the demand hereafter referred to.

When the last month of the contracts was reached, the average monthly amount which had been called for by the Worcester Post was much less than 45 tons, and there remained a difference between what had been ordered and delivered, and the 900 tons specified in the contract, amounting to a little over 200 tons. The Post thereupon demanded delivery of this entire amount, either all at once, or in such installments running past the termination of the contract time as might be convenient to the defendants. The defendant offered to deliver the monthly amount for the last month, which was done, and refused to make any deliveries beyond that. A like situation arose on the Lowell Sun contract, and was similarly dealt with by the parties. The undelivered balance on the Post contract is about 162 tons, and on the Sun contract about 154 tons. Thereupon the present actions were brought.

The question is whether the defendant was obligated to deliver on each contract, either during the month of July or within a reasonable time after July 31st, the balances above referred to.

The plaintiffs contend that the defendant's failure to object to deficiencies in the monthly delivery orders was a waiver of the delivery terms of the contract, as to the unordered amounts; in other words, that from the plaintiffs' failure to order the full contract amount in any month, and the defendant's silence in relation thereto, there is to be found a new understanding between the parties, whereby the defendant was to deliver the uncalled-for amounts at a later date. The

defendant contends that the silence of the parties indicates that both abandoned the contracts as to such amounts.

[1, 2] In interpreting the conduct of the parties, all surrounding circumstances which throw light on the matter may be considered, including the evidence as to the preliminary negotiations which was introduced by the plaintiffs against the objection of the defendant. "The subject-matter of the contract, its purpose, and the situation of the parties are material to determine their intention and the meaning of words used." Purnell, J., Hull Coal & Coke Co. v. Empire Coal & Coke Co., 113 Fed. 256, at page 260, 51 C. C. A. 213, 217 (C. C. A. 4th Cir.). While the contracts are not by their terms of the kind in which the seller undertakes to supply the buyer's needs as to a certain article, that was what both parties understood was in effect being arranged for. There are indications of this in the contracts themselves (e. g., "the purchaser hereby agrees to purchase and take * * * for use in the publication of the Worcester Post [or Lowell Sun]," etc.; monthly deliveries of a stipulated amount are provided for; the terms of the contracts are unusually long; "* * * and this contract shall not be assignable"), and the discussions which preceded the contracts clearly show that both parties so understood them. The amounts stated, viz. 900 tons, were not the foundation of the agreements; they were reached, as all agree, by taking the buyers' estimates of the maximum amounts which they would probably need in any month, and multiplying by the number of months which, it was finally agreed, the contracts should run. They were outside figures not expected to be actually reached. Mr. Harrington testified that he was to "have the privilege of ordering all the paper that he contracted for" if he saw fit to do so; but he also testified that, when he was asked by the defendant's representative (during the negotiations) what the situation would be if he (Harrington) did not see fit to order it all, Harrington replied, "We may adjust it in making a new contract." His attitude plainly was that he was not bound to take more than he saw fit to order. The same is true of the other contract. It is significant that under previous contracts, similar in character, between the plaintiffs and the predecessor of the defendant in the business, orders and deliveries had been for actual needs, without objection on either side, even when the total called for substantially exceeded the contract amount.

The supply aspect of the contracts is important, because, if the parties had in mind, as I think they did, that the real purpose was to provide from month to month such paper as the two newspapers required, a definite waiver or abandonment of unordered monthly amounts would be more easily inferred than if the purchasers were known to be buying for resale, or for some broader purpose. In the first month of its contract (December, 1914) only 23 tons were ordered by the Post and were delivered. For a year and a half thereafter neither party made any reference to the balance of the 45 tons which should have been ordered and delivered in that month. Then the plaintiff called for the 22 tons, and now claims damages for the refusal to deliver them, upon the ground that the defendant's failure

to object to the deficiency in the December order and its silence in relation to it show that it agreed to deliver the unordered portion whenever the plaintiff might call for it within the contract period.

The defendant did not in fact so understand the matter, nor did it act in such a way as to justify a belief that it so understood it. If the defendant had supposed that it was obligated to deliver 22 tons of paper on account of December, 1914, and the plaintiffs had supposed that they were entitled to that amount whenever they might reasonably request it, the matter would not have gone unmentioned for 18 months. No distinction is suggested between the different months. If the unordered amounts were abandoned by both parties as to the earlier months under the contracts, they were, with the limitation hereafter stated, abandoned as to the later ones.

In the situation existing at the time of the plaintiffs' final demand, it is obvious that the provisions of the contracts relating to the total amount purchased, and to the times of delivery, could not both be carried out. The delivery of the entire 900 tons could not be required without disregarding the agreed rate; while, if the delivery provisions were observed, less than 900 tons would be furnished within the period fixed by the contracts. No such difficulty was inherent under them. It arose solely because of the plaintiffs' repeated failures to order and take the stated monthly amount. It is clear that it devolved upon the plaintiffs to take the initiative in giving delivery orders, by which various necessary details as to size, etc., were to be specified, and that without such orders the defendant could not tender deliveries. The responsibility for the situation referred to was therefore entirely upon the plaintiffs.

The failure of the plaintiffs to order from month to month the stated amount constituted breaches of contract by them. Manhattan Oil Co. v. Richardson Lubricating Co., 113 Fed. 923, 51 C. C. A. 553 (C. C. A. 2d Cir.). Of course, the plaintiffs cannot by their own defaults increase the burden on the defendant, nor vary the contracts as to dates or amounts of deliveries without the defendant's assent. Johnson et al. v. Allen et al., 78 Ala. 387, 56 Am. Rep. 34. It devolves upon the plaintiffs to establish that such assent was given, and upon all the evidence I am of opinion that the defendant's silence does not show an agreement on its part to a modification of the original contracts in respect to deliveries.

[3] Many decisions have been cited by the parties, but from the nature of the case, the real question being one of fact, they do not afford much assistance in arriving at the correct result. It should perhaps be observed that, in the cases relied on by the plaintiffs, there was, instead of silence, negotiation between the contracting parties, which was found to have resulted in a new agreement as to the time of delivery. Modifications of a written contract ought not to be inferred from conduct of doubtful significance. Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co., 105 Minn. 483, 117 N. W. 825. The defendant's silence as to the unordered monthly amounts is at least as consistent with the view that it regarded them as not needed by the plaintiffs, and abandoned, as with the view that it waived the plaintiffs' breaches in not ordering and agreed to fur-

nish the unordered amounts at a later date, in disregard of the limitations on the maximum amount of deliveries in any one month and of the time which the contracts were to run, which were inserted for its protection.

Upon all the evidence I find that the amounts not ordered by the plaintiffs in any given month were treated by both parties as waived and abandoned. The waiver did not become complete until the lapse of a reasonable time after the month in question. In other words, the contract specified monthly deliveries of "approximately 45 tons," which gave the plaintiffs the right to drop slightly below that amount in one month and go slightly above it in any succeeding month within a reasonable period. But the plaintiffs made no claim and gave no orders for a final delivery on that basis, and their claims here are not rested on an alleged breach of that character.

Judgment for the defendant.

NEW ENGLAND FUEL & TRANSPORTATION CO. v. CITY OF BOSTON.

(District Court, D. Massachusetts. April 30, 1919.)

No. 1668.

1. NAVIGABLE WATERS ⟸20(8)—INJURY TO VESSEL FROM COLLISION WITH BRIDGE—NEGLIGENT OPERATION OF DRAW.
   A city, as operator of a drawbridge, and a steamer, both *held* in fault and liable for injury to a tug assisting the steamer through; the steamer because of negligent operation of her engines contrary to signal, causing her to move ahead and strike the swinging draw, and the city because the bridgetender negligently allowed the draw to overswing and strike the tug.

2. NEGLIGENCE ⟸61(2)—PROXIMATE CAUSE OF INJURY—CONCURRENT CAUSES.
   That one person's negligence created a condition of things in which the later independent negligent act of another sets in motion causes which occasion an accident is not sufficient to hold the first person responsible; but, if the effect of his negligence continues into the accident, he is also responsible.

In Admiralty. Suit by the New England Fuel & Transportation Company, owner of the tug Juno, against the City of Boston, with the steamer Currier, the Gulf Refining Company, claimant, impleaded. Decree for libelant against both respondents.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.

James L. Gillingham, of New York City, for respondent Gulf Refining Co.

Joseph P. Lyons, of Boston, Mass., for respondent city of Boston.

MORTON, District Judge. The Currier, which is a large steamer (370 feet long, 52 feet beam, 20 feet draft at the time in question, and properly manned and equipped), came out of the Everett Gas Works dock in the Mystic river about 7:30 a. m. on September 11,

1917, with the tugs Saturn and Juno in attendance. By their aid she was headed towards the Chelsea north drawbridge. Her engine was put half speed ahead and ran so for about three minutes, when it was stopped. When about 2,000 feet from the bridge, she gave the regulation signal for the draw, four long blasts. Near the lower red buoy, the bridge having given no sign of opening, the signal to it was repeated. The bridge shortly after answered the Currier's signal in such a way as to give her to understand that it would open. After this answering signal had been given, however, highway traffic was observed still crossing the draw. It continued to do so until the steamer, which was sliding forward with her engine stopped, had got so near the bridge as to make it doubtful whether the draw would be open by the time she reached it. A danger signal was then blown by the steamer for the purpose of warning and hurrying up the draw-tenders.

When the steamer was 800 or 1,000 feet away from the bridge, the order was given to start her engines slow astern. This order was properly repeated back from her engineroom. According to her engineroom log, however, it was executed as slow speed ahead. After a short, but appreciable, interval, it was noticed by those in charge of her that her headway was not being checked as was expected. By this time she was so near the bridge and moving at such a speed that there was obvious danger of an accident. The order was then given full speed astern and was executed. By the time the backwater from the propeller had become noticeable around the Juno, the attention of everybody was directed toward the impending collision with the bridge. This accounts for the failure of the men on the Juno to notice the backwater, and for their testimony—which I think mistaken—that the steamer's engines were not running astern before the accident.

The draw is 362 feet long and weighs about 1,400 tons. It revolves on its center. It got in motion slowly at first, turning from the steamer. After it had swung 8 or 10 feet, the steamer overtook it and collided with it, crushing in the outer stringer and damaging one of the heavier members farther inside. The draw continued to open, and drew away from the steamer, which advanced through the opening. The Juno at this time was on the steamer's port quarter in the draw opening, between her and the draw pier of the bridge. The draw revolved until it came to its middle, or full-open, position. At that point it ought to have stopped, but it did not do so. It continued to revolve, and its left end—the one not struck by the Currier—overswung and crushed the Juno against the side of the Currier, inflicting serious injuries on the Juno, to recover for which this libel is brought. The Currier kept on through the draw, and the Juno also. This is the account of the accident given on behalf of the Juno and Currier. In its main outlines it is not disputed, and I find the facts as above stated.

Nobody contends that the Juno was at fault, and it is plain that she was not. As between her and the Currier, the only allegation of fault on the part of the latter, which requires discussion, is that the Currier's

engines were not properly handled. The orders to the engineroom seem to have been right, and, indeed, are not criticized; but other facts besides the entry on the engineroom log indicate that a mistake was made there, and that the engines were sent ahead, when the order was to send them astern. In close quarters such a blunder might easily cause a collision; and it did so in this case. If the engines had been handled in accordance with the orders, the steamer would have been checked before she collided with the bridge. I find that there was negligence in handling the Currier's engines, which, in conjunction with the negligent delay in opening the draw, hereafter referred to, caused the collision between the Currier and the draw.

Turning to the occurrences on the draw: Its crew were not at their posts when the first signal was given by the Currier. Nobody was on watch in the tower or on the bridge proper. All the men were down in the house on the pier, on the opposite side from the Currier, changing their clothes and getting ready to go off duty at 8 o'clock. They were not aware of the Currier's signal until their attention was called to it by Capt. Ford of the tug Sprague, which was tied up at a nearby pier. Capt. Ford heard the Currier's signals and noticed that they were not being heeded by the draw crew, and he called the attention of the draw crew to them. Even after this was done, the draw tenders did not go about their work sharply, as they ought to have done. There was delay in excluding the traffic, a delay which, as the accident could have been avoided, if the draw had started to open but a short time sooner than it did, directly entered into the accident. It is clear that there were serious faults on the part of the draw crew in not being at their post of duty, in not observing the signals of the Currier, and in failing to exclude traffic and open the draw promptly, as the regulations require. Rules and Regulations to Govern the Opening of Bridges Crossing Boston Harbor, Made by Secretary of War, rules 7, 8, and 10; River and Harbor Act Aug. 18, 1894, c. 299, § 5, 28 Stat. 362 (Comp. St. § 9973). Testimony by men whose fault is of such gross and obvious character, given in attempted exculpation of their conduct, does not carry conviction when contradicted; and I accept in the main the story as to the movement and conduct of the draw as given on behalf of the Currier and the Juno.

[1] The next question is whether, after the collision, the draw could have been checked in time to prevent the overswing which caused the accident. Doherty, who was handling the machinery, testifies that as soon as the collision occurred he shut off the power and applied the brakes on the draw, and that it swung from that time on under the full braking power, which was insufficient to stop it before the accident. From the nature of the case, no direct evidence can be given in contradiction of his assertion; but I think that the facts show that he is in error. The normal speed of the draw in opening is, I am satisfied, much greater than the speed at which the Currier struck it. Assuming, as Mr. Gardner suggests, I think, rightly, that the spring in the steel in the draw under the blow of the vessel would impart to it a speed somewhat greater than the speed of the vessel herself, nevertheless I am satisfied that, considering the long distance

which the draw swung thereafter, it is very improbable that such a speed was communicated to it as put it out of control by the brakes. After the Currier collided with it, she was still going ahead. I think that Doherty continued the power to keep the bridge swinging ahead of her, and in the excitement of the accident neglected to shut it off and apply the brakes in time to prevent the overswing; and I so find. It is contended for the Juno that the mechanism of the draw was defective; but I do not think that such finding ought to be made on the evidence before the court.

[2] Negligence on the part of the city, which caused the accident, is clearly established. It remains only to consider whether the Currier's negligence so contributed thereto as to make her also responsible. A party is not responsible for his negligence, unless the effect of it continues into the accident. That one person's negligence created a condition of things in which the later independent negligent act of another person sets in motion causes which occasion an accident is not sufficient to justify holding the first person responsible. So, where a dealer negligently sold gunpowder to a small boy, who took it home and kept it there with the knowledge of his guardian, and was later permitted by his guardian to have it again, it was held that the dealer was not responsible for the resulting accident. Davidson v. Nichols, 11 Allen (Mass.) 514. But the fact that the course of the defendant's negligence is so diverted by the act of a second person—even a negligent act— as to result in injury to the plaintiff, does not exonerate the defendant, if there was a continuing causal connection between what the defendant did and the injury. In Eaton v. B. & L. R. R. Co., 11 Allen, 500 (Mass.) 87 Am. Dec. 730, the train of the defendant, in which the plaintiff was a passenger when injured, came to a stop between stations. There was a rear-end collision with a following train, operated by another railroad using the same tracks. The collision might have been avoided by due care in handling the overtaking train. The defendant was, however, held liable, on the ground that its negligence contributed to the accident.

The immediate cause of the present accident was the fact that the drawtender mishandled the draw. He did so because he was upset (mentally) by the collision between the Currier and the draw, and her continuing ahead after the collision had taken place. As above stated, his attention was focused solely on getting the draw out of her way, until too late to prevent the overswing, which did the damage. As between the Currier and the city, it may be that the latter—equitably at least—should stand the loss; but, as between the Currier and the Juno, I think that the former's negligence so continued into the accident as to make her responsible for it.

A decree may be entered in favor of the libelant against both the city of Boston and the Gulf Refining Company, and the case referred to an assessor to state the damages.

CITY OF MONROE v. DETROIT, M. & T. S. L. RY.

(District Court, E. D. Michigan, S. D. May 1, 1919.)

No. 286.

1. REMOVAL OF CAUSES ⟸25(1)—GROUNDS FOR REMOVAL—CASES ARISING UNDER LAWS OF UNITED STATES.
Whether a case arises under the Constitution or laws of the United States, within the removal statute, must be determined from the necessary allegations of plaintiff's pleading, without regard to any defenses which are or may be interposed by defendant, and also without reference to any allegations of plaintiff in anticipation or denial of such possible defenses.
2. REMOVAL OF CAUSES ⟸25(1)—GROUNDS FOR REMOVAL—CASES ARISING UNDER LAWS OF UNITED STATES.
A suit by a city against an interurban railway company to restrain violation of a contract fixing rates, made by a franchise ordinance, is not removable as one arising under the laws of the United States, although the bill alleges, in anticipation of the defense that defendant was authorized to increase its rates by the Interstate Commerce Commission, the invalidity of the order.

In Equity. Suit by the City of Monroe against the Detroit, Monroe & Toledo Short Line Railway. On motion to remand to state court. Motion granted.

J. C. Lehr, of Monroe, Mich., for plaintiff.

Bernard F. Weadock, Stevenson, Carpenter, Butzel & Backus, and Donnelly, Hally, Lyster & Munro, all of Detroit, Mich., for defendant.

TUTTLE, District Judge. This matter is before the court on motion to remand the case to the state court, from which it was removed by the defendant, to this court, on the ground that it was a case arising under the laws of the United States. The sole question involved is whether it was removable on that ground.

The bill of complaint was filed in the circuit court for the county of Monroe, one of the courts of record of the state of Michigan, by the city of Monroe, a municipal corporation of this state, against the Detroit, Monroe & Toledo Short Line Railway, a Michigan corporation operating an electric railway in the streets of said city, and also between it and Detroit, Mich., seeking to restrain the defendant from violating a certain franchise granted by the plaintiff and held by the defendant.

The material allegations of the bill are to the effect that several years prior to the date of the filing of the bill plaintiff granted a certain franchise to the Toledo & Monroe Railway, which afterwards assigned it to the defendant, the Detroit, Toledo & Monroe Railway, a Michigan corporation, giving the grantee the right to operate street cars in the streets of said city, for a period which has not yet expired, on certain terms and conditions; that one of these conditions, which was part of the consideration for the grant of the franchise, was a provision that the company should not charge, as a rate of fare for carrying passengers between Monroe and Detroit, more than the sum of 50 cents per passenger; that the defendant operates its railway from

Detroit to Monroe, and also from Monroe on to Toledo, Ohio, and also operates an electric railway system upon the streets of said city of Monroe, as the assignee of its aforesaid predecessor under the said franchise; that shortly before the filing of this bill defendant applied for and obtained from the Interstate Commerce Commission an order granting it permission to increase its fare between Detroit and Monroe to a sum in excess of the aforesaid sum agreed on in said franchise; that defendant has put into effect and is now charging said increased fare between the cities mentioned, and in so doing is wholly disregarding its said franchise; that the order just mentioned is void, for the reason that the rate of fare between said cities does not involve interstate commerce, but is wholly intrastate, and is the subject of contract between the plaintiff and defendant; that said defendant has no legal right or authority to thus increase such rate; that the action of defendant company in raising said fare as established by said franchise is contrary to the provisions of the laws of the state of Michigan; that one of the statutes of such state (quoted in the bill) provides that the rates of fare which any railway company may charge for the transportation of passengers shall be established by agreement between such company and the separate authorities of the city where the road is located, and shall not be increased without consent of such authorities, and that defendant, in the operation of its cars through said city of Monroe, has always held itself out as a street railway company; that the collection by defendant of the increased fare provided for in its application filed with the said Interstate Commerce Commission constitutes a direct violation of the terms and provisions of the said franchise, and a violation of the laws of the state of Michigan, and that such action is not by reason of any lawful or competent authority whatsoever; that "the collection of such increased rate of fare will cause this plaintiff and all of the residents of said city irreparable damage and injury, and that in order to prevent the same an injunction should be issued forthwith."

The bill prayed for a temporary and also a permanent injunction restraining the defendant from collecting or charging on its railway between the cities of Monroe and Detroit any rate of fare in excess of that stipulated and set forth in said franchise, that the court decree such franchise to be a binding and valid obligation upon defendant, and that defendant be decreed to comply with the terms thereof.

After the filing of the bill, the defendant caused the case to be removed from the state court to this court. It then filed its answer in this court, denying all of the material allegations of the bill and declaring that it was entitled, by reason of the order of the Interstate Commerce Commission already mentioned, to charge the increased rate of fare complained of.

Plaintiff has moved this court to remand the cause to the state court, and as the cause was removed on the ground that it was a case arising under the laws of the United States, of which this court is given original jurisdiction by the federal statutes, the sole question presented is whether this is such a suit.

Section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [Comp. St. § 1010]) provides that—

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, * * * of which the District Courts of the United States are given original jurisdiction * * * which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. * * * Whenever any cause shall be removed from any state court into any District Court of the United States, and the District Court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution."

[1] Whether a case arises under the Constitution or laws of the United States, within the meaning of this statute, must be determined from the necessary allegations in the statement of the plaintiff's cause of action, without regard to any defenses which have been or may be interposed by the defendant, and also without reference to any allegations of the plaintiff in anticipation or denial of such possible defenses. State of Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; Boston & Montana Consolidated Copper & Silver Mining Co. v. Montana Ore Purchasing Co., 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626; Louisville & Nashville Railroad Co. v. Mottley, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. 126; Taylor v. Anderson, 234 U. S. 74, 34 Sup. Ct. 724, 58 L. Ed. 1218; American Well Works Co. v. Layne & Bowler Co., 241 U. S. 257, 36 Sup. Ct. 585, 60 L. Ed. 987.

[2] Applying this rule to the present case, I am clearly of the opinion that such case is not one arising under the laws of the United States, within the meaning of the statute in question. It will be noted that the bill is not directed at the Interstate Commerce Commission, and that the members of such commission are not made parties to the suit, nor is any relief asked as against them. The substance of the complaint made in the bill is, without doubt, the allegation that the defendant has violated and is attempting to violate the franchise agreement between it and the plaintiff. The plaintiff does not bring its bill in order to attack the validity of any order of the Interstate Commerce Commission. All that the plaintiff really seeks in its bill is relief from the alleged violation by the defendant of this franchise in respect to the rate of fare between Detroit and Monroe. It is true that plaintiff refers to the order mentioned, but it is plain, in my opinion, that it does so only because defendant has justified its acts by pointing to such order, and that the reference to the order, in the bill, is merely for the purpose of anticipating and denying in advance a defense which it in effect charges that the defendant will interpose in its own behalf. In other words, after alleging the grievance complained of, namely, the violation by the defendant of this franchise, which it seeks by this suit to prevent, plaintiff has gone beyond the essential scope of its bill, and, in substance and effect, charges that the defendant excuses, or will attempt to excuse, such violation by relying upon the order of the Interstate Commerce Commission mentioned in the bill and alleged therein to have been made upon the application of the defendant itself. Thus plaintiff anticipates a defense upon which it expects defendant will rely. Then, in order to forestall

such defense, and to show its lack of merit before it has been presented by defendant, plaintiff declares that it is not a good defense, because the order relied on by defendant is void, for the reason stated in the bill. Plaintiff makes no affirmative claim of right, or to relief, by reason of such order; nor does it seek to have the latter set aside or modified. In fact, all mention thereof could be omitted from the bill without in any way affecting the real substance thereof. The act of the defendant, not that of the Commission, is the grievance against which this bill is aimed and upon which it is based.

As, therefore, the contention of the defendant that this case is removable on the ground that it arises under the laws of the United States, of which this court is given original jurisdiction, is based entirely upon the reference in the bill to this order of the Interstate Commerce Commission, it follows, from the conclusions herein stated, that such contention is without merit and must be overruled; and an order will be entered remanding the case to the state court from which it was removed.

In re SPRINGFIELD REALTY CO.

(District Court, E. D. Michigan, S. D. April 23, 1919.)

No. 3739.

1. COMMERCE ⟸40(1)—INTERSTATE COMMERCE—CONSTRUCTION OF CONTRACT.
A contract by a foreign corporation to equip certain property located in Michigan with a system of automatic fire sprinklers, in accordance with specifications, but containing no provision as to where the materials or labor should be procured, does not involve interstate commerce, but is wholly intrastate in character.

2. COMMERCE ⟸16—INTERSTATE COMMERCE—CONSTRUCTION OF CONTRACT.
Whether a particular contract is interstate or intrastate in character must be determined by a construction of the contract rather than by a consideration of the manner in which it has been performed by the parties.

3. CORPORATIONS ⟸657(3)—FOREIGN CORPORATIONS—VALIDITY OF CONTRACT.
A contract by a foreign corporation that has not complied with the requirement of Comp. Laws Mich. 1915, § 9063, to entitle it to lawfully do business in that state, which calls for the carrying on of business therein, is void, although, not being made in the state, it escapes invalidity under a further provision of the statute.

4. BANKRUPTCY ⟸341—ALLOWANCE OF CLAIMS—RULES GOVERNING.
In allowing or disallowing claims against estates in bankruptcy, the court is bound by the established rules of law and equity, and cannot arbitrarily exercise its power in their allowance or disallowance.

5. BANKRUPTCY ⟸314(3)—CLAIMS—ILLEGAL CONTRACT.
A contract by a foreign corporation, which is illegal because the corporation failed to comply with the requirement of the state law to authorize it to do business in the state, cannot be made the basis of a claim in bankruptcy, on the ground that the estate had the benefit of its performance.

In Bankruptcy. In the matter of the Springfield Realty Company, bankrupt. On review of order of referee. Affirmed.

McNamara & Scallen, of Detroit, Mich., for petitioner.
Keena, Lightner, Oxtoby & Hanley, of Detroit, Mich., for trustee.

TUTTLE, District Judge. This is a petition filed by the Phillips Company, a Wisconsin corporation (hereinafter called the claimant), one of the creditors of the bankrupt herein, a Michigan corporation, to review an order of the referee in bankruptcy for this division, dismissing the claim of such petitioner for work and labor furnished in installing a certain automatic fire sprinkler system on premises owned by the bankrupt in the state of Michigan. Prior to the filing of the bankruptcy petition herein, claimant had filed a mechanic's lien under the laws of Michigan. The real estate of the bankrupt, including these premises, was sold at a bankruptcy sale, under an order of this court, free and clear from all liens, such as this mechanic's lien; the latter being, so far as it might be valid and enforceable, transferred to the proceeds of such sale. Claimant now seeks to enforce this lien herein.

It is undisputed that the claimant is, and at the time of making the contract in question was, a Wisconsin corporation, and that it did not comply with the statutes of Michigan governing the right of such a corporation to do business here. The defense here urged is that the contract on which such lien depends was void, because it called for the doing of business in Michigan by a foreign corporation which had not obtained the necessary authority from the state of Michigan to do business therein.

By the terms of the contract in question the claimant agreed "to equip the property of the second party, located at Detroit, county of Wayne, state of Michigan," such property being therein specifically described, "with a system of automatic fire sprinklers as described and enumerated in the annexed specifications, with the exceptions noted, all material to be of the first class, and all work done in a workmanlike manner under the rules and regulations of, and in accordance with the plans approved by, Michigan inspection bureau, whose approval shall be conclusive and final as to the proper completion of the contract."

Claimant seeks to meet this defense by three different contentions as follows: (1) That the contract in question did not provide for the doing of intrastate business, but related to and constituted interstate commerce, and that, therefore, it was not within the prohibition of the Michigan statute invoked. (2) That this contract was not made in Michigan, but in Illinois, and that, therefore, it is not void under such statute. (3) That as the bankrupt and ultimately its trustee received the benefit of the full performance of this contract by claimant, this court should, in equity, require payment to be made therefor. These contentions will be considered in the order named.

[1] 1. The provisions of the Michigan statute referred to are as follows: Section 1 of Act 206 of the Michigan Public Acts of 1901, as amended, being section 9063 of the Michigan Compiled Laws of 1915, provides:

"It shall be unlawful for any corporation organized under the laws of any state of the United States, except the state of Michigan, or of any foreign

country, to carry on its business in this state, until it shall have procured from the secretary of state of this state a certificate of authority for that purpose."

Section 6 of the same act (section 9068 of the Michigan Compiled Laws of 1915), provides as follows:

"No foreign corporation, subject to the provisions of this act, shall be capable of making a valid contract in this state until it shall have fully complied with the requirements of this act, and at the time holds an unrevoked certificate to that effect from the secretary of state."

Section 8 of the act (section 9070, Compiled Laws of 1915) concludes thus:

"Nor shall this act be construed to prohibit any sale of goods or merchandise which would be protected by the rights of interstate commerce."

The meritorious question here involved is whether this contract provided essentially for the carrying on of business by claimant in Michigan (that is, the doing of intrastate business in Michigan), and hence falls within the prohibition of section 1 of the statute, or whether, on the other hand, this contract so related to interstate commerce as to be a part thereof, and therefore not within this statutory prohibition.

What, then, was the character of this contract? By its terms the claimant agreed "to equip the property" of the bankrupt in Detroit "with a system of automatic fire sprinklers" in accordance with certain plans and specifications referred to and attached to the contract. There is nothing in the contract, plans, or specifications which in any way provides or indicates that it was intended by either party that any of the material or labor required for the performance of the contract was to be brought into Michigan from outside the state. The claimant merely agreed to equip this property with the fire sprinklers in the manner already referred to. No mention is made in the contract, plans, or specifications as to the place where any of this labor or material should be obtained, although such specifications provide in detail for the furnishing of the necessary material and apparatus.

It will thus be noted that this contract provided merely for the equipment of a certain building in Michigan with a certain system of fire sprinklers. That is all which claimant agreed to do. It would, of course, not be contended that the mere reference to claimant as a Wisconsin corporation made such a contract interstate commerce. That, however, is the only reference therein to any other state than Michigan. There is no language in the contract, plans, and specifications expressly or impliedly providing for the shipment of anything into Michigan from outside. Certainly the claimant would have been warranted, under the contract, in obtaining all of its labor and material there. It seems clear, therefore, that the contract did not involve interstate commerce, but was wholly intrastate in character, and not within the prohibition of the statute. Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239, 55 C. C. A. 93 (C. C. A. 6); Hastings Industrial Co. v. Moran, 143 Mich. 679, 107 N. W. 706.

[2] Nor does the mere fact that in performing this contract the claimant or its subcontractors purchased and brought into the state from outside some of the material and labor used in equipping this

plant affect the character of the transaction or make it interstate commerce. Oakland Sugar Mill Co. v. Fred W. Wolf Co., supra. If this were not so, any party to a contract on its face intrastate in character could readily change it into interstate commerce by merely transporting into the state where the contract was to be performed material purchased in and sent from another state, and using it in performing such contract. This shows clearly the soundness of the rule. The question, then, whether a particular contract is interstate or intrastate in character, must be determined by a construction of the contract, rather than by a consideration of the manner in which it has been performed by the parties thereto.

It must be borne in mind that the contract in question does not provide for the sale of an article in interstate commerce under an agreement containing a clause to the effect that the seller shall install the article in the state to which it is to be sent. This contract provides merely for the furnishing and installation of certain apparatus in a certain building in the state of Michigan, without any provision for the prior transportation of such apparatus from outside into this state. Therefore the cases are not here applicable which distinguish between intrastate transactions and interstate commerce in contracts providing, not only for the sale and installation of articles, but also for the transportation of such articles from one state to another.

[3] 2. The contract, then, being, for the reasons already stated, void under section 1 of the statute, the contention that it is not void under section 6 becomes immaterial, even if correct. Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611; 23 Sup. Ct. 206, 47 L. Ed. 328.

3. Finally, it is urged by claimant that as it furnished to the bankrupt certain property under the contract in question, and such property ultimately came into the possession of the trustee, who reaped the benefit thereof by selling it at the bankruptcy sale and receiving the full value thereof; therefore this court ought, in equity and fairness, to order this claim allowed and paid.

[4] Claimant, however, overlooks the fact that in allowing or disallowing claims against estates in bankruptcy the court is bound by the established rules of law and equity, and cannot arbitrarily exercise its power in the allowance or disallowance of such claims.

[5] It is well settled that when a contract like that here involved, illegal because contrary to a statute, has been made, and the parties thereto are in pari delicto, neither party will be permitted to have the aid of the court in obtaining any relief in regard to such contract, but the court will leave such parties where it finds them. McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Walhier v. Weber, 142 Mich. 322, 105 N. W. 772; Benson v. Bawden, 149 Mich. 584, 113 N. W. 20, 13 L. R. A. (N. S.) 721; Cashin v. Pliter, 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913C, 697; 6 R. C. L. § 218; 13 Corpus Juris, 507.

The record and briefs of counsel have been examined with care, but from the views and conclusions herein expressed it follows that the order of the referee must be, and it is, affirmed.

ADLER v. CAMPECHE LAGUNA CORPORATION.

(District Court, D. Delaware. May 2, 1919.)

No. 368.

1. COURTS ⟸371(1)—JURISDICTION OF FEDERAL COURTS—APPOINTMENT OF RECEIVER UNDER STATE STATUTE.
   A federal court in the state of incorporation has jurisdiction of a suit for the appointment of a receiver for a corporation under a state statute, where there is the requisite diversity of citizenship and the requisite amount is involved.
2. COURTS ⟸347—EQUITY RULES—SUIT BY STOCKHOLDER.
   Equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv), relating to suits by stockholders against the corporation and others, founded on rights which may properly be asserted by the corporation, does not apply to a suit by a stockholder against the corporation alone, for appointment of a receiver under a state statute, because of insolvency, and such a bill is not defective for noncompliance therewith.
3. CORPORATIONS ⟸553(3)—RECEIVERS—GROUNDS FOR APPOINTMENT—INSOLVENCY.
   Independent of statutory authority, insolvency alone is not a sufficient cause for appointment of a receiver for a corporation.
4. CORPORATIONS ⟸557(2)—RECEIVER—APPOINTMENT FOR INSOLVENT CORPORATION—SUFFICIENCY OF BILL.
   Under Rev. Code Del. 1915, §§ 3883, 3884, authorizing the appointment of a receiver for a Delaware corporation on the ground of insolvency at suit of a stockholder or creditor, and vesting such receiver with title to all the corporation's property, of whatever kind and wherever situated, except real estate situate outside the state, it is not essential that the bill for such a receiver should allege that the corporation has assets within the state.
5. CORPORATIONS ⟸557(2)—RECEIVER—APPOINTMENT FOR INSOLVENT CORPORATION—SUFFICIENCY OF BILL.
   A bill by a stockholder for the appointment of a receiver for a corporation on the ground of insolvency *held* sufficient, under the Delaware statute.

In Equity. Suit by Francis C. Adler against the Campeche Laguna Corporation. On motion to dismiss the bill. Denied.

MORRIS, District Judge. The plaintiff, Francis C. Adler, a citizen of Pennsylvania, having filed his bill praying for the appointment of a receiver of the defendant, the Campeche Laguna Corporation, a corporation of the state of Delaware, the latter moved to dismiss the bill, under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), on the ground of insufficiency of fact to constitute a valid cause of action in equity, and urges in support of the motion that the bill fails to disclose (1) compliance with equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv); (2) any property belonging to the defendant of which possession could be properly taken by a receiver appointed herein; and (3) facts justifying the exercise of the discretion of the court in favor of the appointment of a receiver.

The bill is founded solely upon paragraph 3883 of the Revised Code of Delaware of 1915. That statute provides:

"Whenever a corporation shall be insolvent, the Chancellor, on the application and for the benefit of any creditor or stockholder thereof, may, at any time, in his discretion, appoint one or more persons to be receivers of and for such corporation to take charge of the estate, effects, business and affairs thereof and to collect the outstanding debts, claims, and property due and belonging to the company, with power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits, to appoint an agent or agents under them, and to do all other acts which might be done by such corporation and may be necessary and proper; the powers of such receivers to be such and continued so long as the Chancellor shall think necessary: Provided, however, that the provisions of this section shall not apply to corporations for public improvement."

The bill alleges that the plaintiff is a stockholder of the defendant corporation; that "the defendant corporation is insolvent in that it is unable to pay its obligations as they fall due, in due course of business"; that it is not a corporation for public improvement; that it is principally a holding company owning stock in other corporations; that the stock so owned is pledged to secure outstanding bonds of the face value of $1,754,750, some of which are overdue, and on all of which interest has been in default since March, 1917, and that the defendant is unable to pay either the principal or interest so due; that the real property of the underlying companies is covered by a mortgage securing bonds on which interest has been in default since October, 1917; that the defendant and one of its subsidiary companies has also mortgaged all their personal property and accounts receivable; and that the security and value of the stock of the plaintiff, as well as of other stockholders, is being depleted and diminished under the present unsuccessful and unsatisfactory condition of defendant's business. The bill also discloses diversity of citizenship of the parties and that the amount involved exceeds the jurisdictional amount.

[1, 2] This suit is cognizable in this court. Jones v. Mutual Fidelity Co. (C. C.) 123 Fed. 506; Land Title & Trust Co. v. Asphalt Co. of America, 127 Fed. 1, 62 C. C. A. 23; McGraw v. Mott, 179 Fed. 646, 103 C. C. A. 204. Is the bill jurisdictionally defective for noncompliance with equity rule 27? It does not show compliance with this rule, and therefore the matter to be determined is whether it is applicable to this case. The rule embraces "every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation." To come within its scope the bill must not only be brought by a stockholder, but it must be brought "against the corporation and other parties," and must also be "founded on rights which may properly be asserted by the corporation." This bill is brought against the corporation alone and not against "the corporation and other parties," and is not "founded on rights which may properly be asserted by the corporation." Whatever be the rights, if any, of a corporation under the general equity powers of the court to have a receiver appointed for itself upon its own application, such rights are not here involved. This bill seeks a receiver on the ground of insolvency alone.

[3] Independent of statutory authority insolvency alone is not a sufficient cause for the appointment of a receiver. Alderson on Re-

ceivers, § 352; Land Title & Trust Co. v. Asphalt Co. of America, 127 Fed. 1, 18, 62 C. C. A. 23. The Delaware statute enlarges the jurisdiction of the Court of Chancery over the appointment of receivers for corporations to include cases where insolvency is the sole ground for the appointment. It not only creates the right, but designates the persons entitled to the relief. In such instances, only the persons so designated may sue. Fithian v. St. Louis & S. F. Ry. Co. (C. C.) 188 Fed. 842. The corporation is not so designated. The rights asserted by the bill are consequently not rights which may properly be asserted by the corporation. The bill having been brought against the corporation alone, and not being "founded on rights which may properly be asserted by the corporation," it comes within neither the letter nor spirit of equity rule 27, and is not defective for noncompliance therewith. Excelsior Pebble Phosphate Co. v. Brown, 74 Fed. 321, 20 C. C. A. 428.

[4] The defendant's objection that the bill fails "to show any property belonging to defendant of which possession could be properly taken by any receiver appointed herein" seems to be directed to the absence of assets of the defendant company in the state of Delaware. While the point might probably be well taken if the bill had been filed in a jurisdiction other than that of the domicile of the defendant, the presence of assets of the defendant in the state of Delaware is not a prerequisite to the appointment of a receiver therefor in this state. It is not so required by the statute in question. The receiver here appointed supplants its officers in the management of all its business affairs. In Du Pont v. Standard Arms Co., 9 Del. Ch. 315, 320, 81 Atl. 1089, Chancellor Curtis said:

"Being a statutory receiver, the effect of it was to suspend the right and power of its officers to continue the business of the company. The effect of the Delaware statute of 1891 [now section 3883, Rev. Code Del. 1915], enlarging the jurisdiction of the Court of Chancery over the appointment of receivers for corporations to include cases where insolvency is the sole ground for the appointment, is to transfer to the receiver so appointed the functions of the corporation; and the corporation is therefore necessarily deprived of all management of its property and affairs, except, perhaps, the doing of acts necessary to the perpetuation of its corporate existence, such as elections of officers; for by the Delaware act unless limited by the order of the Chancellor, the receiver so appointed, in addition to conserving and collecting the assets of the company, and prosecuting and defending suits, is given in general language power 'to do all other acts which might be done by such corporation and may be necessary and proper.' Chapter 181, vol. 19, Laws of Delaware. This is also the legal consequence of the appointment."

Again, a receiver so appointed has, by virtue of section 3884 of the Revised Code of Delaware of 1915, title to all the property of the corporation wheresoever situate, except real estate situate outside the state of Delaware. That statute, among other things, provides:

"The receiver or receivers appointed by the Chancellor, of and for any corporation created by or existing under the laws of the state of Delaware, and the successor or successors of any such receiver or receivers, shall upon his or their appointment and qualifications, * * * be vested by operation of

law, without any act or deed, with the title of such corporation to all its * * * property, real, personal or mixed of whatsoever nature, kind, class or description, and wheresoever situate, except real estate situate outside the state."

It is therefore not essential for the bill to allege that there are assets of the defendant corporation within the state of Delaware, the state under whose laws it was created.

[5] The remaining point urged by the defendant in support of its motion to dismiss the bill is that sufficient facts to justify the exercise of the discretion of the court in favor of the appointment of a receiver are not alleged, and in support of this contention relies principally upon the case of Sill v. Kentucky Coal & Timber Development Co. (Del. Ch.) 97 Atl. 617, and a case between the same parties in the District Court of the United States for the Eastern District of Kentucky. While the decision in the latter case purports to be based upon section 3883 of the Revised Code of Delaware, above quoted, this statute has no extraterritorial force or effect, and could not be made the basis of relief against a Delaware corporation in any jurisdiction outside the state of Delaware. The Kentucky case cannot have either controlling or persuasive influence upon the decision of this case. In the Delaware case the Chancellor held that insolvency of a defendant Delaware corporation is sufficiently alleged in a bill by a creditor or stockholder for the appointment of a receiver to wind up the affairs of such corporation, if it be averred that the company is unable to meet its debts and obligations as they mature, and added:

"That bills of that character should contain other allegations in order to move the court to exercise its discretion respecting the appointment of a receiver of the defendant company."

But in either aspect the allegations of the present bill are sufficient. Insolvency is properly alleged. Sill v. Kentucky Coal & Timber Development Co. (Del. Ch.) 97 Atl. 617; Whitmer v. William Whitmer & Sons (Del. Ch.) 99 Atl. 428. The bill also contains other allegations which, if true, and for the purpose of this motion must be assumed to be true, are, in the absence of countervailing facts, sufficient to justify the exercise of the court's discretion in favor of the appointment of a receiver.

The motion to dismiss the bill must be denied, and the defendant required to answer within 20 days. Let an order in accordance with this opinion be prepared and submitted.

THE F. Q. BARSTOW.

(District Court, D. Maryland. April 15, 1919.)

1. SALVAGE ⟸48—PROCEEDINGS—EVIDENCE.
On libel on behalf of the owner of tugs which towed burning steamship from a burning pier, *held*, that the service was meritorious, and it was to the interest of the ship to be removed from the pier as soon as possible.
2. SALVAGE ⟸21—AWARDS—ABANDONMENT OF VESSEL.
Where a tug removed a burning steamship from a pier that was on fire to a point of safety, *held*, that the tug should not leave it without making certain that it is secure, and where it left the ship without making the same secure and the services of another tug were necessary, the value of such service should be deducted from the salvage award in favor of the first.
3. SALVAGE ⟸31—AWARDS—SERVICES.
Where a vessel which, with her cargo of naphtha, was worth $3,500,000, caught fire from a burning pier, and though the naphtha and munitions on board were liable to explode, tugs removed the vessel from the pier to a point where the fire was extinguished, *held*, that the salvors should be awarded $50,000 to be apportioned as stated between the several tugs and the owners, master, and crew.
4. SALVAGE ⟸38—AWARD—DISTRIBUTION.
Whenever a sum is awarded to the master and the crew of salving vessels, it will in the absence of special circumstances, be shared among them in proportion to the wage bill.

In Admiralty. Libels by the Atlantic Transport Company and others against the steamship F. Q. Barstow. Decree for libelants for salvage awards.

George Forbes, of Baltimore, Md., and Chauncey I. Clark, of New York City, for libelant Atlantic Transport Co.

Harry N. Abercrombie, of Baltimore, Md., for libelant Baker-Whiteley Coal Co.

Marbury, Gosnell & Williams, of Baltimore, Md. (George Weems Williams, and L. Vernon Miller, both of Baltimore, Md., of counsel), for libelant Curtis Bay Towing Co.

Ritchie, Janney & Stuart, of Baltimore, Md., and Kirlin, Woolsey & Hickox, of New York City (Albert R. Stuart, of Baltimore, Md., and Mark W. Maclay, Jr., and Peyton Randolph Harris, both of New York City, of counsel), for claimant Standard Oil Co.

ROSE, District Judge. On the morning of the 22d of November last the American Tank steamship F. Q. Barstow, with a cargo of some 3,000,000 gallons of naphtha distillate, tied up to the south side of the Standard Oil Company's pier at Canton, in this harbor. Her stern projected some distance beyond the sea end of the pier. She was a large new ship, built in 1917, of upwards of 10,000 tons gross register, 500 feet long, 68 feet wide, and 35 feet deep. She was then, in her undamaged condition, worth $3,000,000, and her cargo about $500,000. Her earned freight amounted to upwards of $22,000. The unloading of the naphtha, which had begun shortly after she made fast, had been interrupted, because the permanent pipe line through which the discharge was taking place in some way got out of order. The pier was part of a large plant maintained by the Standard Oil Company

at this point, upon which were storage tanks for oil, gasoline, naphtha, and similar inflammable products.

Between 2 and 3 o'clock in the afternoon, fire was discovered on the pier. It spread rapidly, and the bow end of the ship broke into flames before it was possible for those on board to cast off her lines. They were forced to flee for their lives, escaping, for the most part, over her starboard quarter. In order to facilitate their descent, a towing hawser was thrown lightly around one of the bits. It was quite sufficiently secured to maintain the weight of an individual or two, but not to hold under any attempt to pull the ship away from her moorings. She not only had on board a highly inflammable cargo, but her fore and aft guns were still mounted, and there were near each a few shells ready for immediate use. Directly under each of them was a magazine containing considerable supplies of ammunition.

The fire attracted the attention of all the tugs in the harbor, and nearly all made haste to the scene. When they arrived where they could take in the situation, there was on the part of nearly every one of them much more hesitation than they usually display where there is a chance to save property and earn salvage. All of them knew how dangerous was the neighborhood of a burning oil plant. They knew or suspected the character of cargo the ship had on board. Empty or partly empty gasoline drums on the pier and the shells lying near the bow gun were constantly exploding.

As the tug Curtis Bay came up from the lower harbor, it passed, bound down, the powerful tug Britannia, commanded by Capt. William Freeburger, one of the most experienced and competent tugboat masters in the harbor. He signaled that he wanted to speak to the Curtis Bay, and when the two boats came within hearing distance he told Capt. Thompson of the Curtis Bay that he had docked the Barstow that morning, and knew what she had on board, and that she was liable to explode at any time.

When Capt. Thompson reached the fire, the sights and sounds were calculated to shake an ordinarily steady nerve. Nevertheless, apparently without hesitation, he pushed his tugboat, bow on, under the port quarter of the Barstow, put up a ladder from his deck to that of the ship, upon which there at once climbed one Frank Brophy, a deck hand on the Curtis Bay, who made fast the line from the tug, looked carefully about the after part of the ship to make sure that no one was left on board, and then, and not until then, clambered back to his tug, which, having made the line from the ship fast to her stern bits, turned so as to head out. The Curtis Bay is a powerful boat. She pulled to her full capacity, but the ship held fast. The tug Elma then took a line from the Curtis Bay to her stern; next the government cutter Tioga in like manner got a line from the Elma, and in spite of this combined pulling force the ship would not come away. The situation became too alarming for those on board the Elma, and the terror of her crew was so great that the captain yielded to it all the more readily that it seems not improbable that he shared it. She cast off her lines. The connection of the Tioga was thus broken, but so soon as she could get around, she got a line on the Curtis Bay. After a while, perhaps because the progress of the fire had released the fastenings

which kept her bound to the wharf, the ship moved, and was towed out to the flats.

It is not possible to fix with accuracy the number of minutes which elapsed from the time the Curtis Bay made fast until the ship came away. Some of the estimates go as high as 50. I think, however, the probability is that they did not greatly exceed 20. There was no doubt that during this time, however long it was, every one on board the Curtis Bay felt he was in peril.

The chief engineer of the Barstow had succeeded in inducing another tug to put him upon the Curtis Bay. He was so apprehensive that the after magazine on the ship might explode that he made up his mind to try to get aboard of her, so that he could flood it. He attempted to climb up the hawser, but when he was halfway up, too late for him successfully to go on or to go back, he realized, as he testified, that it had been 20 years since he had essayed any such feat. Just at this time his danger was seen by the tug Mary P. Riehl, which, after rescuing a lighter, to be hereinafter mentioned, had returned to the scene and was looking for a chance to get a line on the Barstow. It ran in under the hawser upon which he was, and held itself in such position that he was able to drop to its deck in an exhausted condition. About this time, it in some way fouled one of the lines of the other tug, and had its flagstaff pulled away. It claims to have got its line fast to a hawser hanging over the Barstow's starboard quarter. If it did so, it must, I think, have been after the happening of the trifling accident already mentioned. According to its story, the ship came away shortly after it began pulling. If so, I cannot escape the conviction that it was a mere coincidence. I accept unreservedly the testimony of the first officer of the Barstow as to the insecure way in which the inboard end of the line in question was made fast. It follows that the part the Riehl played in moving the ship was very nearly negligible.

After the Tioga and Curtis Bay pulled the Barstow over on the flats, the Curtis Bay kept her line taut to hold the steamer in position. The tugs Mary P. Riehl, Atlantic, and International, all belonging to the Atlantic Transport Company, then came up, and from the starboard poured water on her, while the city fire boat, which had been playing upon her while still at the pier, followed her out and threw powerful streams on her port side, which, because it had been next the burning pier, was much the hotter. Men from the tugs, or some of them, got aboard the ship and assisted in putting out the smaller blazes on her. The serious work of extinguishing the dangerous fire was done by the fire boat, which threw streams many times larger and more effective than the combined force of all those of the tugs. All of them, except the Curtis Bay, were sent away at or about nightfall. Some time after dark the captain of the Barstow, who had been on his ship, wanted to go ashore to attend to some of the multifarious things which he had then to look after. He asked Capt. Thompson if the ship was fast ground, and on being assured that it was requested to be put ashore. The Curtis Bay accordingly went away with him, and while it was gone the Barstow started to drift down upon the pier ends, and had nearly come into collision with them, when the

Britannia, which had been summoned by an appealing whistle, arrived in the nick of time and pulled her out of danger.

The damage to the ship, from fire and water, amounted to $500,000; its cargo was uninjured; so that the total value of the saved property was in round figures $3,000,000.

After the fire broke out, the rescued lighter, of which mention has already been made, was lying across the end of a pier some 100 feet north of the one which burned. She had nothing on her but a few empty oil barrels. Sparks had already started a small blaze upon her, and, if it had not been speedily checked, she would have burned fiercely. As it was, the Mary P. Riehl, upon arriving on the scene, got a line on the lighter and pulled her out into the harbor, extinguished the light fire on her, and turned her over to the Riehl's sister tug, Atlantic, and by the latter she was made fast in a place of safety.

[1] The chiefs of the fire departments of New York and of Baltimore, who testified for the claimants, were doubtful, or more than doubtful, whether anything was gained by pulling the ship out into the stream. Their theory was that, with two city fire boats at the fire, the Barstow and the other property exposed were more likely to be saved if the municipal fire service did not have to divide its forces to look after the ship. They are very experienced and highly competent men. There is a good deal to say for their point of view, but, on the whole, I am convinced that it was to the interest of the ship to get her away from the burning pier as soon as possible.

[2, 3] In passing on salvage claims arising out of harbor fires, it is, of course, necessary to keep in mind that the hope of large rewards sometimes leads tugboats not only to rush in where they are not needed, but to get in the way of the municipal fire department and of each other, or to take ships where they are in more danger, or where they will expose other property to unnecessary hazard. There can be no question that it took more than ordinary courage to go and stay in the neighborhood of the burning Barstow. It is true that the claimant has put experts on the stand to explain that the chances against an explosion of the naphtha were great. Doubtless they are right, but there was at least a possibility that there might have been one. If there had been, the consequences to life and property would have been disastrous. The explosion of the ammunition in the after magazine might well have been fatal to those near her stern. How imminent this peril was to the apprehension of the chief engineer of the ship was shown by his risking his life in an effort to prevent it. After all said, what the tugboat men did not do speaks eloquently of their fears. They are a bold set. They dearly love a salvage allowance. There were perhaps a score of them near the fire. If they had not thought that death was hovering over the ship and all near it, every one of them would have striven to get a line on her, or on some other tug which had already done so. The Elma did make fast to the Curtis Bay, but those on board were so alarmed that it cast off. The Riehl went up close to the ship, but only after Capt. Donahue, the marine superintendent of the owner, who chanced to be aboard, had taken over the command from the captain, who frankly stated his unwillingness to take the risk.

It is highly probable that the faulty navigation of the Riehl, which resulted in the loss of her flagstaff and other trifling damage, was a consequence of the more or less divided command incident to Capt. Donahue's partial displacement of its master.

Capt. Thompson, of the Curtis Bay, has graphically portrayed the danger and his own indifference to it. It may be that, so far, at least, as concerns the part anybody else had in pulling the ship away, he may be more positive than he was observant. Brave men are usually both modest and accurate; but there are exceptions to the rule, as witness Cyrano, the immortal creation of the great French playwright who has recently passed away.

I am persuaded that the services rendered, and for which compensation is asked, were useful, and they were rendered with exceptional courage and all needed skill. After allowing for the fact that the Tioga, which well performed its part, is a government ship, and therefore does not ask salvage, an award of an aggregate sum of $50,000 against the Barstow, her cargo and freight, and $1,000 against the lighter, appears to be at once reasonable and adequate.

Of this, the Britannia is entitled to $1,000. What it did required simply promptness and skill, involved no danger, and took no appreciable time, but yet it was quite important. Its allowance must come out of the $36,000, which otherwise would be apportioned to the Curtis Bay. It should not have left the ship without making sure that it was secure, and, if it had not done so, the services of the Britannia would not have been required. Of the remaining $35,000, to go to the Curtis Bay, Capt. Owen A. Thompson, its master, is entitled to $3,000, in recognition of the courage, skill, and persistence shown by him. The deck hand, Frank Brophy, who climbed upon the steamer, the most perilous feat of all, is awarded $750. The remaining $31,250 will be distributed, two-thirds to the owners and one-third to the master and crew.

The Mary P. Riehl, for her services, and particularly for the part she played in saving life, is awarded $12,500. She will also receive $750 of the $1,000 charged against the lighter, or $13,250 in all. Of this Capt. William J. Donahue will get $2,000, because it was due to his courage that the Riehl participated at all. To E. F. Hepburn, who was on board and assisted, will be given $200. Two-thirds of the remaining $11,050 is awarded to the owner, the Atlantic Transport Company, and the balance, one-third, to the master and crew.

To the Atlantic is apportioned $1,000, chargeable against the ship, cargo, and freight, and the remaining $250 of the $1,000 allowed for services to the lighter. Of the $1,250 to the Atlantic, $50 will go to the master, $800 to the owner, and the remaining $400 to the master and crew.

The International is allowed, against the ship, cargo, and freight, $500, two-thirds of it to the owner, and one-third to its master and crew.

[4] Whenever a sum is awarded to master and crew, it will be shared among them in proportion to the wage bill, except that, as the captain of the Riehl declined to discharge the duties of that position, he can participate only as if his wages were those of a mate.

THE ISLE OF MULL.

(District Court, D. Maryland. March 26, 1919.)

1. SHIPPING ⟸51—CHARTERS—BREACH—REQUISITION BY ADMIRALTY.
On a libel by the American charterer of a British vessel, which had been requisitioned by a firm of Admiralty agents, *held*, that the requisition must be treated as an act of the Admiralty.

2. SHIPPING ⟸51—CHARTERS—REQUISITION BY ADMIRALTY.
Where the British Admiralty in a Spanish port requisitioned a British vessel under charter to an American firm, *held*, that the British owner was not required to resist the requisition for the benefit of the charterer, and the requisition must be treated as a restraint of princes, regardless of whether the right to requisition vessel in foreign waters existed, for as soon as the vessel put to sea it could have been taken in charge by the first British man-of-war.

3. SHIPPING ⟸51—CHARTERS—REQUISITION OF VESSEL BY ADMIRALTY.
In determining the effect of the requisition of a chartered vessel by the British Admiralty, no distinction should be made on the question whether the charter was a voyage or time charter.

4. SHIPPING ⟸51—CHARTERS—REQUISITION OF VESSEL BY ADMIRALTY.
Though the charter party of a British vessel to an American firm contained the usual clause as to restraint of princes, yet where vessel was requisitioned by the Admiralty at a rate in excess of the rate fixed by the charter party, and the Admiralty retained control of the vessel until after the expiration of the charty party, *held*, as the charterer would have made a profit despite the requisition, such requisition cannot be accepted as a frustration of the contract, and the charterer is entitled, the owner having repudiated the charter party, to the difference between the rate fixed in the charter party and the hire paid by the Admiralty.

5. SHIPPING ⟸58(2)—REQUISITION OF VESSEL—ACTION—LIBEL.
A charterer of a British vessel, which was requisitioned by the Admiralty during the life of the charter, *held* not to be in any wise estopped from asserting rights based on the validity of the requisition, notwithstanding the original libel was on the theory of the owner's repudiation of the charter party.

6. SHIPPING ⟸38—CHARTER—REQUISITION OF VESSEL.
Where the British Admiralty requisitioned a vessel under charter to an American corporation at a rate in excess of the rate fixed by the charter, the American corporation cannot insist that the charter party should remain in force, so that it might be entitled to the excess, and at the same time claim the right to refuse to take the ship, if the requisition was of short duration and ended at a time when market rates were below that fixed in the charter party.

7. SHIPPING ⟸58(1)—CHARTER OF VESSEL—COAL—REQUISITION.
Where the British Admiralty requisitioned a British vessel under charter to an American firm, and paid the British owner for coal found in the bunkers, which belonged to the charterer, but which the owner was entitled to buy under the charter party, *held*, that the charterer was entitled to recover for the value of the coal.

8. SHIPPING ⟸51—CHARTER—OWNER'S REFUSAL TO ALLOW VESSEL TO VISIT PORT OF WARRING NATION.
The owner of a British vessel, under charter containing the usual restraint of princes clause, properly declined to allow the vessel to proceed to the German port of Bremen at a time when a state of war between England and Germany existed.

9. SHIPPING ⇐51—CHARTER—BREACH—OBJECTION TO VOYAGE TO PORT OF WARRING NATION.

Where the port of Rotterdam was a safe port, *held* that, though a state of war between Germany and England existed, the owner of a British vessel under charter to an American firm was not warranted in refusing to allow the vessel to proceed to Rotterdam, and where his refusal lost the charterer a chance at the Rotterdam cargo, the charterer was entitled to deduct from the charter hire for the delay of the vessel occasioned by the unwarranted refusal.

10. SHIPPING ⇐50—CHARTERS—INSURANCE—ALLOWANCE.

Whether or not a vessel under charter is insured against war risk was a matter solely for the owner, and though the owner obtained such insurance because the charterer desired to send the vessel to a Dutch port, though the voyage was not made such sum cannot be charged against the charterer.

11. SHIPPING ⇐49(2)—CHARTERS—PAYMENT OF COMPENSATION—RIGHT TO DEDUCTION—WAIVER.

Where a charterer, on demand of the owner, paid amounts which it had withheld in order to save the vessel and prevent the owner from declaring the charter party at an end, *held*, that such payments did not operate as a waiver of claims to amounts which the charterer was entitled to deduct.

In Admiralty. Libel by the Gans Steamship Line against the Isles Steam Shipping Company, Limited, owner of the steamer Isle of Mull. Decree for libelant.

Haight, Sandford & Smith and Edward Sandford, all of New York City, for libelant.

Kirlin, Woolsey & Hickox, of New York City, and Ritchie, Janney & Stuart, of Baltimore, Md. (John M. Woolsey, of New York City, of counsel), for respondent.

ROSE, District Judge. The libelant is a corporation of New York; the respondent, of the United Kingdom. The former will be called the charterer; the latter, the owner.

On January 7, 1914, the owner's British steamship Isle of Mull entered upon the 5-year term of service with the charterer, contracted for by a charter made on the 19th of the preceding May. On the 11th of July, 1915, at Bilboa, Spain, upon demand of those assuming to act for the British Admiralty, the owner placed the ship at the service of that department of the British government, and so far as the record shows or suggests it remained in that service until after the chartered term expired on January 7, 1919.

The charterer, after the ship was taken over by the Admiralty, continued to tender the charter hire, which the owner refused to receive.

By its libel, the charterer charges that the owner repudiated the charter party. It said that such use of the ship as the charter promised it, from July 11, 1915, to the end of the charter term, was reasonably worth to it £5,110 a month. The charter hire was £1,370. Its loss was therefore at the monthly rate of £3,740, which, for the 41 months and 27 days of the 5 years unexpired from the 11th day of July, 1915, amounted to about £156,597 8s.

The charter contained the usual restraint of princes clause, but the charterer says that for two reasons that proviso has nothing to

do with the case: Because (1) it asserts that those who attempted to requisition the ship did not have, and could not be given, the power to act for the Admiralty in such a matter; and (2) that neither the Admiralty nor any other executive department of the British government had any legal authority to requisition a British ship not in a British port, or in waters adjacent thereto. Of these, in their order.

[1] In the first instance, the requisition was made by a firm of Admiralty agents. For anything which is shown to the contrary, they, and they alone, decided that this particular steamship should be requisitioned, rather than another, or none at all. If the owner had refused to pay any attention to their orders, some more formal action by the Admiralty itself would doubtless have been required before resort could have been had to any coercive measures; but in point of fact the owner, supposing that the agents were speaking for the Admiralty, did what it was told to do, and in a few days the Admiralty ratified what had been done in its name. It has ever since given orders as to the use of the ship, and has made monthly payments to the owner therefor. What was done must be held to have been an act of the Admiralty.

[2] It is admitted that there was no legislative authority to requisition British ships in foreign ports or waters, and that, assuming, in the absence of statute, it was competent for the crown to take over such ships against the consent of their owners, no order in Council or royal proclamation had empowered any one to requisition vessels so situated. The owner, however, contends that the power so to do has been a prerogative of the crown for upwards of 700 years, and while for more than two centuries immediately preceding the outbreak of the World War it had not been used, it had never been surrendered, nor had it legally become obsolete, and that it may be and was properly exercised through the Lord Commissioners for executing the office of the Lord High Admiral of the United Kingdom.

The discussion of this question, found in the record in the form of depositions by experts in the constitutional and legal history of England, not only exhibits a wealth of learning, but is extremely interesting as well. It was conducted by confessed masters of the subject. Prof. Holdsworth, the distinguished historian of the English Law, and Mr. Dunlop, for seven years standing counsel to the Commissioners of the Admiralty, were of the opinion that the prerogative existed, while Sir Henry Erle Richards, professor of International Law at Oxford, and Mr. Marus Warre Slade, a well-known specialist in such matters, were as firmly persuaded that it did not. It is doubtful if there anywhere exists anybody else as well qualified to speak on the disputed question as are these four gentlemen. It is safe to say that there are none better informed upon it, and yet they are equally divided. They have produced copies of royal writs issued as early as the first decade of the thirteenth century, when John was king, and before the barons at Runnymede had forced from him the Great Charter. They have learnedly discussed that Case of the Ship Money which for well-nigh 300 years has made Hampden famous among the champions of constitutional liberty. They have carried the

story down to the Restoration, through the days of the Commonwealth, and have told how Blake, when about to attack the Portuguese for the countenance they were giving to the disorderly sailors of Prince Rupert, took possession in the Tagus, or at its mouth, of nine British ships under charter to the Portuguese, and bound for the Brazils.

All agree that in the eighteenth and nineteenth centuries the prerogative, if it existed, was not exercised. Those who believe that it still lives explain that there had been no occasion to resort to it after merchant ships were no longer useful as units of the battle fleet, and before the days when England, depending on oversea transit for her very existence, was forced to struggle with submarine attacks upon her commerce. Their equally learned adversaries assert that the writs which are cited as evidence that the prerogative of Plantagenet, Tudor, and Stuart extended so far, were all or nearly all addressed to the Cinque Ports or other places which held property or franchises from the crown upon tenure of serving the king with ships, as the great body of the tenants in chief did upon tenure of military service, and that, upon the abolition of feudal tenures by the Restoration Parliament, these rights necessarily became obsolete. No one, it seems, questions the power of the crown to requisition a British ship in British ports, or in the waters adjacent thereto, and as early as the 3d of August, 1914, the day before England declared war, a royal proclamation announced Orders in Council authorizing the requisition of ships in such ports and waters.

The libelant's experts assert that such of the writs as were not merely calls upon the liege towns for their feudal duty were directions to seize ships in English ports, including in such ports not unnaturally those in France, which then owed allegiance to the British crown, such as to Bayonne in 1345, part of the more than princely dower which, nearly two centuries before, Eleanor of Guienne had brought to Henry of Anjou, and which for more than 100 years longer was to remain faithful in its allegiance to England's kings, or to Calais in 1452, a date midway between its conquest by Edward III and its loss by that Mary whom her contemporaries sometimes called "Bloody."

Sir Walter Scott was himself well grounded in ancient lore. In his account in the Antiquary of the dispute between Jonathan Oldbuck and Sir Arthur Wardour as to the racial affinities of the Picts, he has caricatured the difficulties in the way of reaching definite conclusions upon such controversies as that which occupies so much of the present record. As a rule, we know little or nothing at all of the circumstances surrounding the issue and enforcement of any of the ancient documents produced. Their significance usually depends upon what those facts were, and each of the disputants supposes that, if they were known, they would harmonize with the view to which he adheres. When the learned so differ, any conclusion of the unlettered would be without worth.

In the case at bar, the Admiralty did not in the most literal sense take the ship out of the hands of the owner. What it did was to re-

quire the owner to operate its property as the Admiralty directed. The owner was left with many duties. It has been decided that the Admiralty had no power to compel the owner of a ship to do anything other than to surrender his ship. China Mutual Navigation Co. v. Maclay, 34 T. L. R., 81. Such other decisions as have been given are, on the whole, not very favorable to the theory that, independent of statute, the power of the crown to requisition the property of its subjects extends far.

There is, however, no question that the Admiralty did commandeer many British ships in like situation with the Isle of Mull, and almost always without challenge. It could not have seized the ship while in a Spanish port, but, as the evidence shows, it would have taken possession of her so soon as she passed out of Spanish territorial waters. Great Britain was then engaged in the mightiest struggle of all time. Never had she been in such deadly peril before, unless perhaps when the armies of Napoleon were concentrated in the camp at Boulogne. Under these conditions, what did the British owner owe the charterer? It had no right to induce the Admiralty to take the ship. Chicago & Eastern Illinois R. R. Co. v, Collins Produce Co., 249 U. S. 186, 39 Sup. Ct. 189, 63 L. Ed. ——. There is no suggestion in the evidence that it did. Was it required to go further, and refuse to obey the orders of its government? It would not have seemed to it that such a course would have profited the charterer, for the first British man-of-war which would have encountered the Isle of Mull would have taken possession of her. To have assumed an attitude, which to the overwhelming majority of Englishmen would have seemed highly unpatriotic, might well have cost the owner much. The law does not impose such an obligation upon it. Its freedom to leave the ship in the charterer's service was in fact effectively restrained by the action of its government, however much lawyers may now or then dispute as to whether such restraint was of right.

This conclusion eliminates the charterer's demand that the owner shall put it, from a pecuniary standpoint, where it would have been, had the Admiralty never acted. It would not be proper to say that, at the hearing before me, the libelant abandoned this contention, but it did not seem to me that it was very earnestly pressed.

[3, 4] There is another aspect of the case which requires more consideration. The Admiralty's action, so far from costing the owner anything, profited it greatly. The government paid it £2,361 15s. a month; that is, £991 15s. in excess of the charter hire, or £41,525 14s. 6d. for the period between the taking over of the ship and the expiration of the chartered term. Doubtless the gain actually realized by the owner was somewhat less, because in the Admiralty's service the ship, while in dry dock or otherwise undergoing repairs, was off hire, as it was under similar circumstances when in the charterer's employ.

The Admiralty assumed the payment of all war risk insurance, a very large item. In other respects, its requirements appear to have been substantially the same as those imposed by the original charter party. It is true that it did not furnish coal for the galley and electric lighting, but that was of small moment. It is therefore certain

that, to an amount not much less than the sum above named, the owner has benefited by the Admiralty's action, while the loss to the charterer, if not as great as the £156,597 8s. claimed, was still unquestionably much larger than the profit the owner made.

At the hearing the libelant strongly insisted that it was entitled to recover the equivalent, at the least, of the sum by which the amount received by the owner exceeded the charter hire. The owner says that such a claim is for an accounting for money had and received, and is not within the jurisdiction of the Admiralty. This reply misinterprets the nature of the charterer's contention, which is that the owner wrongfully refused to recognize its continuing rights under the charter. If so, to determine the amount of the injury thereby done, it may be necessary to do some figuring, and to set off some items against others; but the like is incidental to most cases in which damages are sought, whether they be for maritime or nonmaritime causes of action.

The substantial defense of the owner is that the action of the Admiralty extinguished the charter and all rights under it. Many of the cases dealing with the effect of Admiralty requisitions upon charters were heard before the charter period had run out, and while the ship was still in the public service. F. A. Tamplin S. S. Co. v. Anglo Mexican Petroleum Products Co., Limited, T. L. R. [1916] 2 App. Cas. 397. No one then knew whether the government would release the ship before the time at which, in normal course, the charter would expire. Some of the confusion in judicial utterance is doubtless due to this uncertainty. This is, perhaps, the reason why it was for some time doubtful whether there was not a different rule for time and for voyage charters. Lord Parker of Waddington, in the Tamplin Case, supra. It is apparently now settled that no distinction is to be made on that ground. Lord Sumner and Lord Shaw of Dunfermline, in Bank Line, Ltd., v. Arthur Capel & Co., House of Lords, 35 T. L. R. 150.

That does not mean that every act of government which would release both parties from further performance of a charter for a voyage, or for a brief term, would put an end to one which had months or years yet to run. If a ship were chartered for a single day, for example, that of some fixed holiday, like the Fourth of July, or for a day upon which a yacht race or a naval review was to take place, and the government requisitioned the ship for that 24 hours, there could be no question that the purpose for which the contract was made had been completely frustrated. It is not likely that any one would contend that the government's taking possession of the ship for so brief a period would put an end to a charter for 5 years. They are governed by the same rule in this, however: That in one case, as in the other, the question is whether, after the government has acted, the contract is still capable of execution in such a way that the purpose of neither party in making it has become in a substantial sense impossible. If it is, the contract still lives, although some adjustment of rights under it may be required.

Earl Loreburn, in the Tamplin Case, supra, said:

"Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree"

—a remark peculiarly apt when dealing with long-time charters.

In the instant case we are not called upon to speculate what will happen. We know what has happened. We have no concern with one at least of the factors in the complicated calculation directed by Mr. Justice Rowlatt in Chinese Engineering & Mining Company, Ltd., v. Sale & Company [1917] 1 K. B. 599, 33 T. L. R. 464. Upon the assumption that the charter existed until January 7, 1919, we know precisely how far the purpose of each of the parties at the time the contract was entered into was effected by the action of the Admiralty. The owner would receive all the charter hire for which it bargained. It would have to pay for coals for galley and lighting, and it is possible that the Admiralty required it to supply some appliances which the charter did not. These, however, were trivial matters, and were doubtless compensated for many, many times over by the Admiralty's assumption of the cost of war risk insurance. The Admiralty might have sent the ship anywhere, and might therefore have ordered her to some of the seas in which the charterer could not have used her. It does not appear, however, that anything of the kind was done. The charterer had a right to subcharter. The owner, if the contract be held in force, would be left in every substantial business sense in the same situation it would have been in, had the ship passed into the Admiralty's service by a subcharter from the charterer.

The terms of the charter party indicate that the charterer hired the ship to make money by using it in the carrying trade generally, either on its own account or by subchartering it to others. No more definite purpose can be gathered from the charter party itself, or from any of the evidence in the case. If the charterer's contention now under consideration be sustained, it will have achieved its purpose. Its profits since the Admiralty took over the ship will be nearly $200,000 of our money. It is true that this sum is less than one-third of what it would have cleared, had the admiralty kept its hands off; but, on the other hand, it is highly probable that it is much more than, at the time the charterer executed the charter, it so much as hoped to realize.

If the charter be held to have continued to exist, each party will get what it sought by the charter to secure. There has been no actual frustration, either of their mutual purpose or of the purpose of either of them.

The owner answers that from what the Admiralty did the law conclusively presumes a constructive frustration, independently of how it affected the interests of the parties. It is said, when people enter into a contract which is dependent for the possibility of its performance on the continued availability of a particular thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is prima facie regarded as dissolved. Lord Justice Pickford, in Countess of Warwick S. S. Line, Ltd., v. Le Nickel Société Anonyme, 34 T. L. R. 27.

The owner says that the contract in this case was for the use of the Isle of Mull. The Admiralty took her and kept her for 3½ years and until after the charter term had expired. The owner insists that, when a requisitioned ship ceases to be available, the charter itself comes to an end. There are legal rules which must be enforced no matter how hardly they occasionally press upon individuals; but, when a court is urged to apply one of them in such a way as to work an injustice to one of the parties at its bar, it behooves it to make sure that what it is asked to do is required by the reason of the doctrine it is besought to enforce, and not merely by the words in which it has been found convenient and usually sufficiently accurate to formulate it.

Doubtless Lord Justice Pickford was speaking of a charter party, and the thing in his mind was a chartered ship. But the question remains whether, in the instant case, the requisitioning of the ship put an end, in any true sense, to her availability for the purpose of the contract. As already pointed out, it did not from a practical standpoint end her availability for the purpose the parties had in mind when they signed the charter. She was still earning money for them, and earning it in a way which in fact differed but little from that in which they had then expected. If the argument for the owner went no farther than this somewhat formal logic, there would be little difficulty with the case; but there are some other considerations to be taken into account.

The Admiralty did not take the ship for a definite time. It might have returned it at any moment, and would then have ceased to pay for it. It has been asked whether it would have been fair to have said to the charterer on the 11th of July, 1915: The Admiralty has taken the ship, and no one knows how long it will keep her. Nevertheless you are still bound by the charter, and must take the chance of finding some use for the ship whenever, if ever, during the next 3½ years it may, without notice, be thrown upon your hands. Looking backward from our present vantage ground of knowledge of what has happened, we know that in any event the charterer would have profited from the continuance of the charter.

The demand for ships began towards the end of 1914, and so long as the war lasted it grew ever more insistent. Since the first of this year, freight rates have gone down not a little; but they are even now far above those prevailing prior to August, 1914. The charterer could have found ample employment for the Isle of Mull whenever the Admiralty surrendered her. It will be argued that we should close our eyes to what we now know, and put ourselves in the position of the charterer in the summer of 1915. Submarine warfare on merchant ships had then been going on for nearly 5 months. The destruction of tonnage had already been great. No immediate end to the war or to the waste of shipping was in sight. There was a great probability that high freight rates would prevail for some years to come. During each month the requisition lasted, the Admiralty paid enough over the charter hire to have made good to the charterer all it would have lost, had the ship lain absolutely idle for more than 3

weeks. This particular charterer insisted that the charter had not been terminated. Under the conditions then existing, it is certain that almost any other person in its place would have done the same.

In the case at bar, as well as in all or nearly all of the others which have turned upon the wartime requisitioning of a ship then under an ante bellum charter, the price paid by the Admiralty was greater than the charter hire. If the charter be held still in force, the owner loses nothing, and the charterer saves something. If the opposite ruling be made, the owner profits much, and the charterer loses greatly. The first determination, rather than the second, comes in such cases nearer to doing what we instinctively feel to be justice. But how is it when the Admiralty pays less than the owner was receiving under his charter, as was usually true when the ships taken over were under charters made in 1915 or subsequently? If the charter under such circumstances is still effective, the charterer will be compelled to pay for something which he is not receiving, and the owner will lose nothing. If the Admiralty requisition extinguishes the charter obligations, the charterer's loss, if any, will be the amount by which the going rate of freight exceeds the charter hire, and the owner will lose the difference between the price the charterer is paying and the sum the Admiralty gives it.

Judge Learned Hand, in a case strikingly like that at bar, said the owner may not be deprived of his assurance of a fixed hire, when the venture turns out to be a loss, and deprived of the gain when it results in a gain. Earn Line S. S. Co. v. Sutherland S. S. Co. (D. C.) 254 Fed. 126. Yet, when the owner is hurt, the charter has nothing to do with his loss. He suffers, not because his boat was under charter, but because the Government takes his ship and pays for it, not only less than the market price, but less than the smaller sum for which he had hired it to the charterer. He would have been at least as badly off if his charter had expired the day before his ship was commandeered. Still the feeling that there is some lack of mutuality in allowing the determination of whether the charter has been frustrated to depend at all upon where the loss entailed by the act of the state falls is natural, and has unquestionably, as in the case last cited, often been decisive of the result.

The modern doctrine of frustration assumes that the parties to a contract enter into it upon the implied understanding that conditions, under which performance is in some substantial sense possible, exist and shall continue. But if the parties to a time charter had reduced that understanding to words, how would they have phrased it? It is not likely that they would have said that the party who is not hurt by what the government does shall be free to end the contract, and thereby make a great profit for himself against the protest of the other, who was the only person who suffered at all. It is true that it is not easy to give the choice of treating the contract as dead or as alive to one party under any other circumstances than those in which the other party is at fault. It is not improbable that the great difficulties which the courts would have as to the how and the when under which the choice must be made, the absurdity of making believe that

the parties had tacitly gone into such details, and the feeling that otherwise there would be some lack of mutuality, have been among the causes which have led many eminent judges to hold that what is silently understood is that, when what happens is sufficiently serious to justify one party in treating the contract as at an end if he wills, it is at an end whether he so wills or not. Earn Line S. S. Co. v. Sutherland S. S. Co., supra; Lord Loreburn, in the Tamplin Case, supra.

Such a rule is clear and simple. It can be applied with far less trouble than any other. It is true that it goes further in upsetting contracts than in some cases may be just and expedient. Its application to the instant case is still more questionable. Because the Admiralty has deprived one party to a contract of a part, but only of a part, of the profit he had a right to expect, why should the other party, who has not been hurt at all, be free to treat the contract as at an end, and thereby greatly profit? Judge Hand in Earn Line S. S. Co. v. Sutherland S. S. Co., supra, ably argued that it would be unfair to hold the charterer bound against his will, because, he says:

> Had the parties, when they made the contract, "been faced with the possibility that during the term the ship would be seized at a great discount from the then going hire, obviously, if both were fair, they would have treated it as like a seizure without hire at all. The charterer's right and risk in the variation in rates would be 'loaded,' in the language of an actuary, with a heavy discount. He would not, if I may use the phrase, be getting a fair run for his money."

Quite obviously the argument is applicable to those cases only in which, at the time of the requisitioning, the charterer fears that the ship will be released before the time fixed by the charter for its expiration in regular course. Unless he anticipates that possibility, it will be to his interest to preserve the charter whenever the Admiralty rent is greater than the charter hire. That is as easily recognizable when he entered into the charter as at any other period, for it will involve no choice more difficult than that of willingness to have money which costs nothing. In this particular case, suppose, at the time the parties were making their contract, the thought had occurred to the charterer that perhaps the government would take over the ship during the time it had her under charter, and would keep her for the balance of the chartered period, paying for her in round numbers £1,000 a month more than it was binding itself to pay the owner. Under these circumstances will the charterer want the right to terminate the charter party? Obviously it would say, "No." It had incurred all the risk that the ship might not be chartered, and all the losses, up to the time the ship was requisitioned, resulting from paying the charter hire, which during that time may have been above the going rate. In the particular case, if the charter survived the requisition, the charterer in the next 3½ years would have received $200,000 without any additional risk or expense. It certainly would not want to stipulate that, in such a contingency, the charter would not be binding.

In the instant case, let us put ourselves in the position of the charterer when he entered into the charter party. Suppose it had been told

that there was a possibility, at some indefinite time during the continuance of the charter, the Admiralty would requisition the ship for £2,361 15s. a month. Would it want to stipulate in its charter that, if that happened, the charter should be at an end? If that proposition were put to it, it would say not if the requisition is to last as much as 2 years and 10 days, for if it does, and we have to keep the ship without using it at all during the remaining 17½ months of the chartered term, we will be as well off as if the charter was ended by the requisition.

It is not likely that going rates will ever be so low that the ship will not command a freight sufficient to pay for her bunker coals and other small running expenses, which the charterer must bear. In view of these obvious facts, the practical results of the doctrine laid down in some of the cases are sufficiently curious. A charterer would never stipulate that a requisition for the whole, or for nearly the whole, of the chartered term, at a higher rate than the charter hire, should end the contract.

Judge Hand (Earn Line S. S. Co. v. Sutherland S. S. Co., supra), following the Tamplin Case, supra, albeit reluctantly, held that a requisition which is likely to end when the charter had a considerable period to run did not amount to a frustration. Yet that was the only kind of a requisition under which a charterer would have wanted to be free of his bargain, and, when the Admiralty's compensation is above the charter hire, the owner is not affected at all; that is to say, those cases assume that the parties when they made the charter agreed that it shall be ended if the ship should be requisitioned under circumstances which made it certain that neither parties will lose by the bargain, and that one will have a substantial profit, and shall remain binding if, at the time of the requisition, it was quite possible that one of them will, as the result, be worse off than if he had not entered into the agreement. It would hardly seem that a rule which leads to such results can be altogether sound.

It may be that the true doctrine should be that the charter is ended by any requisition which, at the time it is made, seems likely to take the ship into the government's service for any substantial part of the chartered term, irrespective of what other effects it has or has not. The reasoning of some of the judges who have dealt with the question logically goes to that extent, but it cannot yet be said to be the settled law. 35 Law Quarterly Review, 84. Until it is, a court of first instance will hesitate to apply it where it will work injustice, in the sense, at least, that it will take $200,000 from one of the parties and give it to the other, who, except for the requisition, would have had no claim upon it.

Most men instinctively feel that nobody else should be allowed to profit by the exceptional conditions brought about by the war, however prone each individual may be to consider his own case an exception. Judges should be chary in upsetting the bargains of business men, especially when the effect will be to give an unexpected and unearned advantage to one of them at the cost of the other. Until the ripened wisdom and deliberate consideration of the appellate tribunals

shall have formulated principles to be applied, irrespective of how they affect the pecuniary fortunes of any of the parties, it may be well for the trial courts to content themselves with the more modest rôle of determining each case, so as to preserve, as far as may be, the contract interests of the suitors at its bar, whenever that may be done without entailing hardships on any of them.

After all, the class of cases to which this belongs is incidental to the Great War. The world has not seen anything like it for 100 years. Every one everywhere is praying and planning that it shall be the last great clash of arms. Nevertheless it is not unreasonable to hope that a century may pass before we have another. No great harm may come if we do fail to lay down a general rule for the determination of controversies which seldom arise, except when a cataclysmic disturbance engulfs the world.

It follows that the charterer is entitled to recover from the owner, as the damage which it suffered by the repudiation of the charter, the amount which would have been received by it, had its rights under the charter party been recognized. Apparently this will be the amount by which the Admiralty hire exceeded that fixed by the charter for the days during which the ship was in the Admiralty pay, diminished by such sums, if any, as the Admiralty's requirements would have compelled the charterer to expend, and which, under the charter party, it would not have been called upon to lay out.

[5] I have not lost sight of the contention of the owner that it is now too late for the charterer to claim anything upon the assumption that the ship was validly requisitioned. It is true that the libel is altogether silent as to the Admiralty's action. It was filed on July 24, 1915, only 13 days after the ship was taken into the government service. At that early date, and on this side of the Atlantic, it would scarcely have been possible for the charterer to allege more than what has since been proved to be true, namely, that the owner had repudiated all its rights under the charter party. As a mere matter of pleading, it was not bound to anticipate the owner's defense in whole or in part, or to set up any facts which might limit the quantum of damages to which it might be entitled. There is, of course, no question that as late as 3 years and more after the ship was requisitioned—that is, when the depositions were taken in November, 1918—it still contended that the owner should have ignored the requisition. It supported its opinion by the testimony of some of the most learned authorities in the United Kingdom. In the result, however, it has been held that it was wrong, and that the damages to which it was entitled are less than half they would have been, had it been right. There is in all this nothing of an estoppel, for it is not pretended that anything the charterer said or did led the owner to do aught that it would not otherwise have done.

In the fervor of argument, the learned advocate for the owner said something about being surprised. If the charterer had originally made the claim it now does, I do not quite see what additional testimony the owner could have taken, other than that which will be admissible upon the assessment of damages. If, however, it thinks it has on the

main issue any which it wishes to put in, an application made within the next 10 days to reopen the proofs for that purpose will be given due consideration.

[6] I do not recall that at the hearing it was contended that the charterer had framed its libel so it might have a chance to refuse to take the ship if the Admiralty requisition was of short duration, and ended at a time when the market rates for ships were below that fixed by the charter. In considering the case in its various phases, the possibility that such a claim might be made has been taken into account. If there was, as there is not, anything in the record anywhere to suggest that the charterer intended to keep open such a way of retreat, it certainly should not be allowed to recover upon the only theory upon which it seems it may recover at all. The review already made of conditions existing in July, 1915, shows how improbable it is that then, or at any subsequent time, it had any such purpose.

[7] In addition to damages for repudiation of the charter, the libel makes two other claims against the owner. As already stated, the charterer, while the ship was in its service, supplied the bunker coals. To save the unnecessary trouble and expense of taking some coals out and putting others in, the charter contained the usual provision that the charterer would pay the owner for the coals in the bunkers at the time the ship entered upon its chartered employment, and would sell to the owner those on board when the charter ended.

When the Admiralty took the ship, 506 tons of the charterer's coal were in the bunkers. The Admiralty paid the owner for them. Nevertheless the latter has now the assurance to contend that it owes the charterer nothing for them. For the owner it is said that the obligation to pay for the coals was found in the charter, and when, as it claims, that was frustrated by the requisition, all rights under it ceased. The only trouble with this reasoning is that the coals never belonged to the owner. The Admiralty's requisition was not intended to give the charterer's chattels to the owner. The doctrine of frustration, whatever bearing it has upon the charter, has nothing to do with these coals. Indeed, as was said at the hearing, to give the owner title to them would require a frustration, not only of the charter party, but of the eighth commandment as well.

[8] The remaining question in the case does not concern itself with the Admiralty requisition. It turns on incidents which happened many months earlier. On the 3d of September, 1914, the ship was in Charleston harbor. The charterer notified the owner that it wanted to send the ship to Rotterdam and Bremen, and suggested that, if the owner preferred not to send it to either of these ports, the charterer would consent to a cancellation of the charter. It is needless to say that freight conditions were then very different from what they became a few months later. The offer of cancellation was declined. The owner pointed out that by the terms of the charter the ship could not be required to go to Bremen, and objected to going to Rotterdam on the ground that that was an unsafe port. For some days the charterer continued to press its demand that Bremen was one of the ports to

which the ship had a right to go. Meanwhile the time for the monthly payment in advance came around, and it was not made. The owner stopped discharge of cargo; then the charterer paid the monthly hire and withdrew the demand to go to Bremen. The discharge of cargo was thereupon resumed, but when, on the 18th of September, the charterer called on the owner to make arrangements to get ready to go to Rotterdam, it was again met with a refusal.

On the 26th of September the owner agreed that the ship might go to Rotterdam, but by that time the charterer had lost the chance of the Rotterdam cargo, and had to take another for Marseilles. When the next monthly payment came to be made, the charterer deducted a sum equal to the charter hire for an aggregate of 12 days and 16 hours, being 4 days and 15 hours during which the discharge of cargo was stopped, and 8 days and 1 hour after cargo was discharged, during which the use of the ship was lost to the charterer, as is alleged, by the wrongful refusal of the owner to have the ship go to Rotterdam.

Quite clearly the charterer had no right to ask that the ship be sent to Bremen, for war had been declared between England and Germany a month earlier. It had no right to withhold payment of the charter hire because of the refusal of the owner to comply with the unjustifiable demand, and that much of the charterer's claim may be dismissed from consideration.

[9] On the other hand, Rotterdam was a neutral port, and, from the evidence, I do not believe it was an unsafe port. The record and common knowledge convinces me it was no more dangerous to go to Rotterdam in September or October, 1914, than it was to go to Newcastle after the German proclamation of submarine blockade, and Newcastle has been held to be, at that time, a safe port within the meaning of those terms as used in a similar charter party. Palace Shipping Co., Ltd., v. Gans S. S. Line, [1916] 1 K. B. 138. I confess, in view of the fact that the ship did not go to Rotterdam, and the obvious desire of the charterer at that time to cancel the charter, that I doubt whether it ever wanted to go to Rotterdam; but that is only a suspicion, and the evidence is that it did. Under such circumstances, the charterer is entitled to an allowance for 8 days and 1 hour that the ship was out of service from the 18th of September until the 26th.

[10] The owner claims that it should in any event be credited against this with the net amount it paid to get war risk insurance to Rotterdam. I should be glad to sustain this claim, but I do not see my way clear to do so. Whether the ship was insured or not was a matter entirely for the owner. The charterer had nothing to do with it.

[11] The owner says that, whatever originally may have been the rights of the parties with reference to these delays in September, 1914, the charterer has waived all right to recover anything for them. From the October payment of monthly hire, the charterer deducted a proportion for 12 days and 16 hours it claimed to have been deprived of the services of the ship. The owner protested, but it was not until the next spring, when freight rates had gone up rapidly, that it took the position that it would cancel the charter if these deductions were

not repaid. The charterer, under protest, paid them. It is now said that such payment cannot be recovered. It was made either in accord or satisfaction, or under a mistake of law. I do not think it should be so treated. In charter parties of this kind it is highly expedient that the law shall not be such as to force either of the parties to take extreme measures for the protection of comparatively minor, but still substantial rights.

The learned advocate for the owner, in the argument at the hearing, contended with great force that, whether the owner was justified or not in refusing to go to Rotterdam or Bremen, the charterer was still bound to pay the charter hire when and as it became due. Under such circumstances its payment would not be a waiver of the right of the charterer to recover for the damage done it. I agree with the construction put upon the clause by the owner's advocate, and I therefore think that, when the owner insisted on having the charter hire fully paid, the charterer would have been unwise to refuse to make payment. I see no reason to lay down rules of law which will compel parties to aggravate their disputes. Had, in the spring of 1915, the charterer refused to repay the money it had withheld, the owner would doubtless have withdrawn the ship from the charterer's service, and then the dispute between the parties would have amounted to many thousands or hundreds of thousands of dollars, instead of being confined to less than $3,000. The charterer is therefore entitled to recover damages for the wrongful delay at Charleston of 8 days and 1 hour.

In view of the large volume of deposition testimony and of the fact that almost all of it relates to the power of the Admiralty to requisition a ship, upon which issue the owner won, I shall order the costs to be equally divided between the parties. If they cannot agree as to the amount of the damages to which the libelant is entitled under the principles herein stated, I will either hear them further as to such amount or will make an order of reference to ascertain them.

NORTHERN TRUST CO. et al. v. LEDERER, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. May 16, 1919.)

No. 5792.

INTERNAL REVENUE ⊂=8—INHERITANCE TAXES—DEDUCTIONS.

In view of the history of the legislation, collateral inheritance taxes imposed by the state of Pennsylvania under Collateral Inheritance Tax Act, §§ 1, 3, 5, 9, and 11, are to be treated as paid by the estate, and may be deducted as expenses of administration, or claims against the estate, or other charges against the estate allowed by the laws of the state, within Act Sept. 8, 1916, §§ 201, 203 (Comp. St. 1918, §§ 6336½b, 6336½d), imposing a federal tax upon the transfer of the net estate of decedents.

At Law. Action by the Northern Trust Company and Henry R. Zesinger, executors under the will of Lewis W. Klahr, deceased,

against Ephraim Lederer, Collector of Internal Revenue. On trial by the court without a jury. Judgment for plaintiffs.

Wm. Henry Snyder and Wm. M. Stewart, Jr., both of Philadelphia, Pa., for plaintiffs.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The plaintiffs, executors under the will of Lewis W. Klahr, deceased, were assessed by the defendant, the collector of internal revenue, with a tax under the provisions of sections 201, 202 and 203 of title 2 of the act of Congress of September 8, 1916 (Act Sept. 8, 1916, c. 463, 39 Stat. 777, 778 [Comp. St. 1918, §§ 6336½b, 6336½c, 6336½d]), entitled "An act to increase the revenue and for other purposes," in the amount of $79,172.10, as a tax upon the transfer of the net estate of the decedent. The sections bearing upon the controversy are as follows:

"Sec. 201. That a tax (hereinafter referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section 203, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act:

"[Here follow the percentages based upon the amount by which said net estate exceeds $50,000.]

"Sec. 203. *Net Value of the Estate, How Determined.*—For the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered."

The plaintiffs claimed that in assessing the amount of the tax, in order to ascertain the value of the net estate as provided by section 203, there should be deducted from the value of the estate the collateral inheritance tax due, and subsequently paid, to the commonwealth under the Pennsylvania Act of May 6, 1887 (P. L. 79), amounting to $39,450.92. This deduction not being allowed, the entire amount of the tax assessed was paid under protest as to the sum of $2,331.56; that being the difference between the amount assessed and paid and the amount which would have been assessed and paid if plaintiffs' claim had been allowed. The plaintiffs complied with the requirements of the revenue laws in relation to claim to the Commissioner for refund, and, the claim having been rejected, brought this suit within the statutory period after rejection of the claim for the recovery of the said sum of $2,331.56, with interest from November 1, 1917, the date of payment.

There is no ambiguity in the language of the act of Congress. It imposes the tax "upon the transfer of the net estate" of the decedent. It provides that the value of the net estate shall be determined by de-

ducting, from the value of the gross estate "administration expenses," "claims against the estate" and "such other charges against the estate, as are allowed by the laws of the jurisdiction, * * * under which the estate is being administered." If, in determining the value of the net estate upon the transfer of which the tax is laid, the 5 per cent. collateral inheritance tax is a tax or charge upon the estate of the decedent and included within any of the above items of deduction, the collection of the amount in suit was unwarranted. If the collateral inheritance tax is in fact a tax against the legatee upon the privilege of receiving the transfer of the legacy passing from the decedent at his death, and not within the items of deduction, its collection was lawful.

Section 1 of the Collateral Inheritance Tax Act (Purdon's Dig. [13th Ed.] p. 603) provides that:

"All estates, * * * passing from any person, who may die seised or possessed of such estates," to collaterals "shall be * * * subject to a tax of five dollars on every hundred dollars of the clear value of such estate or estates, * * * to be paid to the use of the commonwealth. All owners of such estates, and all executors and administrators and their sureties, shall only be discharged from liability for the amount of such taxes or duties, * * * by having paid the same over. * * * No estate which may be valued at a less sum than two hundred and fifty dollars shall be subject to the duty or tax."

Section 3 provides that in the case of reversionary interests:

"The tax * * * shall not be payable, nor interest begin to run thereon, until the person * * * liable for the same shall come into actual possession * * * by the termination of the estates for life or years, and the tax shall be assessed upon the value of the estate at the time the right of possession accrues to the owner: * * * Provided, that the owner shall have the right to pay the tax at any time prior to his coming into possession and, in such cases, the tax shall be assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or estates for years: And provided further, that the tax on real estate shall remain a lien on the real estate on which the same is chargeable until paid. And the owner of any personal estate shall make a full return of the same to the register of wills of the proper county, within one year from the death of the decedent, and within that time enter into security for the payment of the tax, to the satisfaction of such register; and in case of failure so to do, the tax shall be immediately payable and collectible."

Section 5 provides:

"The executor, or administrator, or other trustee, paying any legacy or share in the distribution of any estate, subject to the collateral inheritance tax, shall deduct therefrom at the rate of five dollars in every hundred dollars, upon the whole legacy or sum paid; or if not money, he shall demand payment of a sum to be computed at the same rate, upon the appraised value thereof, for the use of the commonwealth; and no executor or administrator shall be compelled to pay or deliver any specific legacy or article to be distributed, subject to tax, except on the payment into his hands of a sum computed on its value as aforesaid; and in case of neglect or refusal on the part of said legatee to pay the same, such specific legacy or article, or so much thereof as shall be necessary, shall be sold by such executor or administrator at public sale, after notice to such legatee, and the balance that may be left in the hands of the executor or administrator shall be distributed, as is or may be directed by law; and every sum of money retained by any executor or administrator, or paid into his hands on account of any legacy

or distributive share, for the use of the commonwealth, shall be paid by him without delay."

Section 9 provides:

"It shall be the duty of any executor or administrator, on the payment of collateral inheritance tax, to take duplicate receipts from the register, one of which shall be forwarded forthwith to the auditor general, whose duty it shall be to charge the register receiving the money with the amount, and seal with the seal of his office, and countersign the receipt and transmit it to the executor or administrator, whereupon it shall be a proper voucher in the settlement of the estate."

Section 11 provides:

"Whenever debts shall be proven against the estate of a decedent, after distribution of legacies from which the collateral inheritance tax has been deducted, in compliance with this act, and the legatee is required to refund any portion of a legacy, a proportion of the said tax shall be repaid to him by the executor or administrator, if the said tax has not been paid into the state or county treasury, or by the county treasurer, if it has been so paid."

The nature of collateral inheritance taxes has been the subject of numerous decisions and the nature of succession and legacy taxes was very amply discussed by Mr. Justice White in Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, and he cites with approval the case of United States v. Perkins, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287:

"The question was whether property bequeathed to the United States could be lawfully included in a succession tax. It was decided that it could be. In the opinion, delivered by Mr. Justice Brown, it was said (163 U. S. 628 [16 Sup. Ct. 1075, 41 L. Ed. 287]): 'The tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee. * * * We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the Legislature assents to a bequest of it.' "

In Howell's Estate, 147 Pa. 164, 23 Atl. 403, the question was whether the executor was liable to pay the tax where seven legacies of $200 each were bequeathed, respectively, to seven charitable institutions. This brought squarely before the court the question whether the exemption of estates of less than $250 in value applied to the estate of the decedent or the estate of the legatee. If the tax had been laid upon the privilege of the legatee to the transfer of the estate passing, it would no doubt have been held that the exemption applied to each legacy. Judge Hanna, who wrote the opinion for the orphans' court, said:

"What, then, is intended by the use of the phrase 'all estates'? It is strongly urged that it is meant legacies, and of course both pecuniary and specific, with annuities, and distributive shares in case of intestacy, and if they be less than $250 they are exempt from the tax. But such has never been our understanding of the meaning of the act, and is contrary to the undisputed interpretation and uniform practice of this court since the passage of the act of 1826, now more than 65 years. When the Legislature said 'all

estates' shall be liable, it meant that which a person shall die seised or possessed of, and shall leave either by will or through intestacy to be administered according to the laws of the commonwealth; in other words, his property real or personal. This, we think, is clear, from an examination of all the statutes passed upon the subject. The act of 1887, which is merely a compilation of the prior acts, and declaratory of the law as found therein, as well as in decisions of the Supreme Court, and in effect intended to provide for the better collection of the tax, as shown by our Brother Penrose in Del Busto's Estate, 45 Legal Intell. 474, indicates throughout, by the word 'estate,' that the property of the decedent was contemplated, and not the interest therein of the legatee or distributee."

The exceptions were dismissed and the decree affirmed per curiam by the Supreme Court.

In Finnen's Estate, 196 Pa. 72, 46 Atl. 269, where the testator left real and personal property amounting to about $50,000, most of which was bequeathed to certain charities, the collateral inheritance appraisers assessed a tax against the charitable bequests. The executors appealed from the appraisement and the orphans' court dismissed the appeal. The decree of the orphans' court was affirmed by the Supreme Court, and in the opinion of Mr. Chief Justice Green, it was held:

"That which the legatee gets and keeps is the aggregate sum bequeathed, less the amount of the tax. The tax must be retained by the person who has the decedent's property in charge. It is therefore not a tax upon the property or money bequeathed, but a diminution of the amount that otherwise would pass under the will or other conveyance, and hence that which the legatee really receives is not taxed at all. It is that which is left after the tax has been taken off. It is only imposed once, and that is before the legacy has reached the legatee and before it has become his property."

In Strode v. Commonwealth, 52 Pa. 181, Woodward, C. J., delivering the opinion of the court, said:

"The law takes every decedent's estate into custody, and administers it for the benefit of creditors, legatees, devisees and heirs, and delivers the residue that remains after discharging all obligations, to the distributees entitled to receive it. * * * Now this 5 per cent. tax is one of the conditions of administration, and to deny the right of the state to impose it, is to deny the right of the state to regulate the administration of decedent's goods. * * * The act operates on the residue of the estate after paying debts and charges, and, theoretically, that residue is always a balance in money."

And in Jackson v. Myers, 257 Pa. 104, 101 Atl. 341, L. R. A. 1917F, 821, Mr. Justice Mestrezat, citing Strode v. Commonwealth, Finnen's Estate, and Orcutt's Appeal, 97 Pa. 179, took the position outlined in the syllabus that—

"The collateral inheritance tax is not levied upon an inheritance or legacy but upon the estate of the decedent; what passes to the heir or devisee, and to which he acquires title, is the portion of the estate remaining after the payment and satisfaction of the collateral inheritance tax."

The case came before the court upon the construction of an agreement by the guardian of certain minors to sell all the right, title, and interest of the minors in the estate of George W. Jackson, deceased, for the sum of $40,000 in cash, without any deduction whatever, and

it was held that what should be sold under the agreement was the interest of the minors after payment of the collateral inheritance tax. The learned Justice said:

"The failure of the learned court to observe the distinction, clearly pointed out in the authorities above cited, between a lien on the estate of the decedent and on the interest of the defendant's wards in that estate, led it to the erroneous conclusion that the tax was a lien within the meaning of the contract of sale which the defendant was required to discharge. The estate of George W. Jackson, deceased, did not pass to the collateral heirs until the tax was paid. If Jackson's representative delivered the personal estate to the beneficiaries before the payment of the tax, the statute unmistakably fixed him for it. If the heirs took possession of the real estate, the tax being unpaid, it was subject to the statutory lien; but the residue, after payment of the lien, was discharged from the payment of the tax, and their title was only to that part of the estate 'which is left after the tax has been taken off.' In selling their right, title, and interest in and to the estate of the decedent, the defendant's wards could sell only the part of the estate left after the payment of the tax. It was that title which they were required to make good, marketable, and such as would be insured by a reputable trust company. If there were no incumbrances against it, the plaintiffs could not complain. The lien reported by the trust company was against Jackson's estate and not against the part of his estate to which the heirs succeeded."

It appears to be the settled law of Pennsylvania, therefore, that the collateral inheritance tax is payable out of the estate of the decedent, that its amount is based upon the clear value of the estate passing from the decedent to collaterals whether mediately or immediately, and that it is not deductible from the estate of the collateral beneficiary as such, and therefore paid by the collateral legatee or devisee, but that the latter receives only what remains after the estate has been diminished by the tax being paid by the executor or administrator, or after the owner has discharged the liability for the tax in case of a reversionary interest.

Under the decisions, it is deductible either as an administration expense, or as a claim against the estate, or, if the right of the executors to deduct it before payment of the federal tax were doubtful under these items, the deductions allowed under the law as "such other charges against the estate as are allowed by the laws of the jurisdiction under which the estate is being administered" broadly and entirely include it.

Judgment for the plaintiffs for $2,331.56, with interest from November 1, 1917.

NORTHERN IOWA GAS & ELECTRIC CO. v. INCORPORATED TOWN OF LUVERNE, IOWA.

(District Court, N. D. Iowa, C. D. May 26, 1919.)

No. 28.

CONTRACTS ⇐10(4)—MUTUALITY OF OBLIGATION—CONTRACT TO FURNISH ELECTRIC CURRENT.

A contract by which an electric company agreed for a term of 20 years to furnish to a town, through a transmission line to be built by the town and connected with the company's line, "all the electricity and current that shall be desired by the town or by its patrons along its transmission line," to be paid for by meter measurement, but by which the town assumed no obligation to purchase any definite quantity of electricity, *held* void for lack of mutuality.

In Equity. Suit by the Northern Iowa Gas & Electric Company against the Incorporated Town of Luverne, Iowa. On motion for preliminary injunction. Granted.

Price & Burnquist, of Ft. Dodge, Iowa, for plaintiff.

Grimm, Wheeler, Elliott & Jay, of Cedar Rapids, Iowa, for defendant.

REED, District Judge. The plaintiff, Northern Iowa Gas & Electric Company, a corporation of West Virginia, engaged in the manufacture, sale, transmission, and distribution of electric current in the town of Humboldt, in this state and district, for light, heat, and power, and other lawful purposes, both at wholesale and retail, brings this suit to enjoin and temporarily and permanently restrain the defendant town of Luverne, a municipal corporation of Iowa, situated in Kossuth county, that state, from connecting its line and equipment for the transmission and distribution of electric current from plaintiff's plant in Humboldt to said town of Luverne, for light, heat, and power purposes.

The petition alleges that on September 3, 1915, the plaintiff and defendant entered into a written contract, whereby the defendant claims that plaintiff agreed to furnish during a period of 20 years from and after the 1st day of October, 1915, all electric current and power that the defendant shall desire for lighting and power purposes by the town or by its patrons along its transmission line for lighting, heating, and power purposes, and at the close of said 20-year period the defendant may at its option renew the contract for another 20 years, which said contract, so far as deemed material, is as follows:

"The company agrees to furnish the town during a period of 20 years from and after the 1st day of October, 1915, all electricity and current that shall be desired by the town or by its patrons along its transmission line (whether within or without the town as hereinafter described) for lighting purposes or for power purposes or for other lawful use. At the close of said 20-year period, the town may at its own option renew this contract for another like period of 20 years.

"The company, its successors or assigns, represents that it can and will furnish such current and electricity for twenty hours during each day of

the whole said period of service, that its service will be of first-class quality and ample in amount to answer the needs of the town and its said patrons; that the company will at all times keep abreast with the best approved practices and customs of the hour; and that it will so provide, regulate, and supply said service as to make it a first-class A No. 1 merchantable service in every respect—it being understood that it is the intention of the town to distribute and supply such electricity to all patrons who may be induced to take it and who are within a reasonable distance of the town or transmission line belonging to the town as hereinafter spoken of; the intention further being that the town may install a transformer along said transmission line at such place or places as the town may desire, from which it may run its secondary and supply lines to patrons. * * *

"The town agrees to pay the company, their successors or assigns, at Humboldt, Iowa, for the electricity so furnished 3½ cents per kilowatt hour. This money shall be paid in monthly installments on the 10th of the month following the furnishing of the electricity by the company. The amount of electricity so furnished shall be recorded by a meter installed by the town on the low tension side of each high tension reformer which may be installed on the line. Such meter shall be made and kept as accurate as possible, and either party may have the right at any time to test said meter in the presence of a representative of the other party, and should such test disclose the fact that the meter is not accurate for practical use, it may be repaired, calibrated, and made accurate at the expense of the party who desires this to be done.

"Such electricity shall be known as alternating 60-cycle current, and it shall be conveyed from the power house of the company in Humboldt, Iowa, to the distributing station of the town of Luverne, Iowa, by the transmission conductors. The company, their successors or assigns, will build and maintain such transmission line from its power house to some convenient point on the north line of the incorporated town of Humboldt, Iowa, where the connection shall be made with the line owned by the town of Livermore; the town shall build and maintain such transmission line from connecting point in the town of Livermore, Iowa. Such transmission line from the connecting point in the town of Livermore, Iowa, and the right of way thereon, with all rights therein (except herein expressly provided) shall be deemed to belong to the town.

"In order that the town may have sufficient territory within which to secure patrons, it is further agreed that the company, its successors or assigns, will not furnish electrical power or service of any kind to any person or place within five miles of any transformer or distributing station which the town may desire to install along said transmission line at any time. The transmission line, together with all meters, transformers, apparatus, machinery, and material used or installed by either party, shall be of substantial, first-class quality.

"It is further understood that the town is about to expend approximately $11,000 in order to secure electric lights and power for its use and for the use of its citizens and patrons, and that it does and must rely upon the company, their successors and assigns, under the terms of this contract, to provide such electricity; and the company therefore agrees that it will furnish the town a good and sufficient bond in the sum of $5,000, upon which the company and a solvent surety company shall at all times be liable, conditioned for the faithful performance of this contract, and for the payment of any damages, stipulated or otherwise, which the town may suffer by reason of a breach in whole or in part of any of the conditions of this agreement, the said sureties to be approved by the town. It is understood that such bond shall be for one year at a time, but it is specifically agreed that it shall be renewed each year 30 days before the expiration of the bond for the preceding year, so that the town may know at least 30 days in advance, that it shall be protected by sufficient sureties."

Signed by the respective parties.

It is alleged by the plaintiff that, in addition to the wholesale contract by it with the town of Luverne and some nine other towns, sit-

uated in the Northern district of Iowa, that it is also engaged as a public utility corporation in furnishing electric light and power to certain other municipalities in northern Iowa in which it holds franchises and carries on the entire business of distributing, selling, and furnishing electricity at retail; that it operates such franchises in the towns of Humboldt, Thor, Rutland, Eagle Grove, Clarion, and Goldfield; that the current and power generated for sale in such municipalities, as well as the power generated for sale at wholesale to the defendant town and nine other towns, known and designated as "high line towns," is generated at the central water power plant at Humboldt, Iowa, augmented by the steam plant at Eagle Grove, Iowa, both operated as a single generating unit; that at the time of the execution of the said contract with the defendant the rates specified therein were, through mistake and error, made too low, and that by reason thereof the plaintiff company has been compelled during the existence of the said contract to furnish, and has furnished, electricity to the said town at a rate which was too low to render a fair and adequate return to it for the service rendered, and that such was the case prior to the abnormal conditions brought about as a result of our recent war with the German Empire; that by reason of the abnormal conditions brought about by the war the said rate, which never was compensatory, has become confiscatory, and is wholly inadequate, and compels this plaintiff to furnish service to the said defendant for less than the cost of producing the same.

It is further alleged that plaintiff and defendant entered into an agreement in the month of December, 1918, by the terms of which it was agreed between the plaintiff and defendant, represented by one Dillon and certain attorneys for the town, that the rates specified in said contract should be increased to five cents per kilowatt hour for six months, and during such time thereafter as the abnormal conditions brought about by the war made such rate necessary; that plaintiff relied upon the agreement so made and believed the promise then made that the increase in rates would be paid, but that the defendant town has repudiated said agreement, and has at all times refused to abide by the terms thereof or to pay such increased rate; that thereafter the plaintiff disconnected the lines of said town of Luverne from its high-tension wire and notified said town that it would no longer continue to furnish service to it under the terms specified in said original contract, nor would it longer be bound by the terms of said contract, for the reason that the said contract was void for lack of mutuality; but that on each occasion, after having been disconnected from the said high-tension line, the defendant town has, without the knowledge, authority, or consent of this plaintiff, connected its distributing system with the said line of the plaintiff, and has continued to take current therefrom without the consent and over the objection of this plaintiff; and on or about the 19th day of February, 1919, the plaintiff caused a written notice to be mailed to the mayor and city council of said town, again notifying them of its purpose to discontinue furnishing electricity to the said town under said contract by reason of its being void; that the defendant town, notwithstanding

such notice and all of the acts and things done by plaintiff in its endeavor to terminate service to said town, is continuing to take from the lines of this plaintiff current for its use and the use of the citizens and residents of said town, and unless restrained will continue to take said current from this plaintiff's lines without making just and reasonable compensation therefor; that plaintiff has no plain, speedy, or adequate remedy at law.

The plaintiff therefore asks that defendant be restrained and enjoined from in any wise connecting its lines with the line and system of the plaintiff for transmitting the electric current so produced by the plaintiff, and for general equitable relief. A time was thereupon set for the hearing of the application for a temporary injunction, of which due notice was given, and the parties have taken and submitted preliminary proofs, which are on file with the clerk.

The main contention of the plaintiff upon the hearing is (1) that the contract of September 3, 1915, is void for want of mutuality, and (2) that because of the alleged error in said contract as originally made, and the abnormal conditions caused by the war, the plaintiff is no longer bound by said contract; while the defendant contends that the contract is based upon a sufficient consideration, and therefore binding upon each of the parties and valid, denies the alleged agreement to increase the contract rate to five cents per kilowatt hour, and other allegations of the bill, and asks that the bill be dismissed.

The rule for determining when a contract of this class is mutually binding upon each of the parties thereto was considered and determined by the Circuit Court of Appeals for this circuit in Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696. In this case it is said:

"The rules applicable to contracts of this class may be thus briefly stated: A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty. An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer [citing the cases]. But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any of the articles mentioned [citing the cases]. Accepted orders for goods under such void contracts constitute sales of the goods thus ordered at the prices named in the contracts, but they do not validate the agreements as to articles which the one refuses to purchase, or the other refuses to sell or deliver, under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder. * * *"

This case is followed by the Circuit Court of Appeals in A. Santealla & Co. v. Lange Co., 155 Fed. 719, 84 C. C. A. 145. And see Drake v. Vorse, 52 Iowa, 417, 3 N. W. 465; Jordan v. Indianapolis

Water Co. (Ind. App.) 61 N. E. 12;[1] Fowler Utilities Co. v. Gray, 168 Ind. 1, 79 N. E. 897, 7 L. R. A. (N. S.) 726, 120 Am. St. Rep. 344, citing, among other cases, Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696.

The case of Conley Camera Co. v. Multiscope & Film Co., 216 Fed. 892, 133 C. C. A. 96, cited by defendant, in no wise conflicts with any of these citations. That case fully recognizes the rule held in Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co., above, and its citations, but distinguishes it from those upon the ground that the defendant Conley Camera Company (plaintiff in error) had purchased from the plaintiff Multiscope & Film Company (defendant in error) for the consideration of $500 and an order for some $9,000 worth of photographic woodenware and certain patents and rights to patents of the United States for improvements in panoramic cameras, and certain cameras manufactured under said patents, and certain tools, dies, and other goods and merchandise described in the agreement, and further agreed to sell to the plaintiff cameras manufactured by the defendant under said letters patent known as the "A1-Vista" panoramic film cameras, at the same price which the plaintiff was then paying to the defendant for such cameras, subject, however, to a pro rata advance in case of an advance in cost of materials or labor over present prices, irrespective of quantities. The plaintiff alleged the full performance in all respects of the contract on its part, and that defendant failed to furnish only a small portion of the cameras it had agreed to sell to the plaintiff, and finally refused to ship any more cameras to the plaintiff, though frequently requested to do so, alleged breaches of the contract on the part of the defendant to the plaintiff's damage, for which it asked and recovered judgment, from which the defendant Conley Camera Company prosecuted a writ of error. Among the defenses alleged by the defendant was that the contract was void for lack of mutuality. Of this defense the Circuit Court of Appeals said:

"In this case the plaintiff was necessarily compelled to buy all the 'A1-Vista' cameras it needed to supply its customers from the defendant, as it alone, as the assignee and owner of all the patents under which they could be made, could manufacture them. Therefore, by necessary implication, the contract compelled the plaintiff to purchase from the defendant all these cameras which it required as long as the patents were alive. This is sufficient [citing Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co. and other cases]"—thus clearly distinguishing the case from Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co.

As the defendant under the contract in question never assumed any obligation on its part, nor agreed to purchase any definite amount of electricity for lighting or other purposes, the contract between the plaintiff and the defendant is lacking in mutuality, and therefore void. Whether or not the alleged mistake in the contract fixing the rate at which the plaintiff was to furnish electric current to the defendant, or the increased cost of the current, because of the abnormal conditions arising out of the war, relieves the plaintiff from the contract,

[1] See 159 Ind. 337, 64 N. E. 680.

we need not consider, for, the contract being void, a breach thereof imposes no obligation upon either party. But see Railway Co. v. Hoyt, 149 U. S. 2, 14, 13 Sup. Ct. 779, 37 L. Ed. 625.

Under the pleadings and preliminary proofs a temporary injunction will be granted as prayed by the plaintiff, upon the execution by it of a bond in the penal sum of $2,500, with sureties to be approved by the clerk, conditioned that it will indemnify the defendant against all damages that it may sustain because of the issuance of the temporary injunction. The defendant may answer or otherwise plead to the petition, if it shall be so advised, within 30 days from the filing of this order, and the cause will then stand for further or final hearing. The defendant excepts to the order granting the temporary injunction.

It is ordered accordingly.

SHEHANE et al. v. SMITH et al.

(District Court, N. D. Georgia. March 29, 1919.)

No. 40.

REMOVAL OF CAUSES ⟸5—RIGHT OF REMOVAL—NATURE OF SUIT—PROBATE PROCEEDINGS.

A suit in a state court by administrators for directions in the distribution of the estate, authorized by Park's Ann. Civ. Code Ga. § 4597, is a part of or ancillary to the probate proceedings, and is not removable into a federal court.

In Equity. Suit by James F. Shehane and others against Zadoc Smith and others. On motion to remand to state court. Motion granted.

Erwin, Rucker & Erwin, Horace M. Holden, and Hamilton McWhorter, all of Athens, Ga., Sibley & McWhorter, of Lexington, Ga., W. M. Howard, of Augusta, Ga., and Paul Brown, of Lexington, Ga., for petitioners.

E. F. Noel, of Lexington, Miss., and W. A. Slaton, of Washington, Ga., for defendants.

NEWMAN, District Judge. This case is removed to this court from the state court—that is, the superior court of Oglethorpe county, Ga.—and is now heard on a motion to remand. It is a bill filed by the administrators of the estate of James M. Smith, deceased, for directions in the disposition of the properties that have come into their hands, and is a suit which the statute of Georgia authorizes (Park's Code Ga. § 4597), which statute is as follows:

"In a case of difficulty in construing wills, or distributing estates, in ascertaining the persons entitled, or in determining under what law property should be divided, the representative may ask the direction of the court, but not on imaginary difficulties or from excessive caution."

It is not even suggested that this bill was unnecessary, or that the questions upon which the administrators were in doubt were simply

"imaginary" difficulties, so it is a proper bill under this statute. It is a proceeding, therefore, incident to the administration of the estate of James M. Smith, and one which seems to be really a part of the probate proceedings concerning the regular administration of the estate, certainly ancillary thereto.

It is not such a suit as might be brought by one of the heirs at law to recover his share of the estate, which would probably be a suit inter partes and would be removable. The case presented here is not one between the parties as to their respective interests at all, or to have any rights they might have enforced. It is simply for direction and protection by the administrators. It is a matter of safety with them to have a decision of the court as to how the estate should be distributed. Is it a proceeding which can be removed to the United States District Court?

In the recent case of Meadow v. Nash, 250 Fed. 911, removed to this court, where this same will was involved, in the opinion filed in that case I referred to the case of Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101, quoting simply the headnotes. I think a thorough examination of that case, while it was a case originally brought in the Circuit Court of the United States (now the District Court), furnishes a test of the right of proceeding in the United States courts to interfere with proceedings concerning the probate of a will in the state courts, and as I say in that case (page 912):

"In the reasoning of the court in the opinion by Mr. Justice White [now Chief Justice White], the whole matter is thoroughly discussed, and as the facts of the case and the situation of the litigation were much more favorable to the right of removal than in this case, it makes that decision, in my opinion, absolutely controlling on the question here," etc.

In the opinion in Farrell v. O'Brien, supra, 199 U. S. at page 110, 25 Sup. Ct. 733, 50 L. Ed. 101, Mr. Justice White says:

"Let us, then, first deduce the principles established by the foregoing authorities as to the power of a court of the United States over the probate or revocation of the probate of a will. An analysis of the cases, in our opinion, clearly establishes the following:

"First. That, as the authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States.

"Second. That where a state law, statutory or customary, gives to the citizens of the state, in an action or suit inter partes, the right to question at law the probate of a will or to assail probate in a suit in equity the courts of the United States in administering the rights of citizens of other states or aliens will enforce such remedies.

"The only dispute possible under these propositions may arise from a difference of opinion as to the true significance of the expression 'action or suit inter partes,' as employed in the second proposition. When that question is cleared up the propositions are so conclusively settled by the cases referred to that they are indisputable. Before coming to apply the proposition we must, therefore, accurately fix the meaning of the words action or suit inter partes.

"The cited authorities establish that the words referred to must relate only to independent controversies inter partes, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continua-

tion of the probate proceeding; that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect. We say the words 'action or suit inter partes' must have this significance, because, unless that be their import, it would follow that a state may not allow any question to be raised concerning the right to probate at the time of the application, or any such question thereafter to be made in an ancillary probate proceeding without depriving itself of its concededly exclusive authority over the probate of wills. This may be readily illustrated. Thus, if a state law provides for any form of notice on an application to probate a will and authorizes a contest before the admission of the writing to probate, then it would follow, if the words suit or action of inter partes embraces such a contest, the proof of wills, if contested by a citizen of another state or alien, would be cognizable in the courts of the United States and hence not under the exclusive control of the state probate court. Again, if a state authorized a will to be proved in common form, that is, without notice, and allowed a supplementary probate proceeding by which the probate in common form could be tested, then, again, if such a contest be a suit inter partes, it would also be of federal cognizance."

It will be noticed that the court refers to proceedings which are merely ancillary to the probate proceedings allowed by the state law, which would seem to be considered matters in which this court has no jurisdiction, and such is this case. It is a proceeding authorized by the state statutes, as I have stated, and is a proceeding only for the proper construction of the will, not a suit inter partes in any proper sense at all. I think this decision in Farrell v. O'Brien, when thoroughly examined, will prove to be conclusive of the question here. This does not seem to be a removable case for this reason.

Another contention of counsel representing the motion to remand in this case is, under the statutes as they now stand (Judicial Code [Act March 3, 1911, c. 231] § 28, 36 Stat. 1094 [Comp. St. § 1010]), that the right to remove the case from the state court to this court could not exist because of the situation of the parties. This provision of the statute is:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district."

It is the nonresident defendants who may remove the case when there exists a controversy which is separable. The fact that there is a defendant or defendants whose interests are the same as those of the parties removing the case, who is a citizen or who are citizens of the state where the suit is pending, would defeat the right of removal. The contention is that in this case certain parties, and especially Edgar L. Smith, would be aligned, placing the parties in their proper positions in this case, on the same side as the removing defendants, and consequently no removal could properly be had. As more fully expressed in the brief of counsel on the motion to remand, the contention is as follows:

"If the case is removable as a whole, diverse citizenship must exist as to the case as a whole. If a separable controversy alone is sought to be removed, the controversy must be really separable, and the requisite diversity must exist in that controversy. We say that there is no separable contro-

versy, and, if there were, the citizenship still would not be diverse, and that in the case as a whole no arrangement of parties according to real interest could produce a diverse citizenship. As pointed out in the argument, the petitioners for removal have exactly the same interest, and make exactly the same contention, as do all the other descendants of Robert Smith, Sr., the half-brother of testator. At least one of those others, Edgar L. Smith, is making an active and aggressive fight for that contention, and his interest and contention is exactly the same as that of petitioners for removal. Any arrangement of parties according to real interest would place him, being a citizen of Georgia, on the same side of the controversy with petitioners, with Mrs. Shehane, a citizen of Georgia, on the other side. The court could not decide either for or against Mrs. Shehane, without deciding also against or for both the petitioners and Edgar L. Smith. And the same is true of every claimant who claims against Mrs. Shehane's right to the whole estate."

I cite this contention of the parties seeking to remand this case without determining it, because I place the decision of the court on the ground that this proceeding in the state court is a part of the probate proceedings or connected therewith and ancillary thereto in such a way as to make it really part of the same, and for that reason it is not a proceeding which can be removed into the United States court. A very interesting and pertinent case is Security Co. v. Pratt (C. C.) 64 Fed. 405.

There is nothing in the well-prepared brief of counsel for the removing parties which militates against what has been said above about the law controlling the right to remove here. Counsel who argued the case for the removing parties seem, on the question of the right of this court to entertain the case at all, to rely on the case of Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80, and several other cases cited in his brief. I do not think this case, or any of them, when thoroughly examined, conflict with what was decided in Farrell v. O'Brien, supra, as to what class of cases concerning or growing out of probate proceedings this court would have jurisdiction.

Whatever may be true as to the cases previously decided, a recent decision by the Supreme Court, which has come to my attention since I have had this case under investigation (Sutton v. English, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664), is, I think, determinative of the matter. In the opinion in this case, by Mr. Justice Pitney, the following occurs:

"By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States; that where a state, by statute or custom, gives to parties interested the right to bring an action or suit inter partes, either at law or in equity, to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy, but that this relates only to independent suits, and not to procedure merely incidental or ancillary to the probate; and, further, that questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration,

are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy. Broderick's Will, 21 Wall. [U. S.] 503, 509, 512 [22 L. Ed. 599]; Ellis v. Davis, 109 U. S. 485, 494, et seq. [3 Sup. Ct. 327, 27 L. Ed. 1006]; Farrell v. O'Brien, 199 U. S. 89, 110 [25 Sup. Ct. 727, 50 L. Ed. 101]; Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 43 [30 Sup. Ct. 10, 54 L. Ed. 80]."

The proceeding in the state court which is sought to be removed here certainly must be considered a suit supplemental or ancillary to the probate proceeding, and if it be such this authority is controlling on the question, without considering former decisions of the Supreme Court.

There is another matter which probably needs mention in connection with the disposition of this case. That is the order of the judge of the superior court removing the case to this court, which is as follows:

"Now therefore, said petition and bond are hereby accepted, and it is hereby ordered and adjudged that this cause be and it is hereby removed to the United States District Court of the Northern District of the Eastern Division of Georgia, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith. Said removal relates to and affects only the four above-named nonresident defendants, this court retaining jurisdiction as to the other defendants."

It is well understood, of course, that a case is removed as a whole, even though it is removed on the ground of a separable controversy. What effect should be given to this order of Judge Hodges I am not prepared to determine, except to say that, inasmuch as the case is controlled, in my opinion, by what has already been said, it is unnecessary to pass upon the character and effect of this order.

The case will be remanded to the state court from which it was removed.

BOYKIN, Sol. Gen., ex rel. JOHNSON et al. v. MORRIS FERTILIZER CO. et al.

(District Court, N. D. Georgia. April 24, 1919.)

No. 127.

1. REMOVAL OF CAUSES ⟸48—GROUNDS OF REMOVAL—SEPARABLE CONTROVERSY.
   Where two parties were made joint defendants in a suit in a state court for violation of a contract in which they joined and of an order of court, there is no separable controversy which will support a removal of the cause by one defendant.
2. REMOVAL OF CAUSES ⟸102—GROUNDS FOR REMAND—DOUBTFUL JURISDICTION.
   Where the jurisdiction of the federal court of a cause removed is doubtful, while the jurisdiction of the state court is unquestionable, the proper course is to remand the case.

In Equity. Suit by John A. Boykin, Solicitor General of the State of Georgia, on relation of Linton Johnson and others, against the Morris Fertilizer Company and the Armour Fertilizer Works. On motion to remand to state court. Motion granted.

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

C. T., L. C. & J. H. Hopkins and R. R. Arnold, all of Atlanta, Ga., for relators.

McDaniel & Black and Anderson, Rountree & Crenshaw, all of Atlanta, Ga., for Armour Fertilizer Co.

NEWMAN, District Judge. This is a case removed to this court by the Armour Fertilizer Works, a citizen of the state of New Jersey, on the ground of a separable controversy between it and the petitioner, John A. Boykin, who represents himself as acting for and on behalf of the state of Georgia, and it is now heard on a motion to remand on the grounds, first, that it is not a suit between citizens of different states; second, that there is no separable controversy between the plaintiff and the Armour Fertilizer Works; and, third, that the case is not removable, because it is a proceeding to abate a public nuisance in the name of the state of Georgia, through the solicitor general, representing the state.

[1] The proceeding which is in question here commenced originally against the Morris Fertilizer Company, a citizen of the state of Georgia, and the Armour Fertilizer Works got into the proceeding by having a subpœna duces tecum served upon it, failing to answer that, and having a rule for contempt filed against it. Pending the proceeding against the Armour Fertilizer Works for contempt for failing to answer the subpœna duces tecum to produce certain books and papers called for in this case against the Morris Fertilizer Company, a contract was entered into February 12, 1918, which is as follows:

"It is agreed between the plaintiff and the relators in the above-stated case and Morris Fertilizer Company, defendant in said case, and Armour Fertilizer Works, as follows:

"1. The present status of the above-stated cause shall be maintained without either side taking any further steps therein until April 15, 1918, at which time the fertilizer plants in Fulton county of the Morris Fertilizer Company and Armour Fertilizer Works shall be shut down, and thereupon the order heretofore granted upon the contempt proceedings relating to the production of certain books and papers, with the approval of the court, shall be revoked, and such contempt proceedings, as well as the contempt proceedings which have been recently brought, seeking to hold the defendant in contempt for the violation of the restraining order, shall be dismissed.

"2. After said date the Morris Fertilizer Company and Armour Fertilizer Works may, if they see fit, take such steps as in their judgment will permit the operation of both of said plants without being a nuisance. Plaintiff and relators have no concern with what steps, if any, such companies may take to accomplish said ends.

"3. Said plants shall not again be operated unless they can be operated without violating the restraining order of force in the above case, and if both of said plants, at the same time, or either separately, cannot be made to so operate, then such plants shall be immediately shut down and shall remain closed.

"4. The defendant will pay the relators' attorney's fees, not to exceed two thousand ($2,000.00) dollars, and actual expenses and costs of the above-stated litigation to date, not to exceed two hundred and fifty ($250.00) dollars.

"5. Nothing herein shall be construed as an admission that either of said plants as now operated is a nuisance.

"6. This agreement is not to be binding until duly executed by the defendant and Armour Fertilizer Works through their several duly and properly authorized agents."

Upon this contract being presented to the court, the Honorable George L. Bell, judge of the superior court of Fulton county, made an order as follows:

"Upon considering the foregoing petition and the exhibit thereto, it is ordered by the court that said petition and the written agreement attached thereto be filed, and made a part of the record in this cause, and entered on the minutes of the court."

Nothing further of importance occurred in this case, apparently, until February, 1919, when a petition for an attachment for contempt was filed, called "Amendment and Rule Nisi for Contempt." This is entitled in the case: "The State of Georgia, upon the Relation of John A. Boykin, Solicitor General, v. Morris Fertilizer Co." It then sets out the petition for the rule nisi for contempt, the fact of the operation of the plants by the Morris Fertilizer Company and the Armour Fertilizer Works, the contract which is shown above, and then alleges that the Armour Fertilizer Works, by virtue of the contract and its participation in the order of the court, became a party to this cause and subject to the jurisdiction of the court, and had entered into a joint and several agreement, as stated, that the two plants should be shut down and neither operated unless they could do so without violating sections 4457 and 5329 of the Code of Georgia. It is then alleged in the petition for contempt that for a considerable time after the date of the contract both of said plants were shut down, and work of some character not known to petitioner and relators was done, or reported to be done, at each of the plants, and as a result either of this work or of other causes unknown to petitioner and relators, said plants, when they resumed operation, did not, for a considerable time, so far as petitioners are aware, constitute a nuisance, violate either of the sections of the Code named in the order, or otherwise emit offensive and injurious gases, odors, or fumes complained of in the original petition. It is then alleged that for the past several months they have been emitting the same type and character of gases, odors, and vapors that were complained of in the original petition, and to the same extent and affecting the same property, property interests, homes of relators, etc.

This petition then prays for an order making the Armour Fertilizer Works a party defendant, and that they show cause on February 11th, why they, as well as the Morris Fertilizer Company, should not be attached for contempt. The Armour Fertilizer Works got into this litigation in a peculiar way, as shown. They seem to have been served with a subpœna duces tecum, according to the pleadings, and, failing to answer that, were attached for contempt. Then, being engaged in the same character of business as the Morris Fertilizer Company, and, according to the record, about to be proceeded against as being guilty of the same character of nuisance as the Morris Fertilizer Company (that is, the emission from their works of noxious gases and odors claimed to constitute a nuisance), they executed this contract.

Thus the way the Armour Fertilizer Works came to be a party to this proceeding, if at all, is certainly novel and peculiar. They were

never served in the case, apparently, and there was never any order by the court, so far as I can see in the record, making them a party defendant in the case, and no pleadings against them until the present proceeding for contempt, and it seems to me to be at least exceedingly doubtful whether the Armour Fertilizer Works has ever become legally and effectually a party to this proceeding. If so, it appears to be certain that they became a party by reason of voluntarily entering into the contract which they did, and which was filed as a part of the record in the case. Whether this contract had that effect or not I need not determine, as that should be decided by the state court.

But, whatever may be true about that, the proceeding which is now pending, and was pending when this removal was had, after setting out what had transpired in the case against the Morris Fertilizer Company, alleges that, at the time the original petition was filed against the Morris Fertilizer Company, the Armour Fertilizer Works was engaged in the manufacture and sale of fertilizers, was operating a plant largely similar to that of the Morris Fertilizer Company and but a short distance therefrom; that the plant of the Armour Fertilizer Works was as great a nuisance, and was guilty of the same acts and character of acts, as the defendant Morris Fertilizer Company. The petition then sets out, as stated heretofore, that petitioners were preparing to start litigation of the same kind and character against the Armour Fertilizer Works, but that a conference was had, which resulted in the contract which is set out above. Then, after setting out that under the contract both plants were shut down for some time, the petition alleges that for several months both plants have been violating said contract and agreement. The petition prays that rule be be issued calling on the Morris Fertilizer Company and the Armour Fertilizer Works, on a date named, to show cause why each of them should not be attached and punished for contempt for violation of the order of the court of February 11, 1918.

This is undoubtedly a joint proceeding on the part of the petitioners against both the Morris Company and the Armour Works. It might, probably, have been a separate proceeding against each; but the petitioners have elected to make it a joint proceeding against the two companies, and, as I understand the case, they charge that each is doing the same thing and together they constitute a nuisance, although each might, by itself, be a nuisance.

One of the main grounds of the motion to remand in this case is that there is no separable controversy here. Evidently the basis of the present proceeding is the contract, which was a joint contract between the two companies and the plaintiff and relators. This contract must be the basis and foundation of any proceeding had against them now, and, the petitioners having chosen to proceed against the two jointly, the fact that they have so elected precludes the existence of a separable controversy. This doctrine is tersely stated by Simkins in "A Federal Equity Suit," page 74, as follows:

"Where the liability of two or more is joint and several, and plaintiff elects to sue jointly, a separable interest of one of the defendants cannot be

set up to obtain Federal jurisdiction"—citing Powers v. Chesapeake & Ohio Railway, 169 U. S. 97, 18 Sup. Ct. 264, 42 L. Ed. 673, and numerous other authorities.

The contract, as above set out, provides in the third paragraph:

"Said plants shall not again be operated unless they can be operated without violating the restraining order of force in the above case, and if both of said plants, at the same time, or either separately, cannot be made so to operate, then such plans shall be immediately shut down and shall remain closed."

It will be noticed that, if either or both of the plants cannot be operated in the manner provided, then both shall be shut down, and, as I have stated above, if the Armour Fertilizer Works is a legal party to this proceeding at all, it is a party because of this joint agreement that, if either shall do wrong, both shall be liable. This being a proceeding against them jointly for violation of this contract and of the order of the court, I do not think there is a separable controversy here, such as would justify its removal to this court.

There is also grave doubt in my mind whether the character of the proceeding is such as can be removed. It is a proceeding for contempt for the violation of an order of a court, and while the argument is that the proceeding relates back through the entire case, and the controversy between the Armour Fertilizer Works and the petitioners is a separate and distinct controversy from that of the Morris Fertilizer Company, yet, after all, it is a proceeding for contempt for violation of an order of the court and the right to remove it, on that account, is questionable at least.

I do not pass upon the question whether or not it is a proceeding by the state of Georgia, or if, construing this case properly, the state is the party proceeding against the defendants, the case should be remanded on that ground; the state not being a citizen. Being entirely satisfied that there is no separable controversy which justifies the removal, it is unnecessary that I should determine this question.

[2] It being exceedingly doubtful for several reasons whether this court has jurisdiction of this case by removal from the state court, even if I was not entirely satisfied that the case does not involve a separable controversy, it should be remanded. I have before me now two authorities on this subject—one the case of Ernst v. American Spirits Mfg. Co. (C. C.) 114 Fed. 981, a decision by Circuit Judge Lacombe, in which it is said, "Where it is doubtful whether or not there is a separable controversy, and citizens of the state are on both sides of the cause, it will be remanded;" and Nash et al. v. McNamara et al (C. C.) 145 Fed. 541, citing many authorities, in which it is held, "Where the jurisdiction of the federal court of a cause removed from a state court is doubtful, while the jurisdiction of the state court is unquestionable, the proper course is to remand the case."

On the whole, I am satisfied that the case should be remanded to the court from which it was removed, and an order to that effect may be taken.

BEVERIDGE v. CRAWFORD COTTON MILLS et al.

(District Court, N. D. Georgia. May 12, 1919.)

No. 38.

1. EQUITY ⟸149—MULTIFARIOUS BILL—JOINDER OF COMPLAINANTS.
Bill against a cotton mill company and individuals for specific performance of agreement between plaintiff and defendant individuals, whereby plaintiff, on account of his experience in weaving, should become largely interested in the mill company, etc., *held* multifarious; the causes of action against the defendant individuals being intermingled with whatever cause of action there was against the mill company.

2. SPECIFIC PERFORMANCE ⟸128(1)—BILL FOR SPECIFIC PERFORMANCE AND DAMAGES—RIGHT TO MAINTAIN.
Plaintiff cannot maintain a bill for specific performance of a contract between him, defendant individuals, and a cotton mill company, whereby, on account of his experience in weaving, he should become largely interested in the company without subscribing for stock, where such bill in the alternative seeks judgment against the individual defendants for the sum of $50,000; it being impossible under the facts to decree specific performance, while any right to damages exists at law.

3. SPECIFIC PERFORMANCE ⟸114(1)—PROMOTION OF MILL COMPANY—PLEADING.
Bill alleging agreement between plaintiff, the individual defendants, and a cotton mill company, whereby, by reason of plaintiff's experience as a man familiar and expert in weaving, he was to become interested largely in the mill company without subscribing for stock, the bill praying separately for specific performance or money judgment against the individual defendants, *held* not to allege facts justifying any interference by a court of equity at all.

In Equity. Suit by George Beveridge against the Crawford Cotton Mills and others. On motion to dismiss the bill. Motion sustained, and decree directed to be taken.

W. W. Mundy, of Cedartown, Ga., and Moore & Pomeroy and Chas. E. Cotterill, all of Atlanta, Ga., for petitioner.

Richard B. Russell, of Winder, Ga., for defendants.

NEWMAN, District Judge. This is a suit, alleged to involve an amount in excess of the jurisdictional amount of $3,000, brought by the plaintiff, a citizen and subject of Great Britain, against the defendants, all being citizens and residents of the state of Georgia and of this district. The allegations of the bill are as follows:

That petitioner is an expert in the weave and finish of textile fabrics, duck, etc., and that prior to April, 1917, he, with other associates, had established and had in operation, at Cedartown, Ga., a large dyeing and finishing plant, under the name of Noble-Beveridge Company, and a plant for the manufacture of duck, known as the Cook Duck Mills.

That petitioner, being desirous of finding other plants engaged in, or to be easily converted as to become engaged in, the manufacture of duck, both for the purpose of supplying the said Noble-Beveridge Company with sufficient material to keep it in operation and for the

additional profits that might be earned thereby, and learning of a small manufacturing plant, known as the White City Manufacturing Company, owned and operated by J. W. Ingle, that might be purchased, he visited Mr. Ingle, at Athens, Ga., and looked over his plant.

That as a result of their interview the petitioner and J. W. Ingle agreed and contracted to form a corporation to take over the plant of the said White City Manufacturing Company, said corporation to be capitalized at $100,000, of which $50,000 would be preferred stock and $50,000 common stock. That a certain addition should be made to the plant by J. W. Ingle, and he was to receive $45,000 of the preferred stock in payment for the plant, and $30,000 of the common stock, to be paid for by the good will of the business. That petitioner was to subscribe for $5,000 of the preferred stock, for which he was to give his note, payable in 12 months from date, and was to receive $20,000 of the common stock in recognition of his long experience in the operation of such enterprises and his knowledge of markets and market conditions, etc. No cash was to be paid by either party for said common stock.

That it was further agreed that said Ingle should receive an annual salary of $5,000, and petitioner, who was to devote but half of his time to the enterprise, $2,500. Petitioner, likewise, was to get a selling agent to advance $10,000 against goods in process of manufacture, to be used in the operation of the business of the company.

That subsequent to this agreement said Ingle, upon the invitation of petitioner, visited and examined the plants referred to, at Cedartown, and seemed highly pleased therewith. That on the return trip Ingle advised petitioner that he had in mind a mill and plant at Crawford, Ga., known as the Edwards mill and Edwards power plant, on which a friend of his, B. T. Comer, one of the defendants in this action, had an option; that it would take $135,000 to handle it, but that, if it could be handled, this property, together with that owned by the parties known as the White City Manufacturing Company, would be worth $250,000. It was suggested that the three plants combined could probably be bonded at $140,000, and that petitioner could probably secure a loan of from $30,000 to $35,000 from the selling agents, which would be used as operating capital.

That petitioner then suggested the employment of a competent architect and engineer to make a careful inventory and appraisement of the three plants, which suggestion was adopted, and the firm of Dallas-Roberts Company employed for this purpose. That the inventory and appraisement made by Mr. Dallas, of this firm, showed the value of the plants, exclusive of stock and merchandise on hand to be as follows:

White City Manufacturing Company		$ 34,455.00
Edwards mill	$146,313.20	
Edwards power plant	61,800.00	$208,113.20

That thereafter, about April 11, 1917, petitioner, together with defendants B. T. Comer and J. W. Ingle, called upon L. F. Edwards, owner of the Edwards mill and Edwards power plant, and purchased the same; L. F. Edwards entering into a legal and binding option

to sell to Benjamin T. Comer, J. W. Ingle, and George Beveridge the two properties, as particularly described therein, for the purchase price of $135,000, of which $20,000 was to be paid in cash, and the balance on or before July 11, 1917, the taxes for the year 1917 to be apportioned between the seller and purchasers.

That thereupon, and in lieu of the contract and agreement theretofore made between petitioner and defendant Ingle, above set out, a new agreement was entered into between him and the defendants Ingle and B. T. Comer to the following effect:

A new corporation was to be formed, to be known as the Crawford Cotton Mills, with a capital stock of $250,000 of which $100,000 was to be preferred and $150,000 common stock. Bonds were to be issued and sold on the combined plants to the amount of $140,000, of which $115,000 was to be used to pay the balance of the purchase price under the option above referred to; the cash payment of $20,000 being advances by Ingle and Comer, and for which they were to receive preferred stock. Ingle was to receive $40,000 of preferred stock in payment for his plant, previously operated as the White City Manufacturing Company, and also preferred stock to an amount equal to the inventory value of all merchandise and products on hand. The balance of the preferred stock was to be sold for cash or its equivalent.

The common stock was to be issued, one-third to each of the parties, to wit, George Beveridge, Benjamin T. Comer and J. W. Ingle, each of them to keep 150 shares thereof and transfer the rest to the corporation, to be held as treasury stock. For the 150 shares each of the common stock thus retained by said parties they were to execute each his notes to the corporation for $15,000, payable $5,000 per year.

Petitioner, Beveridge, was to be president of the corporation, defendant Ingle vice president, and defendant Comer treasurer, and each of said parties was to receive $10,000 per year for their services; it being contemplated that said agreement would extend over a period of three years and the notes given in payment for the common stock paid from the salaries thus agreed upon.

It is then alleged that this agreement was thoroughly understood in each and all of its details and consented to by each and all of said parties.

Following this is an allegation that petitioner had previously secured an option for certain looms, this being the only lot of looms available, and that "thereupon the contract was closed and the looms purchased for and in behalf of the benefit of said corporation." There is no statement as to the details of this purchase, the price paid, or by whom.

It is further alleged that application was made to the superior court of Oglethorpe county, Ga., by Comer, Ingle, and Beveridge, for a charter incorporating the Crawford Cotton Mills, which was granted on May 4, 1917.

That arrangements were made for the issuing and selling of the proposed bonds, and certain correspondence from Ingle to petitioner is set out as showing his (Ingle's) understanding of the agreement, and steps taken to carry out the same.

That on or about May 8, 1917, petitioner went to Athens for the purpose of being on hand at the organization of the Crawford Cotton Mills and furthering the interests of the enterprise. That while there, in conference with J. W. Ingle and B. T. Comer, they stated that they wanted petitioner to put up $15,000 in cash, at once; that they had changed their minds, and decided that petitioner would have to put up the $15,000 in cash by the next day, or they would not let him in on the deal, and he would have no further interest therein. That petitioner replied that he had not agreed to put up $15,000 in cash, that he was willing, able, and ready to comply with his agreement in every respect, that he would execute his notes to them that day, or any other time they might desire, and in addition would voluntarily advance one-third of the money necessary to pay the then incidental expenses, including the bill due Dallas-Roberts Company for the appraisement. That the conference then ended.

That he attempted to see them the next day, but without success, and he then wrote said Ingle, stating that he was at a loss to understand how they could have changed their minds regarding the agreement they had come to in connection with the proposed Crawford Cotton Mills; that he had learned that Ingle and Comer had said that he (Beveridge) had refused to go on with the matter, which was not correct; that he had told them he was ready to go ahead on the basis agreed upon, and asked for a conference, stating that he stood ready to fulfill his part of the terms and conditions agreed upon.

It is not stated whether the requested conference was granted or refused, but it is alleged that defendants declined to live up to their contract and to carry out the arrangement as agreed, and this without fault on the part of the petitioner.

It is then alleged that on the 10th day of May, 1917, defendants Ingle and Comer advised petitioner that they would hold a meeting at Crawford, Ga., on the 11th of May for the purpose of organizing the Crawford Cotton Mills, and invited him to be present, and that he attended. That at said meeting he was presented with a prepared form of subscription, obligating him to take 150 shares of preferred stock, for which $15,000 was to be paid, and 500 shares of common stock, for which $50,000 was to be paid, or a total of $65,000, all of which was to be paid upon the call of the board of directors. That being satisfied from his conversation with defendants Ingle and Comer on the day previous that their purpose was to get him out of the corporation, and they being a majority of the directors, to take action forcing him to pay at once the $65,000 if he so agreed and signed said subscription blank, he "did then and there advise said parties and those present that the proposed subscription did not contain the terms of the agreement between the parties; that he could not subscribe for said stock, agreeing to pay the said $65,000 on the call of the board of directors, but was willing to subscribe and pay for the stock, and then and there offered so to do, on the conditions and terms previously agreed upon between the parties." That said Comer and Ingle refused and declined to permit him to subscribe for the stock upon such terms and conditions, and that thereupon the stock

was subscribed for; J. W. Ingle subscribing for $80,000 of preferred stock and $75,000 of common stock, B. T. Comer for $20,000 of preferred and $74,000 of common stock, and H. T. O'Neal, a mere figurehead, subscribing for $1,000 of common stock.

That petitioner was then requested to transfer his interest, in the option above referred to, to the corporation for a consideration of $1. That he then and there offered to transfer the option to the corporation upon the terms and conditions previously agreed upon between the parties, but his offer was declined.

It is then charged, on information and belief, that during the life of said option, and for the purpose of defrauding and defeating the rights of petitioner, the defendants J. W. Ingle and B. T. Comer agreed with said L. F. Edwards to permit the option, for which they had already paid the $20,000, to expire if said Edwards would agree to give said Comer and Ingle a new option and agreement to sell said property at a price of $140,000, crediting the $20,000 already paid as a part payment thereof.

Petitioner then charges that—

"Said sale was consummated and the property transferred to the corporation, bonds issued thereon, all as previously contemplated and agreed, the enterprise launched, and is now in operation."

It is further alleged that the defendant corporation has failed and refused to pay his salary of $10,000 a year, that the other defendants herein have, without just cause, failed and refused, and continue to refuse, to comply with their contract and permit petitioner to take any part whatever in the operation, management, or control of said corporation, and that all of petitioner's rights were known to the defendant O'Neal at the time he subscribed for said stock. That J. W. Ingle is president and treasurer of said corporation, B. T. Comer is vice president and general manager, and H. T. O'Neal is secretary, these three forming the board of directors, and are named as defendants in their representative capacities as well as individually.

An amendment to this petition has been filed, in which the petitioner avers: That under and by virtue of the contract between him and the defendants, which is the basis of this suit, it was his duty to procure for the benefit of the defendants a competent and skillful selling agent, who, in addition to marketing the output of the mill, would advance to it the sum of $35,000 to be used in the operation of such mill. That in pursuance of such obligation he did, prior to May 11, 1917, go to Philadelphia and New York City, at his own individual expense, for the purpose only of procuring such agent, and that solely by reason of his efforts T. A. Shaw & Co., of the city of Chicago and New York, did agree to act as such selling agent and to advance the necessary sum of $35,000. That thereafter, notwithstanding the manner in which petitioner was treated by defendants, he still advised and requested the said T. A. Shaw & Co. to become selling agents of the mill, and that by reason thereof the said T. A. Shaw & Co. did become such agents, and did advance to it the sum of $35,000, or other large sum, as agreed for by petitioner, and defendants have ever since continuously accepted the benefit of petitioner's services

in that regard, and are still employing the said Shaw & Co. as selling agents.

Then, after alleging that "it is necessary for a court of equity to take charge of this case and the issues herein, and to decree petitioner's title and interest in and to 150 shares of the common stock of said corporation, to decree that the balance of the stock of said corporation be declared and held as treasury stock, other than 150 shares of common stock to B. T. Comer and 150 shares to J. W. Ingle, together with the amount of preferred stock issued to Ingle in payment of cash advanced by him and his plant, as hereinbefore described, and likewise the amount of preferred stock issued to B. T. Comer, for which he has paid cash or its equivalent," petitioner avers that his damages in and about the matters herein set forth are too vague and indefinite to be the cause of an action at law, but that they would amount to the sum of $50,000 or other large sum; also that petitioner is entitled to judgment against the Crawford Cotton Mills for the sum of $10,000 for salary for the year ending May 11, 1918.

The prayers of the petition are:

First, that process of subpœna be issued.

Second, that a temporary restraining order be granted, enjoining and restraining the defendants, and each of them, in the following particulars:

(a) From changing or altering the present status of the stock and assets of Crawford Cotton Mills, pending this litigation, except in the ordinary course of business.

(b) From making any transfer, sale, or incumbering the capital stock of said company, and

(c) From declaring or paying any dividends on the capital stock of said company.

Third, that upon a final hearing the following relief be granted:

(a) That the contract as herein set out between petitioner and defendants Comer and Ingle be required to be specifically performed by all and each of the parties hereto.

(b) That petitioner be decreed to be the owner of 150 shares of the common stock of said company upon the execution and payment of his notes as herein provided.

(c) That petitioner be declared to be the president of said corporation from the date of its organization until the 11th day of May, 1921, at a salary of $10,000 a year, as agreed.

(d) That said Comer be decreed to be the owner of such stock only as may have been subscribed and paid for by him as herein set out.

(e) That said Ingle be declared to be the owner of such stock in the corporation as agreed to be subscribed and paid for by him in accordance with the agreement as herein first contained.

(f) That petitioner have judgment against said Crawford Cotton Mills for the principal sum of $10,000 as salary for the year ending May 11, 1918.

(g) That, in the event specific performance cannot be decreed as herein prayed, petitioner have judgment against defendants herein, J. W. Ingle and B. T. Comer, in the sum of $50,000.

(h) That petitioner have such other and further relief as in good conscience and equity he may be entitled to.

There is a motion to dismiss this bill, and upon that the present hearing has been had.

This motion is on the ground:

First, that there is no equity in the petition, nor any ground for the intervention of equity set forth.

Second, because there is a misjoinder of parties and of causes of action, in that:

(a) The statements imposing liability, if any, upon the defendants J. W. Ingle, Ben T. Comer, and H. T. O'Neal are entirely disconnected from the defendant Crawford Cotton Mills, in that it appears from the averments of the petition that the agreements made by the defendants J. W. Ingle and Ben T. Comer (if any such were in fact made) were made and entered into by them in their individual capacities, and that the said defendants had at the time of entering said agreements no authority to act in behalf of the defendant Crawford Cotton Mills.

(b) The defendant the Crawford Cotton Mills, as an artificial person created by law, is an entirely distinct entity from the defendants Ingle, Comer, and O'Neal, notwithstanding said defendants individually might own all of the capital stock or shares in the Crawford Cotton Mills, and the Crawford Cotton Mills cannot be bound by the contracts or agreements of others than those duly authorized to contract in its behalf.

(c) There being no liability alleged as against the defendant the Crawford Cotton Mills as touching the matters and things wherein petitioner alleges that the defendants Ingle and Comer and O'Neal have endamaged him $50,000, or other large sum, and no joint liability as against said individual defendants for the alleged $10,000 claimed to be due to the petitioner by the defendant Crawford Cotton Mills as salary, there is no community of action or cause of action between these distinct and separate parties, the one artificial and the other three natural persons, and the cause for misjoinder should be dismissed.

Third, defendants also move to dismiss plaintiff's petition upon the ground that the same is multifarious, and, if petitioner has any cause of action against the defendants Ingle and Comer, he has an adequate remedy at law.

There is no allegation whatever in the petition that the contract said to have been entered into by Ingle, Comer, and the petitioner as a substitute for a former contract existing between Ingle and the petitioner was in writing, or any memorandum of the same kept in writing. If the allegations of the petitioner with reference to the purchase of looms must be construed such "part performance of the contract as would render it a fraud of the party refusing to comply with the contract," or if the alleged action of petitioner in obtaining a selling agent to sell goods for the corporation and lend them money could be construed in the same way, either separately or combined, it could only render what is alleged to have transpired between Ingle

and Comer, on the one hand, and the petitioner, on the other, a contract, and relieved by what was done by Beveridge from the operation of the statute of frauds on the matter, and make it a binding contract. The right of petitioner, then, giving the allegations of his petition the strongest view in his favor, would be a proceeding for a breach of contract, for which there would be, of course, an adequate remedy at law ordinarily. The difficulty about this case is that petitioner sets out in his petition "that his damages in and about the matters herein set forth are too vague and indefinite to be the cause of an action at law," so that would seem to be in the way of a transfer of this case to the law docket, that it might be tried as an action at law for damages. Where the petitioner himself avers that his damages are too indefinite to be recovered at law, it would appear useless to send his case to the law docket.

[1] In addition to the foregoing, I think the bill is clearly multifarious. The causes of action against Ingle and Comer are so intermingled with whatever cause of action he may have, if any, against Crawford Cotton Mills, that the suit cannot be maintained for that reason. The damages sought against the Crawford Cotton Mills, and the rights against the Crawford Cotton Mills, if any are shown, are distinct and separate from the damages which would seem to be the basis of recovery against Ingle and Comer; that is, for breach of contract. The Crawford Cotton Mills is, of course, a distinct legal entity from Ingle and Comer individually, and, construed in the light in which this petition presents them, they cannot be joined in the same action.

[2] The prayer is that the contract between Ingle and Comer and petitioner be required to be specifically performed by all and each of the parties hereto. That prayer would include both Ingle and Comer and the Crawford Cotton Mills. Then there is the alternative prayer that, in the event specific performance cannot be decreed, petitioner have judgment against the defendants herein, Ingle and Comer, for the sum of $50,000. These prayers, considered separately and in the alternative, as they are set out, cannot, of course, be entertained. It would be impossible, under the facts stated, to decree specific performance of the contract, and the right to damages, if it exists at all, is a right in a court of law.

[3] The facts set out in this bill do not appeal to me as facts which justify any interference on the part of a court of equity at all. The petitioner, as shown in the bill, declined to take stock in the corporation which was to be organized, or to sign any subscription to stock. He relied upon what he says was an agreement between them, which, not being stated to have been in writing, must be considered as simply an oral agreement, that, by reason of certain experience he had as a man familiar with and an expert in weaving, he should become interested largely in the Crawford Cotton Mills without subscribing for a single dollar of stock. He did offer to give notes, which were to be paid out of a salary which he says he was to receive, which seems to have been a large salary, considering the size of the mill. The most that can be said from the bill that he did was with reference to the

purchase of looms and to the securing of a sales agent, which is so indefinitely set out as to be not entitled to consideration here.

I do not think a case is made which, looking at it from any possible angle, justifies any relief. Consequently the motion to dismiss the bill will be sustained, and a decree to that effect may be taken.

UNITED STATES v. CAPLIS et al.

(District Court, W. D. Louisiana, Shreveport Division. May 24, 1919.)

No. 2526.

GRAND JURY ⊂⊃7—METHOD OF SELECTION—APPOINTMENT OF JURY COMMISSIONER.

Judicial Code, § 276, as amended by Act Feb. 3, 1917 (Comp. St. 1918, § 1253) providing for the selection of names of persons from whom grand and petit jurors shall be drawn by the clerk and a commissioner appointed by the judge, who shall be "a well known member of the principal political party * * * opposing that to which the clerk may belong" so far as relates to the action of the judge in appointing a commissioner is directory only, and the law was not violated by the appointment of a commissioner who was then registered as an Independent, although he had been for many years a member of the principal party opposed to that of the clerk.

Criminal prosecution by the United States against Tom Caplis and others. Plea in abatement overruled.

Joseph Moore, U. S. Atty., and J. H. Jackson, Asst. U. S. Atty., both of Shreveport, La.

Foster, Looney & Wilkinson, of Shreveport, La., for defendants.

JACK, District Judge. The defendants, charged with conspiracy to violate the Selective Service Draft Act (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2044a–2044k]), have filed a plea in abatement, based on the allegation that the jury commissioner who assisted in the drawing of the grand jury which returned the indictment is not a well-known member of the principal political party in the district opposed to that to which the clerk belongs, as required by section 276 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1164), as amended by Act Feb. 3, 1917, c. 27, 39 Stat. 873 (Comp. St. 1918, § 1253). The clerk, it is alleged, is a Democrat; whereas, the commissioner is registered as an Independent; consequently, the defendants allege the grand jury was illegally drawn, and the indictment should be abated and set aside.

Section 276 of the Judicial Code as amended is as follows, the provision relating to a deputy clerk having been incorporated in the section by the amendment of February 3, 1917:

"All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly qualified

deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein."

The evidence shows that the clerk of court is a Democrat. The commissioner came originally from Illinois, and has lived in the state of Louisiana about 27 years, during which time he has always been regarded and considered a Republican. He testifies that he has considered himself a Republican ever since he was old enough to vote, and that he has never affiliated with the Democratic party, nor voted in its primaries, though on one or two occasions in a local election, he has voted for the Democratic candidate; that he has served on the Republican state executive committee, and at one time was a candidate of that party for state treasurer. In Louisiana he has always voted the national Republican ticket, though he has sometimes in local elections "scratched" a party candidate he thought undesirable, and voted for another on the opposite ticket whom he thought better qualified. Under a recent state statute, requiring that a voter fill in on his registration blank the party, if any, with which he affiliates, he registered as an Independent.

While the defendants allege that they were greatly prejudiced as a result of such appointment of the jury commissioner, it has not been suggested, nor is it apparent, in what way they were or could have been prejudiced. They do not claim to have themselves been members of a political party opposed to that of the clerk. There was no partisan alignment in the enactment of the Draft Law, and all patriotic citizens, regardless of party, have stood firmly for its enforcement.

The same plea was made in the case of United States v. Chaires et al. (1889, in the Circuit Court for the Northern District of Florida, before Judges Pardee and Swayne) 40 Fed. 820, in which Judge Pardee, as the organ of the court, held that the provisions in the statute for the guidance of the court in the selection of a jury commissioner were advisory, and not mandatory. The court said:

"An inspection of this statute shows that the work of preparing the names of the persons possessing the qualifications of jurors, and placing them in the box, is to be done by the clerk of the court and a jury commissioner to be appointed by the judge. The duty to be performed by these parties is clearly and specifically prescribed in the statute. It may be considered, and probably is, mandatory; but it is entirely distinct from the duty devolving, under the statute, upon the judge. The plea under consideration relates entirely to the performance of the duty of the judge. By the statute, the judge is to appoint a commissioner, who shall be a citizen of good standing, who shall reside in the district in which the court is held, and who shall be a well-known member of the principal political party in the district opposing that to which the clerk belongs. The question is whether this part of the statute is mandatory or directory; whether, in appointing a jury commissioner, the judge, while endeavoring to comply with the law, must make no mistake of fact or of judgment, but must, at the peril of all subsequent proceedings, be sure to appoint a citizen, not only of standing, but of good standing, and not only a

known, but a well-known, member of the principal political party opposed to that to which the clerk belongs. The statement of the question, and the nature of the case, satisfies us that the statute in this particular is directory, and not mandatory. What is the standard for a citizen in good standing? By what rule is it to be determined who is a well-known member of a political party? Considering that the judge has knowledge, judicial or otherwise, as to the political party of the clerk, by what rule is the judge to determine which is the principal party opposed? Suppose that the clerk is an independent or a prohibitionist? In case of a challenge to the array of jurors, or a plea in abatement, who is to try the issue? All matters and questions come back to the judge. The judge, in the exercise of a sound discretion, under the responsibilities of his office, directed by the statute, passes upon the qualifications of the jury commissioner he appoints, and his action would seem to be final and conclusive, except, perhaps, in the court that can call the judge to account for misbehavior in office. Particularly must this be the case where neither injury nor prejudice nor oppression is apparent nor is averred."

The purpose of the act originally adopted in 1879 (Act June 30, 1879, c. 52, 21 Stat. 43), when many political questions were before the court, was to insure, as far as possible, the selection of jurors without regard to political bias. There were then but two political parties, or at least no third party of any consequence, and so it was provided that the commissioner should be selected from the principal political party opposed to that of the clerk. It was not contemplated, however, that in the making of a jury list each in turn should select a man of his own political faith; but, on the contrary, it was provided that such selection of jurors should be made without reference to party affiliation. This was the end to be obtained.

Since then other parties have come into existence, and at times in certain districts it might be difficult to say which was the principal political party opposed to that of the clerk. One party might be considered such to-day, and another a week hence, after an election. Not only have new political parties arisen, but a large proportion of the electorate now aligns itself with no party, choosing rather to remain independent, to vote for those party nominees who may, in the opinion of the voter, be best qualified. As suggested in the query of Judge Pardee, suppose the clerk of the court is an Independent, affiliated with no party, how is the law to be complied with? The case at bar presents the converse of that situation. The clerk belongs to the dominant political party, and the jury commissioner, although a lifelong Republican, is perhaps technically not a member of that party, because, in his registration, he designates himself an Independent. By his registration he denies to himself the right to participate in the primaries of either party, in order that he may remain free to vote in the general election as his own good judgment and conscience may dictate. Why should this disqualify him for appointment as jury commissioner? Would not the very purpose of the act, the elimination of politics or political influence in the selection of juries, be better subserved by the appointment of such an Independent than by the selection of a partisan, a "well-known member of the political party opposed to that of the clerk?"

The selection of a jury commissioner the law wisely leaves to the good judgment and sound discretion of the judge. Its provisions as to his party affiliation are advisory; but, even were the statute in this

the distinctions based on the home port of the vessel; but it includes no *new* services as a foundation for a maritime lien, except those which are specifically enumerated, citing The J. Doherty (D. C.) 207 Fed. 999. In The Oceana, supra, at the bottom of page 82 of 244 Fed. (156 C. C. A. 508), the court states in detail the effect of the new statute, while in The Hatteras, supra, at page 520 of 255 Fed. (— C. C. A. —), the court holds that a presumption of lien created under general maritime law may be rebutted by showing personal contract, under such circumstances as to exclude liability of the vessel.

Under these decisions it is evident that a maritime lien may arise in a home port from furnishing either "repairs" or "necessaries." If a vessel is placed on a dry dock or pumped out in order to raise her sufficiently for the making of repairs, a lien will arise for the entire bill, just as a lien for the actual work of repair is created. If, therefore, a vessel is lying on the bottom, and as a part of repairing a hole in the vessel she has to be raised, there seems to be no logical reason why it should not be treated as a part of the work from which a lien would arise. The essential element would seem to be that the vessel was to be repaired—that is, to be restored—and that she had not been abandoned or treated as material for the building of another vessel. On the other hand, if the sunken vessel had been treated as a total loss, and yet is saved, the fact that she might be restored to service by having certain repairs made would not take the work out of the class of salvage.

In the case at bar the allegations of the libel show that the case is not one of salvage; the vessel was not, apparently, given up as a total loss, and hence the fact that the services were rendered in the home port does not affect the question which is presented, viz., whether the work of raising the vessel was either "necessary" or a part of the repairs. Certainly nothing could be more necessary, in the ordinary sense, than the raising of the vessel; but the word "necessaries" in the statute has been limited to such things as go to the actual equipment of the vessel as a navigating object. The statute expressly includes the use of a dry dock and marine railway; but mere services involving the consumption of power or fuel, such as towing, have been held not to be a "necessary," in the sense meant by the statute.

The decision in The D. S. Newcomb, supra, seems to point out the distinction. If the raising of the vessel is merely a part of towing her to some other place, even though it is a necessary step in that removal, it is not one of the acts specified by the statute; but if the raising of the vessel is merely like hauling her on the dry dock, or pumping the water out to get at the place of making repairs, then it would seem to be a part of the "repairs" or "necessaries" for which a lien is given in a home port under the statute in question.

[6] In the case at bar, the libel apparently alleges a charge for repairs with the initial step of raising the sunken vessel. But this could be put in issue, or if the libel is so indefinite that the claimant is in doubt and has not information in its own possession which will enable it to answer, further exceptions should be taken, or the point should

be raised by answer and an interrogatory as to the contract for repairs presented therewith.

The exception to the libel should therefore be overruled, and the claimant directed to answer.

YOUNG v. GORDON et al.

In re SIFELL.

(District Court, E. D. New York. April 28, 1919.)

1. FRAUDULENT CONVEYANCES ⟸47—SALE IN BULK—PRESUMPTIVE FRAUD.
   A sale of a stock of goods in bulk, where no list of the seller's creditors was furnished the buyers, was presumptively fraudulent under the New York Bulk Sales Law (Personal Property Law, § 44), though the buyers asked perfunctory questions as to the amount of debts outstanding, and embodied the replies in the bill of sale.
2. COURTS ⟸366(14)—STATE DECISIONS—CONTROLLING EFFECT.
   New York decisions that the question of fact as to whether a sale in bulk was fraudulent, under New York Bulk Sales Law (Personal Property Law, § 44), is largely a matter of intent, are controlling in suit by the seller's trustee in bankruptcy to recover the proceeds of the goods sold by the bankrupt and resold by the buyers.
3. FRAUDULENT CONVEYANCES ⟸289(1)—INTENT—EVIDENCE.
   In determining whether a sale of goods was fraudulent as to creditors, although generally the sale must be viewed from the standpoint of the evidence bearing on the intent of the parties at the time, if the evidence shows a continuous transaction in which the intent relates back to the time of the purchase, the rule does not apply, and subsequent events can be coupled with events preceding the acts, if there is such connecting evidence as to throw light on the original intent.

In Equity. Suit by William A. Young, as trustee in bankruptcy of Annie Sifell, bankrupt, against John Gordon and others. Decree for plaintiff directed to be entered.

Archibald Palmer, of New York City, for trustee.
Kornblueh & Hutter, of New York City, for Gordon and Schwartz.

CHATFIELD, District Judge. The bankrupt was in possession of a 3, 9, and 19 cent store, which was managed by her brother-in-law, and which she had purchased at the bankruptcy sale of the same brother-in-law, who had previously been the owner. It is evident from the testimony that the bankrupt was in financial difficulty, and that this was well known to the brother-in-law, who acted as manager and as attorney in fact throughout the entire transaction.

Both the bankrupt and the brother-in-law lived over the store, and on Saturday night, the 29th day of June, 1918, John Gordon and Harry Schwartz suddenly appeared at the store and arranged to buy the stock for $1,200. This stock, according to the defendants, was from a casual inspection worth some $1,600, while the bankrupt's brother-in-law valued it from an inventory made some time before as amounting to nearly $2,500. The first sum asked of the purchasers was $1,600, and the purchasers were told that the landlord would al-

particular mandatory, rather than directory, in this instance it could not be said that the appointment was not in accord with the spirit of the act and in substantial compliance with its terms.

The plea in abatement is accordingly overruled.

THE CONVOY.

(District Court, E. D. New York. April 25, 1919.)

1. SALVAGE ⊂⊃39—RAISING SUNKEN VESSELS.
   A maritime lien arises from a salvage service requiring the raising of a sunken vessel or its cargo outside of the vessel's home port, but a lien for salvage does not accrue where the vessel is sunk at her home port under such circumstances that no unusual effort or danger is used in raising to the surface and delivering to the owner or to a place of safety.
2. SALVAGE ⊂⊃39—RAISING MATERIAL FROM WATER.
   A maritime lien does not arise from procuring or furnishing material in the building of a boat, by raising such material from under the surface of the water, which is not salvage, and not work on the vessel, until the new boat is complete.
3. SALVAGE ⊂⊃39—SERVICES IN HOME PORT.
   A maritime lien for salvage will lie for a boat in her home port, when the nature of the services renders the saving of the vessel or cargo a recognized salvage service.
4. SALVAGE ⊂⊃39—CONTRACT.
   If a contract is made to perform definite services at a definite price or rate of compensation, even work which would be worthy of the name of salvage does not furnish the basis for a maritime lien.
5. MARITIME LIENS ⊂⊃20—REPAIRS IN RAISING TUG—"REPAIRS"—"NECESSARIES."
   A libel, alleging a charge for repairs as the initial step of raising a sunken steam tug in her own port, stated a cause of action within Act June 23, 1910 (Comp. St. §§ 7783–7787), authorizing a maritime lien for "repairs" and "necessaries."
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Necessaries; Repairs.]
6. ADMIRALTY ⊂⊃71—LIBEL—INDEFINITENESS.
   If libel for repairs against a steam tug is so indefinite that claimant is in doubt and has not information in its own possession enabling it to answer, further exceptions should be taken, or the point raised by answer, and an interrogatory as to libelant's contract for repairs on the tug presented therewith.

In Admiralty. Libel by the Interstate Lighterage & Transportation Company against the steam tug Convoy. On exception to the libel. Exception overruled, and claimant directed to answer.

Macklin, Brown, Purdy & Van Wyck, of New York City, for libelant.

Alexander & Ash, of New York City, for claimant.

CHATFIELD, District Judge. The claimant has excepted to the libel upon the ground that a lien does not accrue, and that an action in rem may not be had, upon a claim for "work, labor, and services

performed at the special instance and request of the owner," when set forth as in this libel.

The libel alleges that in the month of January, 1918, the libelant, at the special instance and request of the owners of said steam tug, performed certain work, labor, and services in raising said steam tug Convoy at the foot of Eighteenth street, Hoboken, N. J., where said tug was lying in a sunken and damaged condition. These services are alleged to be of the reasonable value of $1,118. They are alleged to have been necessary to put the tug in a seaworthy condition, and evidently include repairs; but the extent of these repairs cannot be ascertained from the libel. The raising occurred and the services were rendered, so far as the libel indicates, within the harbor of New York, the home port of the tug. This is a matter of inference only from the libel, but was assumed upon the argument, and there is evidently no intention of claiming that the tug was not in her home port during all of the proceedings.

[1] A maritime lien arises from a salvage service, which requires the raising of a sunken vessel or its cargo outside of the vessel's home port. But a lien for salvage does not accrue where a vessel is sunk at her home port, under such circumstances that no danger or unusual effort is involved in raising the vessel to the surface and in delivering her either to the owner or to a place of safety. The Paul L. Bleakley (D. C.) 146 Fed. 572; The D. S. Newcomb (D. C.) 12 Fed. 735; The Venture (D. C.) 26 Fed. 285; Merritt & Chapman D. & W. Co. v. Morris & Cumings Dredging Co., 137 Fed. 780, 70 C. C. A. 356; The Dredge A (D. C.) 217 Fed. 617.

[2] Similarly, a maritime lien does not arise for procuring and furnishing material in the building of a boat, by raising that material from under the surface of the water. This is not salvage, and not work upon a vessel, until the new boat is complete. The Dredge A, supra.

[3, 4] A maritime lien for salvage will lie, even for a boat in her home port, when the nature of the services renders the saving of the vessel or cargo a salvage service, as recognized by admiralty law. The Camanche, 75 U. S. (8 Wall.) 448, 19 L. Ed. 397. But if a contract is made to perform definite services at a definite price or rate of compensation, even work which would be worthy of the name of salvage does not furnish the basis for a maritime lien. The Camanche, supra.

[5] State statutes are applied with precision, and in such instances as The D. S. Newcomb, supra, and The Venture, supra, the statute of Pennsylvania was held not to have enlarged the services for which a maritime lien could be had, so as to include the raising of a vessel, either as a part of a towing contract, or as a part of the supplies recognized as "necessaries." Thus the distinction between services in a home port and services elsewhere has entered into most of the decisions prior to the passage of the United States statute of June 23, 1910. 36 Stat. at Large, 604, c. 373 (Comp. St. §§ 7783–7787).

This statute has been held in The Oceana, 244 Fed. 80, 156 C. C. A. 508, and The Hatteras, 255 Fed. 518, — C. C. A. —, to wipe out

low them to stay in the store to conduct a sale and that the rent was $60 a month. They inquired from the manager the amount of his debts, and he told them $300, intending thereby to imply the amount of his own personal obligations, and not those of his principal. But at the same time he submitted to them the unpaid bills, which were in the store, amounting to over $2,000. The purchasers made no attempt to examine them, or to question him further. They made no attempt to question the sister, but immediately proceeded to a notary, in order to have a bill of sale drawn, and insisted that a statement should be inserted in the bill of sale that the total owing was not more than $300. They then arranged to deposit this sum of $300 (which would nominally cover these outstanding bills) with a neighboring storekeeper selected by the vendor, but who turned back $200 to the buyers as soon as there was a change in the situation demanding haste. Some time was spent that night in examining the stock, and on the following (Sunday) morning the parties returned, when the brother-in-law manager notified them that they had better get the stock out of the store as quickly as possible, which they agreed to, and moved it by automobile trucks during the night of Sunday to a New York store, which was temporarily obtained for the purpose. From this store, and two other stores subsequently hired, auctions were conducted netting about $1,300.

The bankrupt seems to have plainly perpetrated a fraud on her creditors through the actions of her brother-in-law. The brother-in-law did not apply the money received from the two defendants in a fair proportionate payment of the debts. This sum would have paid substantially all the merchandise debts then outstanding. Instead of using it for this purpose, it was paid to alleged creditors, whose debts were questioned by the trustee, and used by the bankrupt and her brother-in-law for their personal expenses.

[1] The sale was presumptively fraudulent under the New York Bulk Sales Law (section 44, Personal Property Law [Consol. Laws, c. 41; chapter 45, Laws 1909]). The purchasers seem to have had in mind the decisions of the state courts under this law, such as Wallach v. Baumryter, 170 App. Div. 618, 156 N. Y. Supp. 497, and Rugen v. Mulvihill, 85 Misc. Rep. 354, 147 N. Y. Supp. 404, and to have deliberately prepared a defense in advance, by asking perfunctory questions as to the amount of debts outstanding, and by embodying the replies in the bill of sale. They seem to have reasoned that, if an approximately fair consideration were actually paid over to the vendor, the sale might be so covered up that its validity could not be attacked. They made inquiry as to the possibility of renting the store, supposedly for the purpose of conducting a sale at the place, but the circumstances show that they were all the time ready to remove the goods and try to cover up their tracks.

[2] The issue comes down sharply to one of fact. The question of fact, under the New York Personal Property Bulk Sales Law, is largely a matter of intent, as held by the New York decisions, which are controlling in that respect. Greenwald v. Wales, 174 N. Y. 141, 66 N. E. 665. It has also been held in bankruptcy cases, such as Bentley

v. Young (D. C.) 210 Fed. 202, affirmed 223 Fed. 536, 139 C. C. A. 126, that if the entire situation is such that the vendee must have known that the vendor was converting his assets into cash, without regard to the rights of creditors, the transaction is void, and that the trustee in bankruptcy can recover the value of the property sold.

[3] Upon the facts of the present case it is evident that every circumstance tended to put the purchasers upon notice and to arouse suspicion. The $300 deposited nominally to secure creditors was apparently treated as a fund by which the purchase price could be reduced if there were risk of detection before the goods were entirely taken away. No attempt was made to undo the sale at any time, but all the parties joined in trying to cover up their tracks.

In Tennant v. Dudley, 144 N. Y. 504, 39 N. E. 644, it was held that evidence of the actions of parties after fraud had been discovered could not be used as evidence of their intent prior to the completion of a transaction. In other words, a sale must be viewed from the standpoint of the evidence directly bearing upon the intent of the parties at the time, and not upon their actions under different circumstances thereafter, when an entirely different intent might be actuating their movements. But if the evidence shows a continuous transaction, in which the intent relates back to the time of the purchase, that rule of law would not apply. Subsequent events can be coupled with events preceding the acts, if there is evidence so connecting them as to throw light upon the original intent. That is the situation in the present case. The original purchase was made in such a way as to furnish a preponderance of testimony against its good faith. The actions of the parties thereafter, when matters began to develop, were entirely in consonance with what would have been expected. It may not be of itself conclusive proof as to their original intent, but it certainly does not negative a dishonest intent on their part. The sale should be set aside, and the defendants compelled to restore the value of the property.

As to this the evidence shows that a reasonable amount of expense would necessarily be incurred in turning the assets into cash. The expenses of the defendants were not unreasonable, except in so far as they involved the hiring of automobile trucks to move the goods at night and the large expense involved in transferring these goods surreptitiously.

The figures given as to the values of the goods and the net profits received are somewhat indefinite, but are certainly nearer what would have been netted to creditors, if sold at auction or by a trustee in bankruptcy, than is the inventory estimate of the bankrupt's brother-in-law, who fixed the value at $2,500. It will be held, therefore, that $1,400 represents a fair amount to the creditors, out of which they were defrauded by the acts of the defendants.

A decree for that amount may be entered.

NORFOLK & W. RY. CO. v. ROYAL INDEMNITY CO.

(District Court, E. D. Pennsylvania. May 9, 1919.)

No. 5806.

INSURANCE ⊂=163(½)—BOILER INSURANCE—CONSTRUCTION OF POLICY—"BOILER."

A policy insuring a steam boiler against explosion or rupture, which defined "boiler," as used therein, as "any vessel * * * which is used for the generation of steam, and shall include * * * all connecting pipes and fittings up to and including the valve nearest the boiler," *held* not to cover a rupture of the whistle pipe above the whistle valve.

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

At Law. Action by the Norfolk & Western Railway Company against the Royal Indemnity Company. On case stated. Judgment for defendant.

F. Markoe Rivinus, Thomas Reath, and Theodore W. Reath, all of Philadelphia, Pa., for plaintiff.

Frank J. O'Neill, of New York City, and Layton M. Schoch, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The parties have agreed upon a statement of facts for the opinion of the court in the nature of a special verdict; the question being whether, under the case stated, the defendant is liable under its policy of steam boiler insurance, a copy of which is attached and made part of the case stated.

Under the terms of the policy, the defendant indemnified the plaintiff against an explosion or rupture as defined in condition 4 of a certain stationary boiler in the operation of which one M. H. Parker, fireman, employed by the plaintiff was killed. Suit against the plaintiff resulted in the payment by the plaintiff of $5,000, to which the defendant agreed subject to its liability being determined in an appropriate tribunal.

Condition 4 of the policy, as far as it relates to the present case, is as follows:

"(4) The terms 'explosion,' 'rupture,' 'boiler,' * * * shall, when used in this policy, mean respectively as follows:

"(a) 'Explosion' and /or 'rupture' shall mean a sudden substantial tearing asunder of the boiler or any part thereof, caused solely by steam pressure. * * *

"(c) 'Boiler' shall mean any vessel * * * which is used for the generation of steam, and shall include safety valves, steam and water gauges, and all connecting pipes and fittings up to and including the valve nearest the boiler."

The case stated sets out that Parker "opened the whistle valve, whereupon as a result of the said operation, the pipe became ruptured at the upper edge of the whistle valve, the whistle and that portion of the pipe above the whistle valve (which led to the whistle through the roof of the boiler shed) fell, breaking the roof and striking Parker

on the head, killing him. The decedent's death was occasioned as stated in the evidence thus:

"Q. 14. What caused his death? A. Whistle pipe, I think caused his death.
"Q. 15. How did it cause it? A. Whistle pipe blew out and come down.
"Q. 16. Whereabouts did the pipe blow loose, at what connection? A. Blowed loose at the whistle valve."

The pipes leading from the boiler to the whistle valve, and from the whistle valve to the whistle, and their connections and valves are shown on a blueprint accompanying the case stated. The pipes, connections, and valves are thus described in the case stated:

"In the pipe above mentioned, which connected the whistle with the boiler, was a stop valve located in the pipe a distance 18 inches above the boiler, which valve was ordinarily kept open and was open at the time of the accident; that between the stop valve and the whistle valve a connecting steam pipe led to an air compressor in the plant as shown by the annexed blue print; that this stop valve was only used in emergency when it became necessary to make repairs to the whistle valve or other connections above it, or to the pipe, fittings, or apparatus connected with the air compressor and its steam line, or when it was otherwise desirable to cut the connection of the steam between the boiler and any portion of the fittings above the stop valve; that the whistle valve above stated, which was ordinarily closed, was located in the pipe 17 inches above the stop valve or 35 inches from the boiler, the part of the pipe which was ruptured was subject to steam pressure only at such times as the whistle valve was open; all of which is shown on the plan hereto attached and made part hereof, marked 'B,' which shows the relative positions, size and shape of the boiler, pipes, valves, and whistle described in this agreed statement."

The question to be determined is whether, under the policy, the defendant insured the plaintiff against the risk of the explosion or rupture which caused the death of Parker, and the determination of the question depends upon whether the fact that "the pipe became ruptured at the upper edge of the whistle valve" constitutes a tearing asunder of the boiler or any part thereof caused solely by steam pressure, as defined in paragraph 4 (a). That depends upon whether the pipe was ruptured at a point coming within the description of the policy as included within the term "boiler" or any part thereof. Under paragraph 4 (c) the term "boiler," which in common parlance would mean, and is stated in the paragraph to mean, "any vessel which is described in statement 6 of the schedule, and which is used for the generation of steam," is extended to include "all connecting pipes and fittings up to and including the valve nearest the boiler."

The defendant contends that the stop valve, which appears on the blueprint, and is located in a 3-inch pipe leading to an air compressor, which 3-inch pipe is connected with the 2-inch pipe containing the whistle valve, is the valve nearest the boiler, and hence the rupture having occurred beyond that valve, the plaintiff cannot recover.

As I read paragraph 4 (c), I think it clearly means that the "boiler" shall include all connecting pipes and fittings up to and including the valve in such connecting pipes, and fittings nearest the boiler. The whistle pipe and the whistle valve are connecting pipes and fittings, and consequently the whistle valve is included in "all connecting pipes and fittings up to and including the valve nearest the boiler"; that

is to say, it is the valve of the whistle pipe nearest the boiler, and the whistle pipe is a "connecting pipe." The accident occurred, however, not through rupture of the valve of the whistle pipe, but through a rupture of the whistle pipe itself at the upper edge of the whistle valve. That clearly appears from the case stated. It is nowhere stated that the valve became ruptured, but "the pipe became ruptured at the upper edge of the whistle valve," and "the whistle and that portion of the pipe above the whistle valve fell."

Construing paragraph 4 (c) as broadly as its language will permit, it does not include within a rupture of the boiler a rupture of the whistle pipe, except up to the whistle valve, that being the valve of that pipe nearest the boiler, and except the whistle valve itself. But there was no rupture of the valve; the rupture which took place was a rupture of the pipe at the upper edge of the valve, when the valve was open. It is apparent that the rupture occurred beyond the physical limits of what the defendant undertook to insure against steam pressure.

It is contended for the plaintiff that, because section (a) defines "rupture" to mean "a sudden substantial tearing asunder of the boiler, or any part thereof, caused solely by steam pressure," the tearing asunder of any pipe caused solely by steam pressure should, under a liberal construction of the policy, be included within the term "tearing asunder of the boiler."

This is not a case of construction of an exception or limitation upon the insurance of the boiler from explosion or rupture, which would require a liberal construction of the terms of the policy; but, to the contrary, it involves an extension or enlargement of the ordinary meaning of a "boiler" to include valves, gauges, pipes, and fittings up to and including a designated valve, namely, the valve of connecting pipes and fittings nearest the boiler. As the rupture did not occur within the physical limits of the boiler, as defined in the policy, it is not for the court to rewrite the policy, so as to further enlarge the physical limits of what is included in the term "boiler." The language of the policy is plain, clear, and unambiguous, and is binding upon the parties in accordance with its terms.

Judgment for the defendant.

KEOWN v. KEOWN et al.

(District Court, D. Massachusetts. May 19, 1919.)

No. 859.

1. JUDGMENT ⇐828(3)—RES JUDICATA—CHOICE OF STATE COURT AS FORUM—BINDING FORCE OF DECREE.

A husband, having chosen a state court to litigate his rights to property in the possession of and claimed by his wife, cannot be permitted to experiment again, after decree there adverse to him, in the federal court, though he has petitioned the United States Supreme Court to grant certiorari to the state court, which does not enlarge his rights.

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2. TRUSTS ⟸17, 18(3)—ORAL DECLARATIONS—LAND.
In California, under Civ. Code Cal. § 852, as in Massachusetts, oral declarations of trust as to realty are not binding.

3. TRUSTS ⟸2—TRUSTS INVOLVING REAL ESTATE—LAW GOVERNING.
As to a trust involving real estate in Massachusetts, Massachusetts law governs; as to one involving real estate in California, California law governs.

4. FRAUDS, STATUTE OF ⟸150(1)—PLEADING—DEMURRER.
In suit by a husband to recover realty from his wife, the husband relying on the wife's oral declaration of trust, the state court had power to consider questions under the statute of frauds on the wife's demurrer to the bill.

5. TRUSTS ⟸61(3)—TERMINATION—SALE WITH CONSENT OF BENEFICIARY—EFFECT.
Where a wife made a declaration of trust as to realty in favor of her husband, but the property was subsequently sold to a third person with the husband's consent, he cannot recover the realty.

6. TRUSTS ⟸35(1)—DECLARATIONS IN FAVOR OF HUSBAND—TRUST IN MORTGAGE.
Where a husband paid for realty, which was conveyed to his wife under declaration of trust in his favor, and the wife, with his consent, sold it, and the purchaser, with the husband's consent, made the mortgage to the wife, who expressly agreed she held it for the benefit of her husband, the husband is entitled to the mortgage.

7. EQUITY ⟸26—DAMAGES FOR CONVERSION.
A suit in equity is not the proper way to recover damages for property wrongfully converted, except special and peculiar chattels, papers, and documents which cannot be replaced, such as an attorney's certificate of admission to the bar or a certificate to practice medicine in a state.

In Equity. Suit by James A. Keown against Mary E. Keown and others. On defendants' motion to dismiss. Motion of all parties defendant except the named defendant allowed, and bill dismissed as to them. Motion of the named defendant to dismiss the bill denied.

James A. Keown, of Lynn, Mass., in pro. per.

Freeman Hunt, of Boston, Mass., for defendants Keown, Hughes, Administrator, Trudo, and Sullivan.

Charles E. Allen, of Boston, Mass., for defendant Poling.

MORTON, District Judge. The bill is confused and informal; but consideration must be shown to parties who endeavor to act for themselves, however ill-advisedly, in court proceedings. The gist of it is that the plaintiff's wife (who is the principal defendant) obtained the title to several parcels of real estate, which either were bought with the plaintiff's money, or belonged originally to the plaintiff's mother, by expressly agreeing to hold such titles for the plaintiff's benefit; that as to one parcel she made a written declaration of trust, which the plaintiff at one time had in his possession; that she has repudiated her agreements, and is holding the real estate or the securities into which it has been converted, for her own benefit; that she has taken from him practically all his personal property, including, inter alia, said declaration of trust, and his certificates of admission to the bar and to practice medicine in this state, and refuses to give them up; and that, having done so, she "threw him into the

street penniless and homeless." The relief prayed for is that she shall return the real estate, or proceeds of it, and shall account for the rents and profits, and that she shall return the personal property, papers, and documents.

[1] The plaintiff, before instituting the present suit, brought one in the state court in Massachusetts, in which a demurrer was sustained and a final decree was entered against him. Keown v. Keown, 230 Mass. 313, 119 N. E. 785. See, also, s. c. 231 Mass. 404, 121 N. E. 153, and Keown v. Hughes (Mass.) 123 N. E. 98. The record in Keown v. Keown, supra, was offered in evidence without objection on the hearing of this motion, and has been considered. Those decisions settled substantial rights and are binding upon the plaintiff as far as they go. Having chosen his forum, litigated, and lost, he cannot be permitted to experiment again in another court. The fact that he has, according to his statement, petitioned the United States Supreme Court to grant certiorari to the Massachusetts courts, does not enlarge his rights in these proceedings.

A comparison of the present bill with that on which the judgment of the state court was rendered shows that, as concerns the real estate, the two are largely identical. The only points open to the plaintiff in this suit are those there left undetermined, viz. the effect of the California law on the plaintiff's claim, the plaintiff's rights in the $11,000 mortgage given by Margaret E. Hughes to Mrs. Keown, and his claim to personal property described in the bill.

[2-5] The California law now relied on by the plaintiff relates only to the rights inter se of husband and wife. The decision of the Massachusetts court was not rested on any principle which would have been different if the California law had been before it. The bill is based, as the state court pointed out, not on an alleged trust resulting by implication of law, but on express agreements by the wife to hold the property in question for the plaintiff's benefit. In California, as in Massachusetts, oral declarations of trust are not binding. Kerr's California Codes, vol. 2, § 852. As to the real estate in Massachusetts, of course, the Massachusetts law governs; as to that in California, the California law; but in neither state can the plaintiff recover on an oral declaration of trust concerning real estate. The state court had the power to consider questions under the statute of frauds on demurrer, and it was plainly in the interest of justice and avoidance of expense to do so. The declaration of trust as to the Lynn real estate, which I understand to have been in writing, affords no ground for recovery, because, as the Supreme Judicial Court points out, that property, according to the allegations of the bill, was subsequently conveyed by Mrs. Keown, with the plaintiff's consent, to Margaret E. Hughes, who gave back said $11,000 mortgage, which Mrs. Keown now holds, and which the plaintiff seeks to recover.

[6] The final question as to the real estate transactions described in the present bill is whether the plaintiff has stated a case for relief as to said mortgage. The bill contains allegations that the property in return for which the mortgage was given was paid for by the plaintiff, and that Mrs. Keown, at the time when, with his assent,

the mortgage was made to her, "expressly agreed and declared that she held [it] for the benefit of the complainant who retained the entire beneficial interest therein" (clause XXII). If these statements are established, the plaintiff is entitled to the mortgage; and the only question is whether he can sue his wife to get it. The opinion of the state court assumes that he can do so; and for the purposes of this demurrer I accept that view.

[7] As to the personal property: A suit in equity is not the proper way in which to recover damages for personal property wrongfully converted or withheld, except special and peculiar chattels, papers, and documents, which cannot be replaced, like the certificates above referred to, and perhaps some other things mentioned in the bill, as to which the plaintiff would be entitled to a decree for the return of the specific property.

From what has been said it follows that the plaintiff is not entitled to an injunction pendente lite restraining the alienation or incumbrance of the various parcels of real estate, and that the motions to dismiss of all parties but Mary E. Keown should be allowed, and as to them the bill dismissed. In view of the formal stipulation by the defendants not to convey or incumber, which is sufficiently broad to include the mortgage, there seems no occasion for a preliminary injunction. The motion of Mary E. Keown to dismiss the bill is denied.

SHAPIRO et al. v. ENGEL et al.

(District Court, E. D. New York. May 13, 1919.)

1. EQUITY ⇐395—POWER OF MASTER—AMENDMENT OF PLEADINGS.
A master is without power to allow an amendment of the answer by setting up a counterclaim which enlarges the issues referred to him, which can only be done by the court.

2. EQUITY ⇐283—AMENDMENT OF PLEADINGS—LACHES.
Amendment of an answer by setting up a counterclaim and asking a general accounting, which goes beyond the transactions in issue, will not be allowed, where application therefor is not made until the conclusion of a long hearing before a master and his report thereon.

In Equity. Suit by Isaac Shapiro and the American Union Line, Incorporated, against Joseph C. Engel and the Interchange, Limited. On exceptions to report of master, and motion to reopen hearing and allow amendment of answer. Report confirmed, and motion denied.

Butler, Wyckoff & Campbell, of New York City (Homer L. Loomis and Joseph A. Barrett, both of New York City, of counsel), for plaintiffs.

Thompson, Loughman & Bailey, of New York City (T. Langland Thompson and James S. Darcy, both of New York City, of counsel), for defendant Interchange, Limited.

CHATFIELD, District Judge. The issues have been passed upon by a master appointed to hear and report. He has found in favor

of the plaintiff upon the claim for delivery, by the defendants to the plaintiff Shapiro, of the capital stock of the American Union Line, Incorporated, pursuant to a contract between Shapiro and the defendant Interchange, Limited. He has found in favor of the defendant Interchange, Limited, as to certain items of the account between the parties, and has held that no account has been stated.

In his report the master has presented findings of fact and conclusions of law in connection with his general statement of the issues and his opinion thereon. An examination of the evidence shows that there is abundant testimony upon which the opinion of the master is based to support his findings and conclusions. In addition to this, there is nothing to indicate that the master drew erroneous conclusions upon the issues as presented, and the testimony leads the court to believe that the master's findings are correct.

There is no reason, therefore, to sustain any of the exceptions to the report, which will be confirmed, and decree in accordance therewith should go for the plaintiffs, except that an inadvertent statement that $125,000 was in the hands of the defendant Interchange, Limited, should be deemed corrected to read in the hands of the American Union Line, Limited.

[1] The situation has been complicated by the application, which was made before the master to amend the defendants' counterclaim and to include general allegations upon which to base charges of fraud against the plaintiff Shapiro, with a full accounting for all prior and subsequent dealings between the plaintiffs and the defendants.

The defendant Interchange, Limited, also asks that the stock of the American Union Line, Incorporated, shall be held impounded by the court until final judgment upon the claim of fraud and prayer for accounting. The master went, in the hearing before him, into the question of fraud and duress, but limited that inquiry to the particular and special contract sued upon, to the questions relating to the incorporation of the American Union Line, Incorporated, the disposition of the capital stock thereof, and the account up to the time of making the contract sued upon. He therefore held, properly, that a general accounting was unnecessary as a part of the issue on the trial before him. He also held, properly, that charges of fraud with respect to the general business relations of the defendants with the plaintiffs would not affect his determination upon the circumstances and results of the special contract in settlement of the claims relating to the American Union Line, Incorporated.

It is true that the master might have stopped the reference while the defendants applied to the court for leave to amend their pleadings and to enlarge the issues of the entire case by presenting as counterclaims, in which they asked for affirmative relief, all of the matters which are now presented; but the master committed no error in refusing to stop the trial before him, which had been pressed with diligence by both sides, and as to which the reference itself to the master was for the purpose of a speedy determination on the issues referred.

But the defendants did not then proceed, as they could have done, to apply to the court for any relief whatever. The master did not have

the power to allow such an amendment of the issues and the presentation of additional counterclaims, nor to allow, under equity rule 30 (198 Fed. xxvii, 115 C. C. A. xxvii), the presentation as counterclaims of matters which would ordinarily be the basis of a cross-suit or cross-bill in equity. Such application could be made only to the court.

[2] It must be concluded that if the defendants had general charges of fraud and deceit, other than those presented, and general rights for a complete accounting, which would result in their favor, they are guilty of laches in failing to apply to the court for the amendments necessary to bring those issues within the present action and to ask the court to halt the trial of the action until their rights could be protected. Instead of so doing, they have waited until the master has completed his testimony and made his report; they have waited until the motion to confirm the report has been brought on for hearing, and then they have presented an application asking that the entire proceeding before the master be rendered nugatory, the case reopened and much further taking of evidence and delay incurred by trying the issues which they now desire to present, in connection with the issues which have previously been heard and reported upon by the master. This relief is urged upon an order to show cause for leave to file an amended counterclaim, which sets up substantially the same defense of fraud which has been tried and adds thereto the allegations of their intended cross-bill.

Upon this motion they also ask for an adjournment of the hearing upon the master's report, and inferentially ask that the reference itself be opened in order to take the testimony of two witnesses, who were then under arrangement with the defendants' counsel to sail for this country on April 19, 1919. It is alleged that these witnesses could not previously obtain passports to come to the United States, because of matters connected with the European War. Upon the hearing, bad faith in the making of this application was definitely charged, and the plaintiff insisted that the two witnesses for the defendants did not intend to appear. The court, through ordinary accumulation of work, was unable to dispose of the matter upon the merits at once, before the date when these two witnesses should have reached America if they had sailed as represented. Upon inquiry by the court it has appeared, after urgent cablegrams by their attorney, that the men did not sail; but one of them then said that he would definitely sail for the United States upon the 2d of May, by the boat sailing on that date. That promise has now resulted in the appearance of this man upon the boat in question; but his testimony would add nothing to the issue disposed of herein.

The defendants have the right to bring an action for any cause not rendered res adjudicata by the trial already had, and to seek an accounting as to any matters which accrued subsequent to the contract in suit. If such action is brought, the defense of laches can be interposed; but, under the master's rulings on this reference, the Interchange, Limited, has not been precluded by equity rule 30 from seeking whatever relief they may be entitled to. Whether the stock of the American Union Line, Incorporated, should be impounded, or further

security exacted from either party (by way of attachment or order), can be disposed of in that action, and the defendant Interchange, Limited, will be amply protected if it proceeds with diligence.

The motion to reopen the trial of this action, and to include additional issues beyond those heard by the master, will be denied, without prejudice to the merits of any other action thereon. The exceptions will be overruled as above indicated and the report confirmed.

Let decree be entered accordingly.

HUNNEWELL et al. v. GILL et al.

(District Court, D. Massachusetts. June 5, 1918.)

No. 636.

1. INTERNAL REVENUE ⟸8—INHERITANCE TAX—CONSTRUCTION.
Act June 27, 1902, providing that inheritance tax provisions of the War Revenue Act of 1898 should not affect contingent beneficial interests not vested before July 1, 1902, makes the 1898 tax inapplicable to an estate not probated before July 1, 1902.

2. INTERNAL REVENUE ⟸36—RECOVERING TAX PAYMENTS.
Act July 27, 1912, authorizing presentation of claims for refunding inheritance taxes illegally collected under Act June 13, 1898, § 29, to the Commissioner of Internal Revenue, and authorizing the Secretary of the Treasury to pay such refunds, restricts a claimant to suit against the United States, and does not authorize one against an internal revenue collector under Rev. St. §§ 3220, 3226–3228 (Comp. St. §§ 5944, 5949–5951).

At Law. Action by Francis W. Hunnewell and others against James D. Gill and others, former and present Collectors of Internal Revenue. Judgment for defendants.

Warner, Stackpole & Bradlee, of Boston, Mass., for plaintiffs.
George W. Anderson, U. S. Atty., of Boston, Mass., for defendants.

MORTON, District Judge. This is an action at law by the surviving executor of H. Hollis Hunnewell, deceased, against the former and present collectors of internal revenue, to recover back an inheritance tax of $115,668.88 assessed under section 29 of the War Revenue Act of June 13, 1898 (30 Stat. 464, c. 448), against the estate of said decedent, and paid under protest in 1903. The plaintiffs also claim interest amounting to about $83,000. The case was heard on a statement and supplementary statement of agreed facts.

H. H. Hunnewell died in May, 1902. He left a will, which was admitted to probate in September, 1902, and executors were then appointed. There was no probate on the estate, and no payments from it were made, before that time. The inheritance tax provisions of the act of 1898, so far as material to this case, were repealed by Act April 12, 1902, c. 500 (32 Stat. 97), the repeal to take effect on July 1, 1902. The testator, it will be observed, died after the passage of the repealing act, and before it became operative. On June 27, 1902, another act was passed, which provided, in substance, that no tax should thereafter

be assessed or imposed under the act of 1898 "upon or in respect of any contingent beneficial interest which shall not have become absolutely vested in possession or enjoyment prior to July 1, 1902," and that such taxes which had been collected should be refunded. 32 Stat. 406, c. 1160.

Under the act of 1898 the Treasury Department collected various taxes, aggregating a large amount, to which, it was eventually decided the United States was not entitled. The resulting situation not being adequately provided for by existing law, in 1912 an act was passed, which is copied in full on the margin.[1] Under this act the plaintiffs, on December 24, 1913, made a claim to the Commissioner of Internal Revenue for the repayment of the taxes here in question. This claim was refused, and the present suit was then brought. Previous claims had also been made by the plaintiffs to the collector and the Commissioner. They were based, not on the Revised Statutes, but upon the act of 1902, and they were not sufficient to lay the foundation for an action against the collector, under Rev. Stats. §§ 3226 and 3227 (Comp. St. §§ 5949, 5950). They may, I think, be disregarded for the purpose of the present case.

[1] In United States v. Jones, 236 U. S. 106, 35 Sup. Ct. 261, 59 L. Ed. 488, Ann. Cas. 1916A, 316, and McCoach, Collector, v. Pratt, 236 U. S. 562, 35 Sup. Ct. 421, 59 L. Ed. 720 (Comp. St. §§ 5944, 5949–5951) it was decided that the act of 1902 applied to unprobated estates, like the Hunnewell estate, and that no tax was assessable thereon. The tax here in question was therefore illegally assessed and collected.

[2] Passing over several points of rather technical character urged by the defendants, which seem to me not well taken, the question on which the case turns, as I view it, is whether the act of 1912 opens the way for a suit like the present one against the collector under the general revenue statutes. R. S. §§ 3220, 3226, 3227, 3228. United States v. Hvoslef, 237 U. S. 1, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286, expressly decided that the act of 1912 gave a new right of action against the United States, independent of the provisions of the Revised Statutes. In view of that decision, the only contention open to

[1] Act July 27, 1912, c. 256, 37 Stat. 240:

"An act extending the time for the repayment of certain war revenue taxes erroneously collected.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section 29 of the act of Congress approved June 13, 1898, known as the war revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act may be presented to the Commissioner of Internal Revenue on or before the first day of January, 1914, and not thereafter.

"Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the act aforesaid.

"Approved July 27, 1912."

the plaintiffs is that the act has a double aspect, and also authorizes suit against the collector. The question is of practical importance, because, if the plaintiffs can maintain the present action, they would be entitled to interest, which as stated, amounts to $83,000. Old Colony R. R. Co. v. Gill, Collector, 257 Fed. 220 (D. Ct. Mass., June 28, 1916); Boston & Providence R. R. Co. v. Gill, Collector, 257 Fed. 221 (D. Ct. Mass. September 13, 1916). If they can only sue the United States, as the act of 1912 does not provide for the payment of interest, it cannot be recovered.

In the Hvoslef Case, the Supreme Court, after referring to various refunding statutes which created rights of action against the United States, said:

"The same rule must obtain as to all claims described in the act of 1912, and in this view we are not concerned in the present case with questions arising under the general provisions of the internal revenue laws." Hughes, J., 237 U. S. 11, 35 Sup. Ct. 462, 59 L. Ed. 813, Ann. Cas. 1916A, 286.

An examination of the briefs in that case shows that the solicitor general made substantially the same contention as the present plaintiffs. It was with reference to that argument that the language quoted was used by the court. I understand it to mean that all claims under the act of 1912 are to be prosecuted in the same manner; i. e., by suit against the United States. So construed, the decision just referred to is decisive on the question before me. If I am in error in this, and the question is an open one, I should still reach the same conclusion. I do not think that the act contemplates two sorts of claims, one of which may be recovered with interest through suits against the collector, based on the first section and the general revenue statutes (Rev. Stats. §§ 3220, 3226, 3227, 3228), while the other is to be recovered without interest through suits against the United States, based on the second section.

I give such of the requests for rulings as are consistent with the foregoing opinion; the others I refuse.

Judgment for defendants.

UNITED STATES v. SIMPSON.

(District Court, D. Colorado. April 24, 1919.)

No. 3168.

1. INTOXICATING LIQUORS ⟸222—TRANSPORTATION OF LIQUOR INTO PROHIBITION STATES—INDICTMENT—NEGATIVING EXCEPTIONS.
An indictment for violation of Act March 3, 1917, § 5, known as the Reed Amendment (Comp. St. 1918, § 8739a), making it an offense to "cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal or mechanical purposes," into a prohibition state, need not negative the excepted uses, which is matter of defense.

2. COMMERCE ⟸16—INTERSTATE COMMERCE—AUTOMOBILE AS "COMMON CARRIER."
An automobile may be so used as to become a "common carrier" in interstate commerce.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

3. INTOXICATING LIQUORS ⟸138—TRANSPORTATION IN INTERSTATE COMMERCE.
One who buys intoxicating liquor in one state and transports it in his own automobile into a prohibition state for his own personal use, and not for sale, does not transport it in interstate commerce, within the Reed Amendment (Act March 3, 1917, § 5 [Comp. St. 1918, §§ 8739a, 10387a–10387c]).

Criminal prosecution by the United States against Everett L. Simpson. On demurrer to indictment. Sustained as to third count.

Harry B. Tedrow, U. S. Dist. Atty., of Boulder, Colo.
Edmund J. Churchill, of Denver, Colo., for defendant.

LEWIS, District Judge. This is a demurrer to an indictment charging the defendant with the violation of section 5 of the Act of March 3, 1917 (Reed Amendment) 39 Stat. 1069, c. 162 (Comp. St. 1918, §§ 8739a, 10387a–10387c). The three counts charge the same offense, each putting it in a different way. Each charges that the defendant, on August 25, 1917, did unlawfully cause five quarts of whisky to be transported in interstate commerce from Cheyenne, Wyoming, to Denver, Colorado; the laws of the latter state prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes. The second count adds that the transportation was in an automobile, and that the liquor was to be used for other than scientific, sacramental, medicinal, or mechanical purposes; and the third adds that prior to the time of transportation the defendant was in Cheyenne, bought, paid for and owned the liquor, and thereafter himself, as such owner, transported same from Cheyenne to Denver in an automobile then and there owned by him, for his own personal use other than for scientific, sacramental, medicinal or mechanical purposes.

[1] The demurrer to the first count is rested on the ground that the exceptional uses for which the liquor may be brought in is not negatived. The statute reads thus:

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes," etc. Comp. St. 1918, § 8739a.

The permissible purposes are matters of defense. United States v. Cook, 17 Wall. 168, 21 L. Ed. 538; Nelson v. United States (C. C.) 30 Fed. 112, 116; Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570; United States v. Cook (D. C.) 36 Fed. 896; United States v. Stone (D. C.) 49 Fed. 848; The Mary Merritt, Fed. Cas. No. 9,222.

[2] It is said that the second count is bad because transportation by automobile is not a violation of the Act. An automobile may be used so as to become a common carrier in interstate commerce.

The District Attorney stated in argument that the details of the transaction were set out in the third count for the purpose of testing, in the shortest and most inexpensive way, whether the bringing in of liquor in the manner stated in that count is a violation. It is difficult to believe that the innumerable daily transactions, non-commercial in character and privately carried on across State lines, come within the reach of national regulatory power given by the Constitution; and yet I confess the broad language in some of the cases does not leave me entirely free from doubt. After all, my conclusion is reached from what is said about the Uncle Sam Oil Co. in the Pipe Line Cases, 234 U. S. 548, 561, 562, 34 Sup. Ct. 956, 959 (58 L. Ed. 1459). The facts there considered are apt. Justice Holmes, for the majority, said:

"There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two, which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is merely drawing oil from its own wells across a State line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the Act, the transportation being merely an incident to use at the end."

[3] Of course the prime inquiry there was whether the Uncle Sam Oil Company was a common carrier; but to be a common carrier within the Act it was necessary that it be found to be engaged in transportation in interstate commerce, and the transportation in interstate commerce was the part of the inquiry to which Justice Holmes addressed himself. That this is so is demonstrated by the Chief Justice:

"The view which leads the court to exclude it [from the operation of the Act] is that the company was not engaged in transportation under the statute, a conclusion to which I do not assent. The facts are these: That company owns wells in one State from which it has pipe lines to its refinery in another State, and pumps its own oil through said pipe lines to its refinery, *and the product, of course, when reduced at the refinery, passes into the markets of consumption* [italics mine]. It seems to me that the business thus carried on is transportation in interstate commerce within the statute."

I take it that the fact stated by the Chief Justice (in italics) was a necessary element to the conclusion he reached. That is to say, he did not agree with the majority that the transportation was "merely an incident to use at the end," but that the transportation from Oklahoma

to Kansas, the refining of the oil in Kansas, and the passing of the refined oils into the markets of consumption should be viewed as one transaction, and that the three separate acts dealing with the subject constituted transportation in interstate commerce. Kelley v. Rhoads, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359.

Dan Hill's Case, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. ——, recently decided by the Supreme Court, is not in point, as I view it. That also was a prosecution for violation of the Reed Amendment; but the indictment charged that Hill, while in Kentucky, boarded a trolley car being operated by a common carrier corporation engaged in interstate commerce, and by means thereof, did cause himself and the said intoxicating liquor, then upon his person, to be carried and transported in interstate commerce into the State of West Virginia. The charge was exactly within the statute—"cause intoxicating liquors to be transported in interstate commerce." Hill caused the liquor to be transported in interstate commerce, in the manner charged in the indictment, as much so as if he had separately intrusted the liquor to the common carrier for transportation.

The demurrer is overruled as to the first and second counts, and sustained as to the third count. It will be so ordered.

DAMPSKIBS ACTIESELSKABET SANGSTAD et al. v. HUSTIS.

(District Court, D. Massachusetts. June 6, 1919.)

No. 1652.

SHIPPING ⊂=3½, New, vol. 8A Key-No. Series—JURISDICTION OF ADMIRALTY—SUIT AGAINST RAILROAD UNDER FEDERAL CONTROL.

Under Federal Control Act March 21, 1918, § 10 (Comp. St. 1918, § 3115¾j), and General Orders Nos. 50 and 50A thereunder, a suit in admiralty may be maintained against the Director General of Railroads upon a cause of action existing against a railroad company while under federal control.

In Admiralty. Suit by the Dampskibs Actieselskabet Sangstad and others against James H. Hustis, receiver. On exceptions to libel and motion to amend. Exceptions overruled, and motion granted.

Storey, Thorndike, Palmer & Dodge, of Boston, Mass., for libelants.

Henry F. Hurlburt and Hurlburt, Jones & Hall, all of Boston, Mass., specially for respondent.

MORTON, District Judge. The intention underlying section 10 of the Railroad Act of March 21, 1918 (40 Stat. 456, c. 25 [Comp. St. 1918, § 3115¾j]), is clear. It was that the railroads, although under federal control, should continue to be subject to all legal liabilities, enforceable in the ordinary way as if federal control did not exist, except that attachment on mesne process and levy on execution were forbidden. Senator Smith, of South Carolina, reporting the bill to the Senate, said:

"Section 10 provides that, so far as not inconsistent with federal control, each of the carriers shall remain subject to all laws and liabilities whether arising under statutes or at common law."

Mr. Sims, in reporting the bill to the House of Representatives, said:

"Sections 8 and 10 need no explanation."

Strictly speaking, a suit in admiralty is neither an action at law nor a suit in equity (In re Louisville Underwriters, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991); but admiralty suits are so few compared with the total number of suits and actions brought, and come so little to the attention of the lawyer in general practice, that they are often disregarded, and the expression "actions at law and suits in equity" would ordinarily be understood to cover all civil proceedings. I entertain no doubt that it was so used by Congress in section 10.

Moreover, by section 10 a very considerable power is given to the President, and in Orders 50 and 50A suits in admiralty are expressly included. Taking the statute and orders together, I rule that the suit is maintainable against the Director General.

The motion to amend is allowed. The exceptions to the libel, based on alleged lack of jurisdiction, are overruled.

THE CATAWISSA.

(District Court, D. Massachusetts. June 6, 1919.)

No. 1682.

1. SHIPPING ⇐3½, New, vol. 8A Key-No. Series—PROPERTY UNDER FEDERAL CONTROL—SUIT AGAINST VESSEL.
   The provision of Federal Control Act March 21, 1918, § 10 (Comp. St. 1918, § 3115¾j), that "no process, mesne or final, shall be levied against any property under such federal control," does not prevent the arrest of a vessel in a suit in rem in admiralty, although owned by a railroad company under federal control.

2. SHIPPING ⇐3½, New, vol. 8A Key-No. Series—EFFECT OF FEDERAL CONTROL—SUIT IN ADMIRALTY.
   Where a railroad company under federal control, as owner of a vessel, brought suit against another vessel for collision, the claimant, on the filing of a cross-libel, is entitled to the usual order, under admiralty rule 53 (29 Sup. Ct. xiv), staying suit on the original libel until security is furnished by libelant.

3. SHIPPING ⇐3½, New, vol. 8A Key-No. Series—FEDERAL CONTROL—SUIT AGAINST VESSEL—SUBSTITUTION OF DIRECTOR GENERAL AS RESPONDENT.
   In a suit in rem in admiralty against a vessel owned by a railroad company under federal control, the Director General will not be substituted as respondent, on motion of claimant or on his own motion.

In Admiralty. Suit by Marcus Nielsen & Son, Incorporated, against the steamtug Catawissa. On motions for substitution of respondents. Denied.

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

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.

W. M. Richardson, of Boston, Mass., for Director General.

John R. Lazenby, of Boston, Mass., for respondent.

MORTON, District Judge. The facts, while not admitted, are really not in controversy, and are sufficiently established by the formal proofs which have been submitted. The Ulrik Holm and the Catawissa were in collision in Boston Harbor. Both were damaged. The Reading Company, owner of the Catawissa, filed a libel in rem against the Holm, in answer to which her owners, Marius Nielsen & Son, Incorporated, of Copenhagen, appeared, stipulated, and answered. That suit is still pending. Three months and a half afterwards Nielsen & Son Incorporated, filed a cross-libel against the Catawissa, containing the usual prayer that the proceedings under the original libel by the Reading Company be stayed until security be given to respond in damages to the cross-libel, under admiralty rule 53 (29 Sup. Ct. xiv).

[1] The questions now before the court grow out of the fact that the Catawissa, being under charter to the Philadelphia & Reading Railway Company, had been taken over on December 28, 1917, as part of the property of that railroad system, by the United States, under the federal control proclamation. The various proclamations and orders pertinent to this case are set out in the motions of the railroad company, filed February 15, 1919, and of Walker D. Hines, Director General of Railroads, filed March 3, 1919. The Catawissa does not appear ever to have been used for strictly government work. At the time in question she was engaged in the New England coal trade, like a privately owned vessel. (Affidavit of Murphy.) No process has yet issued against the Catawissa upon the cross-libel.

The Reading Company and Mr. Hines have each filed motions asking that he be substituted as respondent in the cross-libel in place of the tug, and that the Catawissa be dismissed from the cross-libel as a party thereto. The present questions are: (1) Whether process shall issue against the Catawissa on the cross-libel, or whether that libel shall be dismissed as to her; (2) whether security shall be required of the Reading Company to respond in damages to the cross-libel as a condition of permitting it to proceed with its original libel; (3) whether, against the objection of Nielsen & Son, Incorporated, the Director General shall be substituted as respondent in the cross-libel.

I have just decided that section 10 of the Railroad Act (Act March 21, 1918, c. 25, 40 Stat. 456 [Comp. St. 1918, § 3115¾j]) authorizes suits in admiralty against railroads while under federal control. Dampskibs, etc., v. Hustis, Receiver (D. C. Mass.) 257 Fed. 862, filed June 6, 1919. It follows that the usual admiralty procedure applies to such cases, including the right of arrest, unless that is forbidden by the last sentence of the first paragraph of section 10: "But no process mesne or final shall be levied against any property under such federal control." If the arrest of the Catawissa be merely the equivalent of attachment on mesne process in an action at law, it is so forbidden.

The arrest of the respondent in admiralty proceedings is, however, much more than an attachment on mesne process. It is the foundation of the jurisdiction. The seizure of the vessel is not simply for the purpose of securing property out of which a decree, if one be obtained, can be satisfied; it is the assertion of jurisdiction over the res, and is necessary to such jurisdiction. The purpose of the sentence quoted is to protect the property of carriers against seizure as security in legal proceedings or for the satisfaction of judgments or decrees. The arrest of a vessel in admiralty, while it has the result of furnishing security, is primarily for a different and more fundamental purpose. The Brig Ann, 9 Cranch, 291, 3 L. Ed. 734; The Propeller Commerce, 1 Black, 574, 580, 17 L. Ed. 107; Taylor v. Carryl, 20 How. 583, 599, 15 L. Ed. 1028.

The statutory provision just quoted does not, therefore, prevent arrest in admiralty proceedings, and process may issue against the Catawissa. General Orders of the Director General 50 and 50A impiledly authorize suits in admiralty against him. The further provisions limiting the control of the courts over such proceedings seem to me of extremely doubtful validity. He cannot by his order prescribe how far he shall be subject to statutory law.

[2] The next question is whether the Reading Company, as original libelant, shall be required to give security under rule 53 on the cross-libel, as a condition of being permitted to proceed with the original libel. The accident happened in September, 1918, and the original libel was filed in that month. The practice of requiring such security under rule 53 in ordinary cases is so firmly established as to be a recognized part of admiralty procedure. Holding as I do that section 10 opens the door to proceedings in admiralty against carriers and their property during federal control, I think that the usual practice in such cases should be followed, as would be done between private parties, and that, where a carrier itself invokes the aid of the admiralty court by filing an original libel, it should be held to respond on the cross-libel like an ordinary litigant. The order prayed for by the cross-libelant, staying the proceedings under the original libel until security is furnished by the respondent in the cross-libel, is granted.

[3] As to the motions of the Reading Company and of Mr. Hines that the Director General be substituted as respondent to the cross-libel: It is for the plaintiff to say whom he will sue, not the respondent. I agree with the result in the Jensen Case. Jensen v. Lehigh Valley R. Co. (D. C.) 255 Fed. 795.

Motions denied.

C. F. HARMS CO. v. BROOKLYN ASH REMOVAL CO. et al.

BROOKLYN ASH REMOVAL CO. v. C. F. HARMS CO.

(District Court, E. D. New York. April 22, 1919.)

SHIPPING ⟸54—CHARTER—SINKING OF SCOW—LIABILITY.

Where a scow, which was being used by the charterer to remove refuse from a city, capsized while loading, and the charterer was compelled to incur expense in removing refuse from the berth where the scow capsized, *held*, that the scow and its captain were at fault, and that neither the charterer nor the city, whose ash cars were dumped therein, were at fault; the accident being caused by the want of care by the captain and leak in the scow which caused it to list and ultimately to capsize.

In Admiralty. Libel by the C. F. Harms Company against the Brooklyn Ash Removal Company, which by petition brought in the City of New York, together with a libel by the Brooklyn Ash Removal Company against the C. F. Harms Company. Libel of C. F. Harms Company dismissed, and decree rendered against it on second libel.

Macklin, Brown & Purdy, of New York City, for Harms Co.

Alexander & Ash, of New York City, for Ash Removal Co.

William P. Burr and Mr. Carroll, both of New York City, for City.

GARVIN, District Judge. C. F. Harms Company, owner of the scow W. F. Harms, has filed a libel against the Brooklyn Ash Removal Company. The latter company answered, and brought in by petition the city of New York. A second libel was also brought by the Brooklyn Ash Removal Company against the C. F. Harms Company, and these actions have been tried together.

The libel of C. F. Harms Company claims damages sustained by its scow W. F. Harms, which capsized on December 2, 1917, while lying at the dumping board at the foot of Twenty-Seventh street, Brooklyn. The libel of the Brooklyn Ash Removal Company, Incorporated, claims damages by reason of the expense which it incurred in removing refuse from the berth at the foot of Twenty-Seventh street, there deposited when the scow capsized, and for injury to the structure on the dump at the place of the accident.

The Harms Company chartered the W. F. Harms to the Ash Removal Company; the charter providing in part as follows:

"Second. We will furnish a captain for each scow at our own expense, who will be under your control and orders; but you are not to be responsible for the acts of any captain in the care, movement, or navigation of said scows, and we will save you harmless and defend you from any claims, actions, or suits arising therefrom.

"Third. We will keep the scows in repair and in seaworthy condition, and will furnish and maintain lines, anchors, and all equipment necessary for the work in which the scow is engaged.

"Fourth. You will be responsible for all repairs of damage done to scows in loading and unloading, where such damage is caused by the negligence of your employés or the imperfection of your machinery or appliances. In case of damage to scows in tow, or by another vessel, the towboat or vessel at fault and its owners shall alone be held responsible. You are not to be

held responsible for damage done by ice, storm, fire, the elements, the act of God, or causes beyond your control, or for repairs that are due to the ordinary use, wear, and tear of the scows."

Late in November, 1917, the W. F. Harms went to the foot of Twenty-Seventh street, Brooklyn, in charge of her captain, Frank Catapano. A careful reading of his testimony satisfies me that while the loading was going on the scow was moored close to the dock, projecting out from the dock into the berth, about 11 feet above which is a dumping board, upon which ash carts of the city of New York are backed and discharge their loads upon the scow below. The contents of these ash carts fall some 10 or 15 feet through the air, and, if the scow is properly moored, are dumped in the center of the scow. The Harms Company claims that the scow was not moored close to the dock; that as a result ashes were piled in quantity upon the side nearer the dock, which caused her to capsize; that the Ash Removal Company was negligent in failing to remove obstructions which were in the water between the scow and the dock, and in failing to properly trim the cargo. These are the real acts of negligence urged.

The Ash Removal Company claims that the scow, as she was loaded with ashes and went lower into the water, began to leak on the side next to the pier, which was caused by her unseaworthy condition, and by reason of the breach of the agreement on the part of the Harms Company to keep her in repair and in a seaworthy condition, and by a further breach of such agreement by Harms Company, in that the captain of the scow failed to properly care for, move, or navigate the scow, having left her unattended shortly before she capsized. The Ash Removal Company, as against the city of New York, claims that if it be established, as contended by Harms Company, that the accident was caused by failure to remove articles from the water between the scow and the dock, or by ashes being dumped upon the scow in such manner as to cause her to list and capsize, the city of New York is responsible, because that would be caused by the negligence of the employés of the city.

Some testimony was given at the trial of a conversation in which Mr. McKenzie, who was acting for the Harms Company, participated, and during which it is claimed on behalf of the Ash Removal Company that he recognized the liability of the Harms Company. I am of the opinion that the testimony does not justify a conclusion that he in any way admitted liability on the part of Harms Company, and in the determination of these actions I shall give that conversation no consideration whatever.

It seems to me that the testimony of the captain of the scow, which was offered by the Harms Company, may be taken to establish that while the scow was in the process of being loaded she was moored close to the dock. During the night and at other times, to allow for the rise and fall of the tide, and when loading was not going on, her lines were doubtless slackened. I do not find that the city is in any way at fault. I am of the opinion that the record establishes that the scow capsized because, as she loaded and settled in the water, she began to leak, which caused her to list and resulted in her being upset.

I cannot credit the testimony of the captain that there was no water in her, and in view of the fact that she listed when he left her for the night, as he explains it, to see his sick child, I am of the opinion that he did not give the scow the care which under the charter he was required to exercise.

The libel of the Harms Company is therefore dismissed. In the case brought by the Ash Removal Company there will be a decree for the libelant.

LEWIS et al. v. ERIE R. CO. et al.

(District Court, M. D. Pennsylvania. March Term, 1919.)

No. 1048.

1. REMOVAL OF CAUSES ⊜84—NOTICE OF FILING PETITION.
Presentation to the state court of a petition and bond for removal, in the presence of plaintiff's counsel, who accepted service of a rule to show cause, and appeared to the rule, filed an answer, and was heard, *held* sufficient notice under Judicial Code, § 29 (Comp. St. § 1011).

2. REMOVAL OF CAUSES ⊜92—TIME FOR FILING RECORD.
The requirement of Judicial Code, § 29 (Comp. St. § 1011), that a removing defendant shall file a certified copy of the record in the federal court within 30 days from the date of filing the petition, presupposes that the state court will act upon the petition within that time, and, where it does not, filing of the record within 30 days thereafter is sufficient.

At Law. Action by Henry A. Lewis and Laura F. Lewis against the Erie Railroad Company and the Delaware & Hudson Company. On motion to remand to state court. Denied.

D. T. Brewster and Denny & Gardner, all of Montrose, Pa., for plaintiffs.

Paul Bedford, of Wilkes-Barre, Pa., L. E. Carr, of Albany, N. Y., and Wm. A. Skinner, of Susquehanna, Pa., for defendants.

WITMER, District Judge. Some of the matters here presented were considered by Judge Smith in passing on the petition for removal from the state court. The conclusions reached, appearing from his opinion filed, have my affirmance, and further discussion here seems needless.

[1] The only matter of importance passed by for decision in this court has to do with the sufficiency of notice given by petitioners in moving for removal. The usual petition, with the required bond, was presented to court in the presence of counsel for plaintiffs, and out of abundance of caution the court entered a rule to show cause why the prayer of the petition should not be allowed, returnable at a time subsequent. Counsel accepted service of the rule. Is this a sufficient compliance with the statute (Judicial Code [Act March 3, 1911, c. 231] § 29, 36 Stat. 1095 [Comp. St. § 1011]), providing for written notice prior to the filing of the petition and bond in the removal of causes from state to federal courts?

We think it is. The plaintiffs were advised in writing of defendants' endeavor. Their counsel was in court, and defendants' petition and bond were before him. Ample opportunity was afforded to be heard before the court accepted the petition and bond and directed the removal. The record shows that plaintiffs appeared to the rule, filed an answer and were heard. What more could they expect from a more literal compliance of the statute, if that were possible? They were afforded a hearing and careful consideration of their objections to the attempted removal. While the recited provision of the statute is imperative, it is not intended to operate as a hindrance or obstacle in the way of those seeking to avail themselves of the provisions of the statute. Its aim and purpose is to give the opposing party full and timely notice of the attempt to remove a suit brought, possibly to afford such an opportunity for hearing before the court accepts the petition and bond tendered. When this is done, all has been accomplished that was intended. Accordingly it was held that notice is unnecessary, where the motion was made upon dismissal as to resident defendant while all parties were in court (Byrne's Adm'r v. Chesapeake & O. R. Co. [1913] 151 Ky. 553, 152 S. W. 538; where copy of the petition for removal was furnished counsel of record in the state court before the same was filed and notice was satisfactory to that court, the court to which the case was removed held it to be a sufficient compliance. Chase v. Erhardt [D. C.] 198 Fed. 305); and if, as stated in Cropsey v. Sun Printing & Publishing Ass'n [D. C.] 215 Fed. 132, "the main, if not the only, purpose of the statutory requirement as to notice is that the plaintiff be seasonably advised of the defendant's intention to remove the cause," this was accomplished by submitting to their attorney the petition and bond, recognized by him as shown in the acceptance of service of the rule to show cause thereon endorsed. The formal notice, consisting of the petition and bond, and the rule fixing the time when the same would be taken up for action by the court, furnished the most substantial form of written notice to plaintiffs of the defendants' intention to remove the cause and constitutes, both in letter and spirit, compliance with the provisions of the act.

That the petitions for removal were filed within the time provided by statute is not doubted. The summons was returnable December 5th. One of the defendants filed its petition a few days before and the other several days thereafter. Both petitions were filed before the defendants were required by the laws of the state, or the rules of the court, in which suit was brought, to answer or plead to the plaintiffs' declaration or statement.

[2] Plaintiffs' contention that certified copy of the record in this suit was not filed within 30 days from the date of the filing of the petitions in compliance with the requirements of the provisions of the act must also be denied. It is true that such certified record was not filed within 30 days from the filing of the petitions; however, the provisions requiring that certified copy of the record be filed within 30 days from the date of the filing of the petitions imply, no doubt, acceptance of such petitions and action thereon by the court, otherwise the clerk would be without authority to certify the record, if de-

manded by the removing parties. Petitions in this case, though filed early in December, were not accepted by the court ordering the removal until January 27th. The record having been filed in the United States court February 15th, following, was easily within the 30 days provided for filing.

The case here presented, as appears from the pleadings, is clearly within the jurisdiction of the United States court, and the allegations of the defendants' petitions regarding the citizenship of the plaintiffs not being denied, it must be assumed that they are citizens of Pennsylvania, as well as residents, as alleged by them in their statement of claim filed.

The motion to remand is accordingly denied.

SWANN v. AUSTELL.

(District Court, N. D. Georgia. April 4, 1919.)

EQUITY ⊂=392—REHEARING—GROUNDS.

A motion for a rehearing in equity should show either newly discovered evidence, or some manifest misapprehension on the part of the court as to the law of the case, or some mistake as to the facts involved.

On rehearing. Denied.

For former opinion, see 253 Fed. 807.

Turner, Kennedy & Cats, of Knoxville, Tenn., and Anderson, Rountree & Crenshaw, of Atlanta, Ga., for movant.

C. T., L. C., & J. L. Hopkins and King & Spalding, all of Atlanta, Ga., for defendants.

NEWMAN, District Judge. This is a motion for a rehearing in a case heretofore heard and disposed of last October, and an opinion filed which is reported in 253 Fed. 807.

There is some difference between counsel as to how this motion for rehearing should come before the court, counsel for the plaintiff claiming that it is simply handed to the court, and a copy of the motion, and probably the briefs, served on opposing counsel, when they have an opportunity to file reply briefs on the merits, and the court takes the matter under advisement and disposes of it. Counsel on the other side have filed a motion to dismiss the petition for rehearing on the ground that it is simply a restatement, more elaborate, perhaps, of the argument made in the original hearing in the case, which was a bill in equity by the plaintiff, claiming, by the operation of law, to have inherited a considerable part of the estate of W. W. Austell, deceased.

I have examined the petition for rehearing, and especially the brief of counsel for plaintiff, which is very elaborate and well gotten up, but which simply makes the questions which were made in the original hearing before me, which was argued at length by able counsel for several days, and especially with a perfect knowledge of the case and perfect familiarity with the law of the case by counsel for the plaintiff.

As I have just stated, while it is considerably elaborated, there is nothing new in this motion for a rehearing. Every question made in it seems to have been passed upon by the court in disposing of the original case. There is not a single ground for rehearing which was not a ground presented for a right to a decree by counsel arguing the case originally. The matters are presented in a somewhat different way probably, certainly somewhat more thoroughly than they were in the original briefs and argument; but there is not a new proposition, so far as I can see, in the motion for rehearing, or one that was not presented in the original case, certainly not a ground which is to me meritorious.

It is well understood, of course, that a motion for a rehearing should show either newly discovered evidence or some manifest misapprehension on the part of the court as to the law of the case or some mistake as to the facts involved. Nothing of this sort appears, so far as I can see, in this well-prepared brief of counsel acting for the plaintiff, or in the oral argument before the court. As stated, it presents the same questions heretofore thoroughly argued and very carefully considered by the court.

One of counsel in the case, an able lawyer, was prevented from being present on this motion because of his having assumed public work as Solicitor General of the United States since the case was disposed of last year. This probably is not a ground for denying the application for rehearing, but is mentioned in connection with it to show how the defendants would be affected, especially those represented by him, by his inability to be here. On the whole, I do not think there is enough shown here to justify the court in entertaining the application for a rehearing.

In this connection I desire to state that in the opinion in this case (253 Fed. 807, 808), in speaking of the sale of the Decatur street end of the Trout House lot by the executors, I stated this:

"Immediately after the renunciation of the will and the taking of dower by the widow, the executors filed a bill in the superior court of Fulton county relating to the rights of the widow and the children in the 'Trout House' property, under which a verdict and decree was rendered in November, 1886, referring in terms to the entire 'Trout House lot,' including that which had been theretofore set apart as dower, holding that the widow had no interest in this property, and that the executors should sell same at public auction and divide the proceeds among the four children. In pursuance of said decree, however, the executors sold only that part of the property referred to which was not set apart as dower; that is, that part which fronted on Decatur street and ran back along North Pryor street about 140 feet, to an alley which separated this part of the Trout House lot from that which had been set apart as dower. No question is made here as to the residue of the estate, or any property belonging to the estate, except that set apart to the widow as her dower, as stated above."

My understanding of the matter, at the time of the original argument, was that it was so perfectly clear from the record, and from what the executors did in only selling the front part of the lot, it was understood that the rear part of the lot, or the Line street (now Edgewood avenue) end being included in the decree was an error or an inadvertence, and conceded to be by everybody. My attention has, how-

ever, been called to the fact that, while it was not, so far as I can recall, stressed in the argument, Gen. Anderson, in his brief originally filed here, referred to the matter and stated:

"It is res adjudicata that as to the Trout House lot the right of the children became immediately vested upon the renunciation by the widow, in the whole of the Trout House lot, including that part which was held as dower."

I had probably overlooked this, because the whole thing is immaterial, as it is perfectly clear from all the facts in the record and in evidence that this decree was not construed as affecting the widow's right to her dower in the rear end of the Trout House lot, and consequently no sale of it was made or any action concerning it taken under the decree. What I said may have been assuming too much, but it does not alter the fact that the verdict and decree was not acted upon or considered by anybody at interest as affecting the part of the Trout House lot in which the widow took dower.

The motion for a rehearing is denied.

In re WEIDENFELD.

(District Court, E. D. New York. May 12, 1919.)

BANKRUPTCY ⊂=92—RESISTANCE TO ADJUDICATION—APPLICATION FOR ADJUDICATION ON SECURING PROPERTY.

Under Bankruptcy Act July 1, 1898 (Comp. St. § 9585 et seq.), a bankrupt, who has resisted adjudication for nearly two years, cannot suddenly change his attitude and obtain an adjudication as of date of filing of petition, on securing a substantial property by death of his wife, which cannot be applied to his debts if his application is granted; the application not having been made until the petitioning creditors applied to withdraw their petition, which they were entitled to do unless some oher creditor objected, for when the creditors withdrew their petition the proceeding was terminated in the absence of objection.

In Bankruptcy. In the matter of Camille Weidenfeld, alleged bankrupt. On motion for order adjudging the alleged bankrupt a bankrupt as of a particular date. Motion denied.

Walter Jeffreys Carlin and Herman J. Witte, both of New York City, for alleged bankrupt.

Otto B. Schmidt, of New York City, for Bessie C. Fischer.

Frederic W. Frost, of New York City, for petitioning creditors.

Marshall S. Hagar, of New York City, for petitioning creditors in second proceeding.

Sullivan & Cromwell, of New York City, for Sayer.

GARVIN, District Judge. This is a motion by the alleged bankrupt for an order adjudging the alleged bankrupt a bankrupt as of May 12, 1917, upon the ground that having filed an answer to the petition in involuntary bankruptcy alleging solvency, and having later ascertained that he was insolvent, said alleged bankrupt filed an amend-

ed answer on March 17, admitting that he was insolvent at the time the petition was filed. He claims that this so-called amended answer was merely a formal admission of insolvency, as a result of which an adjudication must follow as of the date of original filing of the petition.

The application is vigorously opposed by the attorneys for the petitioning creditors herein. It is set forth by affidavit, which is not denied, that the petition was filed on or about May 12, 1917; that on or about July 2, 1917, the alleged bankrupt filed an answer denying insolvency, and that upon the request of the attorney for the alleged bankrupt the trial on the issues was adjourned from time to time, by reason of the fact that, if certain litigation to which the alleged bankrupt was a party should terminate in the latter's favor, he might be in a position to make an offer of settlement to his creditors; that on December 5, 1918, the wife of the alleged bankrupt died, leaving a considerable estate; that the bankruptcy proceedings were brought on March 17, 1919, and that the clerk's minutes of what took place read as follows:

"Case called for trial of question of insolvency, adjourned without date.
"Appearances: Frederic W. Frost, Atty. for Pet. Cred. Herman J. Witte, Walter J. Carlin, for alleged bankrupt. Otto B. Schmidt, for Bessie C. Fischer, a creditor.
"Attorney for petitioning creditors asks leave to withdraw petition.
"Attorney for alleged bankrupt withdraws answer.
"Mr. Schmidt moves to dismiss petition.
"Alleged bankrupt directed to file his schedules within 20 days.
"Hearing adjourned without date in order that 10 days' notice may be given to creditors. Exception allowed to Mr. Schmidt to the court's refusal to hear the issues raised by his answer at the present time, or to entertain a motion to dismiss on jurisdictional grounds prior to the hearing on notice to the creditors."

The court stated that the petition could not be withdrawn without notice to creditors, and under the direction of the court the alleged bankrupt has filed a list, under oath, of all his creditors, with their addresses. This matter came on before me, and no creditor objected to the withdrawal of the petition. The course pursued by the bankrupt indicates an apparent willingness on his part to co-operate in the distribution among his creditors of the proceeds of the litigation, which may be absolutely without value, but a refusal to devote such property as has come to him recently, by reason of his wife's death, to the payment of his obligations.

It does not seem to me that it was ever the intention of those who enacted the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. § 9585 et seq.]) to permit a bankrupt, who has resisted an adjudication for nearly two years, to suddenly change his attitude, and to obtain an adjudication as of the date of filing the petition, upon application, upon securing a substantial property, which cannot be applied to the payment of his debts if his application is granted; such application not having been made until the petitioning creditors applied to withdraw their petition, which they were entitled to do unless some other creditor objected. It seems to me that, when the petition-

ing creditors withdrew their petition at the time the case was called for trial, the proceeding was thereby terminated, unless, under the ruling of the court that notice be given, some creditor thereafter objected.

The attitude of this alleged bankrupt has already been the subject of comment by the Circuit Court of Appeals for the Second Circuit:

"In conclusion it must be said that the petition to revise which the alleged bankrupt has brought indicates what his policy has been throughout. He has sought to delay and to obstruct the orderly and proper administration of the bankruptcy court. The examination of his wife should take place at the earliest practicable time and an end put to the obstructive tactics which have been employed to hinder and delay creditors contrary to the intent of the Bankruptcy Act." Matter of Camille Weidenfeld, 254 Fed. 677, at page 680, — C. C. A. —, at page —, 42 Am. Bankr. R. 425, at page 429.

The motion for an order adjudging Camille Weidenfeld a bankrupt as of May 12, 1917, is denied.

THE EASTERN.

(District Court, D. Massachusetts. June 9, 1919.)

No. 1534.

1. MARITIME LIENS ⊂=30—SUPPLIES—VESSEL UNDER CHARTER.
A fuel company, which had previously furnished coal to a tug while being operated by her owner, on orders from her engineer, *held* entitled to a lien under Act June 23, 1910, § 1 (Comp. St. § 7783), for coal furnished on orders of the same engineer, although she was then under a charter which required the charterer to furnish the coal, but of which fact it was not informed until afterward.

2. MARITIME LIENS ⊂=40—SUPPLIES—WAIVER OF LIEN.
A libelant, who furnished coal to a tug on orders of her engineer, and was then told by him to charge the coal to her charterer, which he did, and attempted to collect from it until it became insolvent, *held* to have waived his lien on the tug.

In Admiralty. Suit by the City Fuel Company against the steam tug Eastern. Libel dismissed.

Eaton & McKnight and Charles T. Cottrell, all of Boston, Mass., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimant.

MORTON, District Judge. The tug Eastern is owned by the Eastern Transportation Company, the claimant. In November, 1916, she was chartered to the New York & Boston Transportation Company. By the charter the charterers were to pay for her coal. On December 20th, while under this charter, the Eastern was supplied with coal by the City Fuel Company, as stated in the libel. She had been coaled by it many times before while being operated by her owner. On this occasion she had the same engineer as on the former ones; he ordered the coal, and after it had been put on board he told the representative of the Fuel Company that the Eastern was under charter to the New

York & Boston Transportation Company, and that the charterer was to pay for the coal. A notation to that effect was made on the delivery slip of the fuel company.

[1] The information that the steamer (or tug) was under charter was not communicated to the fuel company until the coal had been furnished, and I do not think that the libelant was lacking in reasonable diligence, within the meaning of the statute, in not ascertaining the existence of the charter before the coal had been put on board. See U. S. Compiled Statutes, § 7785. "The management of the vessel" in respect to her coal supply was intrusted to Snyder, her chief engineer, by whom the coal was ordered. See U. S. Compiled Statutes, § 7784. The furnisher, therefore, acquired a lien for the price of the coal under Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (U. S. Compiled Stats. § 7783).

[2] The real question is whether the lien was waived and lost. The coal was promptly billed by the libelant to the New York & Boston Transportation Company, and later the New York & Boston Transportation Company was pressed by the libelant for payment of the account. Not until the charterer had suspended payment was any effort made to collect from the tug.

If the information that the charterer was to pay for the coal had been given to the fuel company before the coal was put on board, no lien would have arisen. Section 7785, supra. Immediately after the coal had been furnished, and before the steamer left the libelant's wharf, it was notified that the vessel was not in fact liable for the coal. Under such circumstances, if the libelant intended to hold the vessel, prompt intimation of such intention ought to have been given to her owner and the libelant should have made it plain that it was insisting on the condition which it understood to exist at the time when the coal was put on board, instead of the real condition of things. It is difficult to see how the libelant could hold both the charterer and the tug, and slight evidence is sufficient to show a waiver of the apparent liability of the vessel and an acceptance of the charterer in her stead. The libelant's act in billing the coal to the charterer, after it knew that the charterer had no right to pledge the credit of the tug, seems to me an acceptance of the actual situation, and to leave the libelant in the same position as if the information as to the charter had been given to it before the coal had been put on board, instead of just afterwards. The Samuel Marshall, 54 Fed. 396, 404, 4 C. C. A. 385; The J. Doherty (D. C.) 207 Fed. 997, 1001.

I therefore find and rule that the lien was waived and abandoned. A decree may be entered dismissing the libel.

In re SCHLOSS et al.

(District Court, E. D. New York. May 7, 1919.)

BANKRUPTCY ⊂=359—AGREEMENT OF PURCHASER OF ASSETS TO PAY UNSECURED LIABILITIES—CLAIMS NOT FILED AND ALLOWED.

Although bankruptcy court accepted offer of purchaser of bankrupts' assets to pay 100 per cent. on prior or preferred claims and 20 per cent. of unsecured liabilities to general creditors, the final and only dividend of 20 per cent. can be declared and paid only to those creditors whose claims have been filed and allowed.

In Bankruptcy. In the matter of David Schloss and Max Schloss, trading as Schloss Plumbers' Woodworking Supply Company, alleged bankrupts. On motion of the trustee for an order directing a final dividend to be paid. Motion granted.

Louis J. Castellano, of Brooklyn, for the motion.

GARVIN, District Judge. The trustee moves for an order directing that a final dividend be paid to creditors whose claims are filed and allowed. At the same time the following question is certified by the referee:

"Shall an only and final dividend of 20 per cent. be declared upon the claims filed and allowed, and also to those creditors whose names appeared on the bankrupts' schedules, but whose claims have not been filed and allowed, or shall this only and final dividend be declared to those creditors alone whose claims have been filed and allowed?"

It appears that one Harry Barschi made an offer to purchase all the assets of the bankrupts, which reads as follows:

"I, Harry Barschi, the undersigned, residing at 1440 Crotona Park East, Bronx, N. Y., hereby offer to purchase all the assets of whatever nature and description of David Schloss and Max Schloss, doing business as Schloss Plumbers' Woodworking Supply Company, including all merchandise, bills and accounts receivable, choses in action, furniture, fixtures, cash in bank and on hand, and all property, real and personal, and effects of every kind, nature, and description, upon the following condition:

I agree to pay for all the property of the bankrupt, a sum equal to twenty (20%) per cent. of the unsecured liabilities owing by the said bankrupts to their general creditors, and I also agree to pay one hundred (100%) per cent. on all claims entitled to priority or preference under the United States Bankruptcy Law, as shown by their books filed or to be filed by the alleged bankrupts.

"I reserve the right to contest at my expense, in the name of the receiver or otherwise, any claim or claims of any alleged creditor believed by me not to be a just and proper or enforceable obligation against the bankrupt, or deemed by me not to be provable or allowable in bankruptcy, or which I may deem to be invalid or to be for an excess amount.

"I agree to pay all fees of administration for such amount as may be agreed upon by me, or, if not agreed upon, as may be allowed by the court.

It is understood that one hundred and fifty ($150) dollars, deposited by me with this offer, is to be returned to me forthwith, if the bid is not accepted, less the necessary expense for advertising.

"This bid is to be acted upon by the receiver or otherwise on or before the 16th day of November, 1917."

The receiver accepted this offer and an order was made by this court November 24, 1917, providing in part as follows:

"Ordered, that Louis J. Castellano, receiver herein, be and he is hereby directed to transfer and turn over to said H. Barschi all the assets and effects of the bankrupts, now in his possession, both real and personal, of whatever kind and nature, upon the receipt from said H. Barschi, in cash, 20 per cent. of the respective amounts due to unsecured creditors, as set forth by the schedules filed herein, and upon the receipt from the said H. Barschi of a sufficient amount to pay all priority claims, if any, in full, and upon the receipt from said H. Barschi of the fees and disbursements incurred in the proceedings, and it is further

"Ordered, that H. Barschi make and execute his bond, indemnifying the payment of twenty per cent. of any sum or sums that may be filed and allowed by any creditor within one year from the date of the adjudication had in these proceedings."

I construe this offer, and the order referred to, to mean that Barschi was willing to pay for the assets of the estate 20 per cent. of the unsecured liabilities of the bankrupts. I do not believe, however, that a dividend can be declared and paid to creditors whose claims have not been filed and allowed.

It does not appear that Barschi has objected to the payment of any claim appearing in the schedules, but which have not been filed and allowed. Therefore it does not appear to me that he is to be considered upon this question. It is my judgment that the estate should be distributed in the usual manner and the question certified is therefore answered as follows: The only and final dividend shall be declared to those creditors whose claims have been filed and allowed.

The motion of the trustee is granted.

CAVENDER v. VIRGINIA BRIDGE & IRON CO.

(District Court, N. D. Georgia. April 8, 1919.)

No. 349.

TRIAL ⊂⊃4—RELEASE AS DEFENSE—SEPARATE TRIAL OF ISSUE.

In an action at law for damages, for which plaintiff has executed a release, the validity and effect of which are in controversy, such issues should be tried first by the court sitting as a court of equity.

At Law. Action by S. C. Cavender against the Virginia Bridge & Iron Company. On motion to hear issue in equity. Motion granted.

Atkinson & Born, of Atlanta, Ga., for plaintiff.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This case is now heard on a motion, filed on March 20, 1919, which originally was as follows:

"Now comes the Virginia Bridge & Iron Company, defendant in the above-stated cause, and shows that said case is one in equity and should be transferred to the equity docket, and it makes this motion in order that such direction may be given to said case."

This was amended on March 29th as follows:

"Now comes the defendant and by leave of court first obtained amends its motion in the above-stated case, and prays that either the entire case be removed to the equity side of the docket, or that the court hear as chancellor under equity rules the question of setting aside the release, prior to the submission of any question of liability for damages, to the jury."

The plaintiff has filed a motion to strike from his plea that part of the pleadings which asks that the paper he gave to the defendant company be found and declared by the court to be a receipt only, and that the same be set aside and a decree entered declaring the said paper to be void and of no effect.

This motion was not allowed by the court, but was taken into consideration with the balance of the case after the argument was completed on the motion to transfer to the equity docket, or, as prayed, that the court hear the portion of the case which seeks the cancellation of the paper given to the defendant by the plaintiff as being null and void, in advance of and separate from the trial of the damage suit on the merits of that suit alone.

It is an interesting question, and I have considered the matter carefully. My conclusion is that the proper course to pursue is the one laid down by the Circuit Court of Appeals for the Eighth Circuit, in Union Pacific R. Co. v. Syas, 246 Fed. 561, 158 C. C. A. 531. This rule is stated by Judge Carland, in the opinion at page 567 of 246 Fed. at page 537 of 158 C. C. A., as follows:

"In the case before us, and all others like it, where it appears that no damages can be recovered until the release is out of the way, orderly procedure and a due regard for the rights of the parties demands that the equitable issues should be first tried by the court sitting as a court of equity. It is true the chancellor may take the advice of a jury, but in such cases the issues to be passed upon by the jury should be carefully framed, and the jury should not be the one which also tries the action at law, as the desire of the jury to render a verdict in the law action in favor of plaintiff or defendant may so cloud their judgment as to render their advice unsafe to follow."

This case was followed by the same court in Fay v. Hill, 249 Fed. 415, 161 C. C. A. 389.

I agree thoroughly with the law as laid down in this case, brought to the attention of the court by counsel for the defendant here, and I shall pass upon the validity of the paper signed by the plaintiff and claimed to be a release of the defendant in advance of the trial of the suit for damages. I will have the matter placed on the calendar as a matter to be heard by the court, whether the amendment of the plaintiff is allowed or not, in advance of the hearing of the main case. This, of course, enables it to be heard without being affected in any way by the evidence in the suit for damages, and will enable the court, sitting as a chancellor, to hear the case in an orderly way provided for the hearing of equity causes, and the paper either annulled and canceled or a decree entered declining to do so.

I shall hold the plaintiff's motion to strike that part of his plea which seeks to set aside and cancel the paper given by him to the defendant as being void, until after the hearing of the equity cause, or

during its hearing, at least, when the facts about the claim can be developed. I think the statement of the facts in the plea independently of the prayer are sufficient to authorize the court to give the case the direction I have indicated, and indeed to require the court to do so, in order that the whole case may proceed in an orderly way by passing first upon the validity of this paper as a release.

WOOD v. CLYDE S. S. CO.

(District Court, S. D. Florida. May 28, 1919.)

SHIPPING ⊂=3½, New, vol. 8A Key-No. Series—FEDERAL CONTROL—SERVICE OF PROCESS.

Under the Florida statute, providing for service upon a corporation by service upon its business agent, valid service cannot be made upon a transportation corporation by service on the agent of the United States Railroad Administration then in charge of and operating the property, but who is not the agent of the corporation.

Action by G. M. Wood against the Clyde Steamship Company. On motion to quash summons. Motion granted.

Geo. C. Bedell and A. H. & Roswell King, all of Jacksonville, Fla., for plaintiff.

Kay, Adams & Ragland, of Jacksonville, Fla., for defendant.

CALL, District Judge. On October 7, 1918, the plaintiff commenced suit against the defendant for damages claimed to have been sustained by him on June 3, 1918, on board of a ship of the defendant, while employed by the defendant as a carpenter, by one of the agents or employés of the defendant carelessly and negligently leaving a hole open in the floor of said ship without any guard or protection, through which plaintiff fell, without fault on his part.

On November 4th defendant entered its special appearance and moved to quash the summons, because the party upon whom the summons was served was not the agent of the defendant, and supported said motion by an affidavit setting up that fact.

The question raised by this special appearance is: Will the service of process upon an agent of the Director General of Railroads bind the transportation company, then being operated under federal control?

I do not think there is any doubt but that the court will take judicial cognizance of the proclamations of the President taking over transportation systems for war purposes, and the orders of the Director General made for the transaction of the business of transportation under those proclamations. Under proclamation of the President the defendant's properties were taken over on April 13, 1918, and continued to be operated by the United States Railroad Administration until January, 1919.

The return of the service shows it was made upon H. G. White, as a resident business agent of the defendant, on October 7, 1918. The affidavit supporting the motion alleges that said White was not the agent of the defendant, but was the agent of the federal government in the control of the properties of the defendant. On November 30, 1918, the plaintiff filed a demurrer to said motion to quash, treating it as a plea in abatement.

The question involved here was before Judge Evans, of the Southern district of Georgia, and was decided adversely to the contention of the plaintiff in this case, and I think his decision and the reasoning by which he arrived at it sound.

The Florida statutes provide that service upon a corporation may be made upon a business agent resident in the county in which the suit is brought. If the party upon whom the service was made was not the business agent of the corporation, then there was no service to bind the corporation.

The facts set up in the affidavit supporting the motion in this case, admitted by the demurrer of the plaintiff, show the party to have been the agent of the United States Railroad Administration, then in charge of and operating the property of the defendant, and not the agent of the defendant.

The discussion before me involved the construction of the acts of Congress, the proclamations of the President thereunder, and the orders of the Director General; but I do not think such construction is required for the decision of the question before me. The fact, if it be a fact, that the party upon whom service was attempted had, before the taking over of the property by the United States government, been an agent of the defendant, would not, in my opinion, continue him in that position while acting for the Director General.

The motion to quash will therefore be granted.

HAYES WHEEL CO. v. AMERICAN DISTRIBUTING CO.

(Circuit Court of Appeals, Sixth Circuit. May 12, 1919.)

No. 3252.

1. COMMERCE ⟸69—INTERSTATE COMMERCE—INTERFERENCE BY STATE—CORPORATIONS.
Pub. Acts Mich. 1907, No. 310, declaring that no foreign corporation shall be capable of making a contract within the state until compliance with provisions of the act, does not impose or attempt to impose a tax on all the capital of a foreign corporation, whether employed in state or interstate commerce, or to tax property permanently without the state, or to impose a fee upon its business done in the state, without distinction between state and interstate, and is not otherwise invalid.

2. CORPORATIONS ⟸661(2)—FOREIGN CORPORATIONS—RIGHT TO SUE.
Plaintiff, a foreign corporation, *held* to have a substantial local and domestic business entirely separate from, and not merely incidental to, its interstate business, so that it could not, where it had not complied with Pub. Acts Mich. 1907, No. 310, maintain suit for unpaid commissions, as well as anticipatory damages on account of cancellation of contract for sale on commission "for the entire United States" of automobile wheels manufactured by defendant, a Michigan corporation, in view of Comp. Laws Mich. 1897, § 10467.

3. TRIAL ⟸141—QUESTIONS OF LAW OR FACT.
Whether plaintiff, a foreign corporation, was doing business in Michigan, so as to be subject to the taxing laws of Michigan, *held* one of law; the evidence not being conflicting.

4. COURTS ⟸95(2), 366(7)—DECISION OF STATE SUPREME COURT—FOLLOWING BY FEDERAL COURT.
The Supreme Court of Michigan having construed Pub. Acts Mich. 1907, No. 310, as making unenforceable a contract made by a foreign corporation before compliance with the act, notwithstanding compliance had while contract is still in force, the declaration of invalidity must be recognized by courts, state or federal, wherever suit may be brought for enforcement of contract.

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

Assumpsit by the American Distributing Company against the Hayes Wheel Company. Verdict and judgment for plaintiff, motion for judgment notwithstanding verdict denied (250 Fed. 109), and defendant brings error. Reversed, with directions.

Justin R. Whiting, of Detroit, Mich., and Richard Price, of Jackson, Mich., for plaintiff in error.

Thomas E. Barkworth, of Jackson, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. On July 1, 1910, the American Distributing Company, an Ohio corporation, having its office and principal place of business at Jackson, Mich., contracted in writing at that place, for the sale on commission "for the entire United States," for a term of five years, of automobile wheels manufactured by the Hayes Wheel Company, a Michigan corporation, engaged at Jackson,

Mich., in the manufacture of such wheels. The Distributing Company's business was that of selling agents for manufacturers of automobile parts. At the time this contract was made the Michigan statute (P. A. Mich. 1907, Act No. 310) declared it unlawful for any foreign corporation to carry on business in Michigan until it should procure from the secretary of state a certificate of authority for that purpose, to obtain which it was required to make a sworn statement showing, among other things, the location of its principal office and principal place or places of business generally, as well as specifically, in Michigan, the total value of the property owned and used by it in its business and the value of the property owned and used in Michigan, the total amount of business transacted during the preceding year, and the amount, if any, transacted in Michigan, and "such other facts bearing on the matter as the secretary of state may require." The corporation was required to pay to the secretary of state a franchise fee (subject to a minimum of $25) of one-twentieth of 1 per cent. of "its authorized capital stock represented by the property owned and used and business transacted in Michigan," as determined by the secretary of state. Until compliance with the act, foreign corporations subject to it were declared incapable of making valid contracts in Michigan. Section 8 expressly provided that the act should not be construed "to prohibit any sale of goods or merchandise which would be protected by the rights of interstate commerce." The Distributing Company had made no attempt to comply with this statute, although it had been doing the same kind of business at Jackson, Mich., for about 18 months before the contract in question was made; nor did it make any attempt to so comply until more than 3 years after the contract was made.

On May 25, 1914, the Wheel Company canceled the contract, and thereupon the Distributing Company brought this suit to recover certain unpaid commissions already earned under the contract, as well as anticipatory damages on account of its cancellation. By another statute then in force (Comp. Laws Mich. 1897, § 10467) a foreign corporation, subject to the act and not complying with it, was in effect denied right of action upon contracts resulting therefrom. Flint v. Le Heup, 199 Mich. 41, 47, 48, 165 N. W. 626, and cases cited. There was trial by jury. Against defendant's objection that plaintiff could not recover, because of failure to comply with this statute, the latter recovered verdict and judgment; the trial court holding as matter of law that the contract related essentially to interstate commerce and so was not affected by the Michigan statute. See opinion on motion for new trial, 250 Fed. 109. The correctness or incorrectness of this conclusion is the only question presented.

The general limitations upon state control of commerce are well defined. It is fundamental that interstate commerce is within the protection of the federal Constitution, and that a state has no power by taxation to impose a burden upon it. Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150; Rosenberger v. Pacific Express Co., 241 U. S. 48, 36 Sup. Ct. 510, 60 L. Ed. 880. And if, as plaintiff

contends, the effect of the Michigan statute is to impose a tax upon every foreign corporation which does business in the state, even though engaged wholly in interstate commerce, it is bad. McCall v. California, 136 U. S. 104, 109, 10 Sup. Ct. 881, 34 L. Ed. 392; N. & W. Ry. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394. And so, in other words, if the state has required plaintiff, as a condition of doing business in Michigan, to surrender its constitutional right to transact commerce between the states. So. Pacific Co. v. Denton, 146 U. S. 202, 207, 13 Sup. Ct. 44, 36 L. Ed. 942. Applying these principles concretely, the statute is bad if it attempts to impose a tax upon all plaintiff's capital, whether employed in state or interstate commerce (Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; Western Union Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; Butler Bros. Co. v. U. S. Rubber Co. [C. C. A. 8] 156 Fed. 1, 17, 84 C. C. A. 167); or if it attempts directly or indirectly to tax property permanently without the state (Louisville, etc., Co. v. Kentucky, 188 U. S. 385, 396, 23 Sup. Ct. 463, 47 L. Ed. 513); or if it assumes to impose a license or franchise fee upon business done in the state without distinction between state and interstate business (Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649).

On the other hand, the authority of the state to restrict the right of plaintiff corporation to engage in business within its limits, or to sue in its courts, so long as interstate commerce is not thereby burdened, is well settled (Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 83, 34 Sup. Ct. 15, 58 L. Ed. 127; Interstate Amusement Co. v. Albert, 239 U. S. 560, 568, 36 Sup. Ct. 168, 60 L. Ed. 439); and the mere fact that plaintiff is engaged in interstate commerce does not exempt its property from state taxation (White Co. v. Massachusetts, 231 U. S. 68, 82, 83, 34 Sup. Ct. 15, 58 L. Ed. 127; Baltic Mining Co. v. Massachusetts, supra); and if the state tax affects merely the proportion of plaintiff's property in the state devoted to state business, or the domestic business done within the state, and the state business is thus capable of separation from the interstate, the latter is thus not directly or indirectly burdened, and the tax is good (Western Union Co. v. Massachusetts, 125 U. S. 530, 552, 8 Sup. Ct. 961, 31 L. Ed. 790; Ratterman v. Western Union Co., 127 U. S. 411, 424, 8 Sup. Ct. 1127, 32 L. Ed. 229; Pullman Co. v. Adams, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877; Allen v. Pullman Co., 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134). If not so capable of separation, it would be bad. "The substance, and not the shadow, determines the validity of the exercise of the power." International Paper Co. v. Massachusetts, 246 U. S. at page 144, 38 Sup. Ct. at page 295, 62 L. Ed. 624, Ann. Cas. 1918C, 617.

[1] Does the Michigan statute impose or attempt to impose a tax upon all the capital of a foreign corporation whether employed in state or interstate commerce, or to tax property permanently without the state, or to impose a fee upon its business done in the state, without distinction between state and interstate? It seems to us clear that it neither does nor attempts to do either of these things. The language of the statute indicates, in our opinion, an intention to assess the

franchise fee only upon domestic business, which is assumed to be capable of separation from interstate business. The tax is in terms limited to a percentage of "the proportion of its authorized capital stock represented by the property owned and used and business transacted in Michigan, determined as above provided." The secretary of state is to determine this proportion, not arbitrarily, as plaintiff charges, but "from the papers so filed and the facts so reported [by the corporation] and any other facts coming to his knowledge bearing upon the question." Nor is the corporation without remedy against unrestrained or mistaken determination of what such proportion amounts to, neither is it subject to the employment of secret or private information in reaching such determination. It is not only expressly given "the right, on application, to be heard by the secretary of state touching the matter of the determination of the proportion of its capital stock represented by property used and business done in Michigan," but, if dissatisfied with the result, it is in terms given the right of appeal to a "board of appeal consisting of the auditor general, state treasurer and attorney general." Due provision is thus, in our opinion, made for separating state from interstate business. The fact that the statute declares final the decision of this board of appeal does not effect a denial of due process. The right of appeal from the decision of an administrative board in assessing taxes and valuing property is not necessary. "One hearing is sufficient to constitute due process." Mich. Central R. R. Co. v. Powers, 201 U. S. at pages 301, 302, 26 Sup. Ct. at page 466, 50 L. Ed. 744. "A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles." [1] Under the Michigan system of taxation generally, while a valuation by a reviewing board is final in the absence of fraud, yet a remedy in some form is always open against fraudulent or arbitrary conduct. We are cited to no authorities, and we have found none, opposed to the conclusion that a tax measurement such as the statute in question provides does not burden interstate commerce. It cannot well be claimed that the minimum fee of $25 is unreasonable, or that it burdens interstate commerce.

The remaining provisions of the act strengthen rather than weaken the inference naturally deducible from the assessment provisions we have discussed, viz. that the act was not intended to impose a tax upon interstate business. The declaration that it shall be unlawful for any foreign corporation to carry on its business in this state until it has procured certificate of authority must be considered in connection, not only with the assessment provisions already cited, but with the declaration of section 8, that the act shall not be construed "to prohibit any sale of goods or merchandise which would be protected by the rights of interstate commerce." So considered (whatever might be the effect of the quoted words standing alone), the natural meaning of the words "its business" would be "its domestic [state] business." But we are not left to our own interpretation of the statute, for the Supreme Court of Michigan has expressly or by necessary implication repeatedly construed the act of 1907 and other statutes of like nature

[1] Per Justice Cooley, in Weimer v. Bunbury, 30 Mich. 214, 215.

as not imposing a tax upon interstate business.[2] The Michigan statute of 1891 (No. 182), as amended by Pub. Acts 1893, No. 79, which in terms required every foreign corporation "which shall hereafter be permitted to transact business in this state" to pay a franchise fee, and provided that all contracts made in the state "by any corporation which has not first complied with the provisions of this act shall be wholly void," was construed by the Supreme Court of the state as not applicable "to foreign corporations whose business within this state consists merely of selling, through itinerant agents, and delivering commodities manufactured outside of this state." Coit v. Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819. The Michigan act of June 20, 1889 (3 Howell's Ann. Stat. § 4161d6) which declared the terms on which manufacturing and mercantile companies generally, both foreign and domestic, might carry on business in that state, was construed in People v. Hawkins, 106 Mich. 479, 483, 64 N. W. 736, 738, as not "aimed at the exclusion of foreign companies, or the imposition of conditions upon their doing business, unless they desire the benefits to be derived from the law applicable to domestic corporations." The construction of both of these acts by the Michigan Supreme Court was adopted by this court in Oakland Co. v. Wolf Co., 118 Fed. 239, 243, 55 C. C. A. 93. And see Coit v. Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819.

In Fifth Avenue Society v. Hastie, supra, section 6 of the act of 1901 (No. 206), which is in the identical language of section 8 of the act of 1907, is referred to as declaring that the provisions of this act shall not be applicable to the sale of goods or merchandise which would be protected by the rights of interstate commerce. In Imperial Curtain Co. v. Jacob, supra, 163 Mich. 76, 127 N. W. 774 (also under the act of 1901), it is said: "If the plaintiff did any business of a local character, the case is not within the terms of the statute." In Standard Fashion Co. v. Cummings, supra, the foreign corporation involved was held not to be doing business in Michigan. The act of 1901 (No. 206) and the amendments of 1903 (No. 34), 1911 (No. 266), and 1913 (No. 277), differ, we think, from the act of 1907 (No. 310) in no respect material to the decision of this case. The construction put by the Supreme Court of Michigan on the meaning of the statute is binding upon us, although its determination of the necessary effect of the statute is not conclusive. Crew v. Pennsylvania, 245 U. S. 292, 294, 38 Sup. Ct. 126, 62 L. Ed. 295; Standard Oil Co. v. Graves, 249

[2] Despres v. Zierleyn, 163 Mich. 399, 128 N. W. 769; Nernst Lamp Co. v. Conrad, 165 Mich. 604, 609, 131 N. W. 120; Lange Co. v. Brace, 186 Mich. 453, 459, 152 N. W. 1026 (all of these cases involve the statute of 1907); Fifth Avenue Society v. Hastie, 155 Mich. 56, 118 N. W. 727; Imperial Curtain Co. v. Jacob, 163 Mich. 72, 127 N. W. 772 (both of which cases were under the previous act of 1901); Haughton Elevator Co. v. Candy Co., 156 Mich. 25, 120 N. W. 18; Standard Fashion Co. v. Cummings, 187 Mich. 196, 153 N. W. 814, L. R. A. 1915F, 329, Ann. Cas. 1916E, 413 (the last two cases arising under the act of 1903); Power Specialty Co. v. Michigan Power Co., 190 Mich. 699, 157 N. W. 408 (arising under the amendment of 1911); Sturtevant Co. v. Leitelt, 196 Mich. 552, 163 N. W. 13 (arising under the amendment of 1913).

U. S. 389, 39 Sup. Ct. 320, 63 L. Ed. ——, decided by the Supreme Court April 14, 1919.

The cases specially relied upon by plaintiff are, in our opinion, clearly distinguishable from the instant case. In Crutcher v. Kentucky, supra, the statute was construed as requiring the foreign express company to obtain a license from the state preliminary to doing interstate business. The statute involved in Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, and Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, attempted to tax the entire capital stock of the foreign corporation as condition of doing business within the state. The law involved in International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, exacted a tax by way of a percentage upon the entire capital stock of the foreign corporation, and, as construed by the Kansas courts, was intended to apply even where the business of the foreign corporation was purely interstate. It also required, as a condition of doing business, a statement setting forth certain facts as to the amount of capital stock, its value, etc., and forbade the maintaining of action by the corporation unless certificate of such filing had been obtained. The requirement of this statement was held a burden on interstate commerce. In Looney v. Crane, 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230, the taxes in question seem to have been assessed with reference to the entire authorized capital stock. The case was aggravated by large increases in rates, etc., after the foreign corporation had established its agency. In Crew v. Pennsylvania, 245 U. S. 292, 38 Sup. Ct. 126, 62 L. Ed. 295, the tax held bad was measured by a percentage of the entire business transacted, although the foreign sales were about 86 per cent. of the gross sales. In International Paper Co. v. Massachusetts, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617, there was involved a percentage tax computed on the entire authorized capital. The case was distinguished from the Baltic Mining Co. Case, supra, in the fact that since the decision in the latter case was rendered the Legislature had removed the previously existing $2,000 maximum limitation, thus making it in essential and practical operation like Western Union Co. v. Kansas and Pullman Co. v. Kansas, supra. The other cases relied upon by plaintiff seem to require no special mention.

On the other hand, in Western Union Co. v. Massachusetts, supra, a tax on account of property owned and used by the corporation in that state, whose value was ascertained by comparing the length of its lines in that state with the length of its entire lines, was held good. In Ratterman v. Western Union Co., supra, a tax assessed under the laws of Ohio upon receipts of the telegraph company, derived partly from interstate and partly from state commerce and capable of separation, but returned in gross, was held invalid in proportion to the extent that the receipts were derived from interstate commerce, but otherwise valid. In Pullman Co. v. Adams, supra, a tax imposed by the laws of Mississippi on sleeping and palace car companies, based on mileage of railroad track in the state over which the cars were run, plus a specific charge of $100, was sustained. In Allen v. Pullman Co.,

supra, a statute of Tennessee assessing a tax of $3,000 per annum, in lieu of all other except ad valorem taxes, on account of passengers whose transportation began and ended within the state, not referring to or affecting the interstate business of the companies, was sustained. In Kansas City Railway v. Kansas, 240 U. S. 227, 232, 36 Sup. Ct. 261, 60 L. Ed. 617, a tax on the privilege of being a corporation, graduated according to paid-up capital, with a reasonable maximum assessed against a domestic corporation engaged in both state and interstate commerce, was held not improper under the due process clause of the Constitution. In Baltic Mining Co. v. Massachusetts, supra, and White Co. v. Massachusetts, supra, an excise tax measured by the authorized capital of the corporation, but limited to a specified sum, was held not an unconstitutional burden on interstate commerce, and not to violate the due process or equal protection clauses of the Constitution. We conclude that a foreign corporation, doing a wholly interstate business, was not required to make declaration or procure certificate of authority. It results that, in our opinion, the Michigan statute in question does not impose a burden upon interstate commerce, nor is it otherwise invalid.

[2] We are thus brought to the ultimately controlling question whether, as plaintiff urgently insists is the case, its business was solely interstate commerce, the local business being merely incidental thereto, or whether, on the other hand, plaintiff was engaged locally in both state and interstate commerce. In the former case it would not be subject to the tax; in the latter, it would be.

Plaintiff's business embraced sales largely by way of orders taken by traveling solicitors from automobile manufacturers in several states lying generally, if not universally, north of the Ohio and east of the Mississippi rivers. Plaintiff seems to have had no office, at least for commercial business, anywhere except at Jackson, Mich. There its books and records of commercial transactions were kept; there a majority at least of its officers resided, and at or from that point all of its business seems to have been directed and conducted, excepting so far as concerns actual solicitation of orders by traveling salesmen. The business of at least one of these salesmen was confined to Michigan. Plaintiff was acting under similar contracts as sales agent for several manufacturers of automobile parts, other than defendant. So far as the record shows, all its tangible property was in Michigan. That state was and is the most prominent of the automobile manufacturing states.

During the five-year contract period plaintiff's sales in Michigan amounted to 61.2 per cent. of its total sales, and for the last 1½ years of that period the Michigan sales were about 75 or 80 per cent. of the aggregate business. While the proportion of Michigan business increased during the contract period, and the proportion when the contract was made does not definitely appear, the natural inference from the record and the arguments would be, we think, that the Michigan sales were from the first approximately at least one-half of the total sales. Plaintiff's declaration, made September 29, 1913, for authority to do business in Michigan, gave the location of its principal office

and of its principal place of business as Jackson, Mich., and two of its three officers as residing there, and the third as living at Detroit, Mich. Its authorized capital stock was reported at $4,000 [under the statute in question the tax would have been $25]; the total value of its property owned and used in its business as $23,538.98, all of which, with the exception of furniture and fixtures, represented cash and accounts and bills receivable. The value of the property owned and used in Michigan was given as "furniture and fixtures $294.96," the total amount of business transacted during the preceding year was stated (in the sixth item) to be $42,893.96, and the amount transacted in Michigan as "all, as specified in sixth item."

It is difficult, if not impossible, to distinguish plaintiff's business in principle from that of the ordinary domestic mercantile corporation selling at wholesale, both in the state of its creation and business location as well as in other states. Assuming, as we do, for the purposes at least of this opinion, that plaintiff's business, so far as it related to business outside of Michigan, was in interstate commerce, it yet seems plain to us, not only that, independently of the question whether plaintiff's business was local or interstate, it was doing business in Michigan, and so within the statute of that state if it was doing a substantial Michigan business (International Text-Book Co. v. Pigg, supra, 217 U. S. at pages 104, 105, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. [N. S.] 493, 18 Ann. Cas. 1103), but also that it was in fact doing a substantial local business in Michigan within the meaning of the law of interstate commerce. We think it a misnomer to characterize its business as essentially interstate. In our opinion it had a substantial local and domestic business, entirely separate from, and not merely incidental to, its interstate business. Baltic Mining Co. v. Massachusetts, supra, at page 86, 34 Sup. Ct. 15, 58 L. Ed. 127; Nernst Lamp Co. v. Conrad, supra; Lange v. Brace, supra, at page 462, 152 N. W. 1026; American, etc., Co. v. Griswold, 143 App Div. 807, 128 N. Y. Supp. 206, affirmed 206 N. Y. 723, 100 N. E. 1124; Flint v. Le Heup, supra, at page 47, 165 N. W. 626; Loomis v. Construction Co. (C. C. A. 6) 211 Fed. 453, 456, 128 C. C. A. 125, and cases cited.

Comparison with the leading cases relied on by plaintiff serves to emphasize the substantial and, we think, the dominant nature of this local and domestic business. For example, in Crutcher v. Kentucky, supra, the principal office was in New York, the state of its creation, only its local office was in Kentucky, and the Kentucky business was presumably but a few per cent. at the most of the company's total business. In Western Union v. Kansas, supra, and Pullman v. Kansas, supra, a similar situation presumably existed. In International Text-Book Co. v. Pigg, supra, the Book Company did its manufacturing and exercised its corporate franchises generally in the state of its incorporation, and had no office of its own within the state of Kansas. In International Paper Co. v. Massachusetts, supra, the corporation's home office was in the state of its creation, where its sales were passed on; and in Massachusetts, whose tax was in question, but one of its 23 mills was located. In Looney v. Crane, the corpora-

tion's home office and principal place of business, where its manufacturing and dealings generally were carried on, was in the state of its creation. The Texas agency was a supply depot for carrying on interstate commerce, and to it goods were shipped from the principal place of business and from it shipments were made to customers within and without Texas. The situation in Crew v. Pennsylvania has already been stated.

[3] In each of these cases the business done at the office in the state of the corporation's creation was the dominant business. In the instant case, even if the business done by plaintiff in the foreign state (Michigan) was not its dominant business, it clearly was a substantial and separable part of it. The mere fact that it involved interstate business did not impress the local and domestic business with that character. Williams v. Fears, 179 U. S. 270, 276, 21 Sup. Ct. 128, 45 L. Ed. 186; Interstate Amusement Co. v. Albert, 239 U. S. 560, 565, 36 Sup. Ct. 168, 60 L. Ed. 439. While the question whether the plaintiff was "doing business in Michigan," so as to subject it to the tax law of that state, would be one of fact, if the evidence were in conflict (Oakland Co. v. Wolf Co., supra), we think that, upon this record, the question is one of law.

[4] These views compel a reversal of the judgment below, unless plaintiff's compliance with the statute in 1913 made the contract enforceable after that date. Section 6 of the statute of 1907 declares that—

"No foreign corporation, subject to the provisions of this act, shall be capable of making a valid contract in this state until it shall have fully complied with the requirements of this act. * * *"

The Supreme Court of Michigan has construed the statute as making unenforceable a contract made before compliance with the statute, notwithstanding compliance was had while the contract was yet in force. Showen v. Owens, 158 Mich. 321, 332, 122 N. W. 640, 133 Am. St. Rep. 376; Despres v. Zierleyn, 163 Mich. 399, 403, 404, 406, 407, 128 N. W. 769; Nernst v. Conrad, 165 Mich. 604, 605, 609, 131 N. W. 120. And see Flint v. Le Heup, 199 Mich. 41, 47, 48, 165 N. W. 626; Hastings Industrial Co. v. Moran, 143 Mich. 679, 107 N. W. 706. This declaration of invalidity must be recognized by the courts, state or federal, in whatever state suit may be brought for its enforcement. Loomis v. People's Construction Co. (C. C. A. 6) 211 Fed. 453, 457, 458, 128 C. C. A. 125, and cases there cited. As the case must be tried again, we neither express nor intimate an opinion on the question whether plaintiff is entitled to recover on a quantum meruit or otherwise, on account of commissions earned before the cancellation, or whether (a question not suggested by counsel) the dealings between the parties have been such, since plaintiff's compliance with the Michigan statute, as to work, in equity or otherwise, a ratification by or estoppel against defendant, as concerns the contract in suit. See Turner v. Construction Co. (C. C. A. 5) 229 Fed. 702, 144 C. C. A. 112; Montgomery Traction Co. v. Montgomery Light, etc., Co. (C. C. A. 5) 229 Fed. 672, 144 C. C. A. 82. Neither of these

questions has been argued by counsel or apparently considered by the District Judge.

The judgment of the District Court is reversed with directions to award a new trial.

EMPIRE FUEL CO. v. LYONS.

LYONS v. EMPIRE FUEL CO.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1919.)

Nos. 3243, 3255.

1. COURTS ⟸274—FEDERAL COURT—PROCESS—CORPORATIONS.
   Service in the federal district of Ohio on a West Virginia corporation will give the District Court for Ohio jurisdiction, if such corporation was doing business in Ohio in such a manner and to such extent as to warrant an inference that through its agents it was present there.
2. CORPORATIONS ⟸642(4½)—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE.
   The fact that the general manager of a West Virginia corporation, who resided in Ohio and maintained an office there as managing agent of another corporation, maintained a file for the West Virginia company, so as to carry on from his Ohio office correspondence necessary between himself and the West Virginia corporation, does not show that such corporation was doing business in Ohio.
3. CORPORATIONS ⟸642(6)—DOING BUSINESS IN STATE.
   A sporadic or occasional sale in Ohio of coal, made by a West Virginia company, whose mines were in the latter state, does not constitute doing business in Ohio.
4. CORPORATIONS ⟸673—DOING BUSINESS IN STATE—EVIDENCE.
   Where a West Virginia mining company, the capacity of whose mines was about 600 tons per day, contracted for the transportation of a large part of its product by boat into Ohio, and thence by rail to a city therein, such contract was important on the question of whether the West Virginia company was doing business in Ohio.
5. CORPORATIONS ⟸642(6)—DOING BUSINESS IN STATE.
   Doing business within the state does not necessarily require that it be done persistently and continuously, in order to justify service of process on an agent of a foreign corporation which does business within the state.
6. COURTS ⟸274—FEDERAL COURT—DISTRICT OF SUIT—DOING BUSINESS IN STATE.
   In an action against a West Virginia corporation, begun by service of process out of the federal District Court for Ohio upon its agent found within that state, *held*, that the West Virginia corporation was doing business within the state of Ohio, so as to be subject to the jurisdiction of the federal court.
7. CONTRACTS ⟸176(1)—CONSTRUCTION—UNAMBIGUOUS CONTRACT.
   The construction of an unambiguous contract is for the court, notwithstanding the construction involves consideration of attendant conditions and circumstances not in dispute.
8. SHIPPING ⟸108—SPECIAL CONTRACT FOR TRANSPORTATION—CONSTRUCTION—JURY QUESTION.
   In an action against a West Virginia mining company for breach of a contract under which plaintiff was to transport by boat coal from the mine in West Virginia to a point in Ohio, whence it would be reshipped by rail, the question whether the contract required defendant to furnish coal

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

for water shipment, regardless of whether it could obtain cars at its mine, *held*, under the evidence, for the jury.

9. APPEAL AND ERROR ⊂⇒859—REVIEW—EVIDENCE.
On writ of error, the Circuit Court of Appeals cannot weigh the evidence or determine a question of fact.

10. SHIPPING ⊂⇒108—CONTRACT FOR TRANSPORTATION—CONSTRUCTION—EVIDENCE.
In an action by the plaintiff for breach of contract, which he asserted obligated the defendant mining company to furnish him 350 tons of coal per day for transportation by water, evidence *held* sufficient to support a finding by the jury that such was the parties' intention.

11. APPEAL AND ERROR ⊂⇒518(4)—REVIEW—RECORD.
Where it did not affirmatively appear from the record that plaintiff asked leave to amend an affidavit for attachment, a claim on writ of error that the dismissal of the attachment was improper, and that plaintiff should have been allowed to amend, cannot be considered.

12. APPEAL AND ERROR ⊂⇒1151(3)—DETERMINATION—MODIFICATION OF JUDGMENT—RECORD.
Where the record did not show that defendant's liability for an item was conceded, and that there was no room for contesting it, a modification of the judgment cannot be directed, so as to include such item, even though it was improperly excluded on the ground that it was a matter cognizable only in a court of admiralty.

13. APPEAL AND ERROR ⊂⇒1178(6)—DETERMINATION—REMAND.
A judgment may be remanded for trial upon a particular branch of the question, such as damages, or an issue relating to jurisdiction, without the judgment being reversed in toto.

14. APPEAL AND ERROR ⊂⇒1178(6)—DETERMINATION—REMAND.
Where the amount of damages recovered was not palpably right or plainly insufficient, plaintiff cannot be awarded a new trial on the issue of damages, as he desired to retain the recovery already had.

In Error to the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Action by John E. Lyons against the Empire Fuel Company. There was a judgment for plaintiff, and defendant brings error, and plaintiff also brings error, asserting that the award of damages was insufficient. Affirmed on both writs.

Murray Seasongood, of Cincinnati, Ohio, for plaintiff.

Frank E. Wood, of Cincinnati, Ohio, and M. G. Sperry, of Clarksburg, W. Va., for defendant.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff in error in No. 3243 is a West Virginia coal-mining corporation. Having a contract for shipping coal to Toledo, Ohio (as stated in the brief of its counsel), it made with defendant in error, on April 28, 1917, a written contract for the transportation of coal from May 15, 1917, to May 15, 1918, by river barges, from Hugheston, W. Va., which is on the Kanawha river, to Pomeroy, Ohio, which is on the Ohio river, and for the loading of such coal into "such cars as may be furnished at Pomeroy, Ohio." On August 15, 1917, defendant in error, hereafter styled plaintiff, brought this suit in a state court of Ohio for damages for

alleged breach of the transportation contract, attaching certain barges of coal. Summons was served August 23, 1917, at Cincinnati, Ohio, on B. Lee Hutchinson, who was general manager of the fuel company, hereafter called defendant. The suit was removed to the court below. Defendant there moved to quash the service of summons on the substantial ground that defendant was not doing business in Ohio and so was not subject to suit therein. After hearing, both on affidavits and oral testimony, the District Judge overruled the motion to set aside the service, holding that defendant was doing business in Ohio. Under issue joined on the merits, plaintiff recovered verdict and judgment.

[1-6] 1. *Jurisdiction.* The effectiveness of the service of summons, and thus the jurisdiction of the court below, depends upon whether defendant was doing business in Ohio, "in such a manner and to such an extent as to warrant an inference that through its agents it was present there." Green v. Chicago, B. & Q. Ry. Co., 205 U. S. 530, 532, 27 Sup. Ct. 595, 596 (51 L. Ed. 916). If defendant was doing business in Ohio, service on Hutchinson gave jurisdiction. Defendant had acquired no permission under the statutes of Ohio to do business in that state. Its main office was at Fairmount, W. Va.; its mining office at Hugheston, in that state. Mr. Hutchinson, its general manager in charge of operations, spent about one-half his time at Hugheston, the remainder at Cincinnati, where he resided, going back and forth from Cincinnati to the mines. He was the managing agent of the Hutchinson Coal Company, which maintained an office at Cincinnati, where Hutchinson kept "an Empire Fuel Company file," "for his personal reference and for the Hutchinson Coal Company," and carried on from Cincinnati such correspondence as was necessary between himself and persons at the mines. But this, standing alone, was not enough to constitute a doing of business by defendant in Ohio. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Green v. Chicago, B. & Q. Ry. Co., supra; Peterson v. Chicago, R. I. & P. Ry. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; Atchison, T. & S. F. R. R. Co. v. Weeks (C. C. A. 5) 254 Fed. 513, — C. C. A. —. Hutchinson also sold in Ohio, to another coal company, three barges of coal, which were loaded from time to time between August 20th and September 26th, in that company's barges at Hugheston, W. Va. But a sporadic or occasional sale in Ohio did not constitute a doing of business therein (Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137); and except as already or hereafter stated defendant seems to have done no business in Ohio, and it kept no books or bank account there.

But this further situation is presented: The contract in suit was personally negotiated at Pomeroy, Ohio, between Hutchinson and plaintiff. It was executed at Charleston, W. Va.; Hutchinson signing for defendant as its general manager, his authority to do so being unchallenged. Hutchinson kept at the Cincinnati office a copy of the contract, the original being kept at defendant's main office at Fairmount. At Cincinnati, while the contract was still subsisting, Hutchinson discussed with plaintiff its "meaning and intent." From

Cincinnati he conducted correspondence with plaintiff, signing one or more letters in defendant's name by himself as general manager. From Cincinnati, as representing defendant, he sent plaintiff "different telegrams," at least one of which (that of August 2d), relating to the unloading of barges then at Pomeroy, was signed in defendant's name alone. From Cincinnati he inclosed to plaintiff vouchers for the transportation and loading of coal during the months of May and June under the contract in suit; the checks having been sent to Hutchinson from defendant's main office for the correct address, the letter of transmittal being signed in defendant's name by Hutchinson as its general manager. Hutchinson wrote plaintiff from Cincinnati to forward to him at that place an expense bill of about $500 incurred for raising a sunken boatload of coal, and the bill was sent accordingly. On June 23d plaintiff wrote Hutchinson at Cincinnati, as defendant's manager, regarding the loading of fuel coal called for by the contract. Hutchinson replied thereto by letter as defendant's general manager, apparently from Cincinnati. On or about June 1st the loading of coal into plaintiff's barges was suspended, because defendant had then a full supply of cars. From June 29th to August 11th, however, six barges were loaded, all of which were attached by plaintiff before they were unloaded; but the relations under the contract were not broken off until just before this suit was begun. Hutchinson acted for defendant in all the dealings between it and plaintiff relative to the contract in suit, and had no dealings with plaintiff except on behalf of defendant. The contract covered, potentially, at least, an important and substantial amount of defendant's business during the year. Plaintiff construes it as providing absolutely for the transportation of 350 tons per day; defendant construes it as providing for such transportation to the extent that railroad cars were not available. The capacity of the mines was approximately 600 tons per day. This consideration is entitled to weight. Maxwell v. A., T. & S. F. R. R. Co. (C. C.) 34 Fed. 286, 287. The contract called for its performance in Ohio, to the extent of the delivery of the coal at Pomeroy to defendant in railroad cars. The fact of delivery necessitated the furnishing by defendant of cars therefor and the billing of the same to destination.

The Hutchinson Coal Company, of which Hutchinson was the managing agent, "had the agency for the Empire Fuel Company." Hutchinson was at Pomeroy on several occasions (apparently during the period covered by operations under the contract) "seeing that barges were unloaded and cared for." Those barges were said to be "not involved in this suit," whatever that may mean. While there was testimony that the Hutchinson Company's "agent at the mines" was in charge of the unloading and billing out of cars, and that Hutchinson merely went to Pomeroy with him, and while other testimony was susceptible of a construction that the Hutchinson Company bought all defendant's output and itself sold it, the district judge states in his opinion that it was Hutchinson's claim that the Hutchinson Company "as the defendant's agent sells the defendant's coal," and defendant's counsel does not dispute this interpretation. While it may

be that this is not the correct interpretation of the relations between the Hutchinson Company and defendant, yet, as the record stands, we think it should be accepted. On this state of facts we must accept the court's conclusion that defendant was doing business in Ohio, certainly until the severing of relations between plaintiff and defendant, immediately before the bringing of this suit.

The question remains whether defendant should be regarded as still doing business in Ohio when service of process was made a few days later. The record permits a presumption of defendant's intention, in the regular course of its business, to ship by water to Pomeroy and there load into cars and bill coal, as was contemplated and as was done under the contract with plaintiff, whenever there should be a shortage of railroad cars. We think the burden of proof was upon defendant to overcome that presumption, and that this has not clearly been done. Previous to the contract with plaintiff defendant had had "a river connection" with other people for whom plaintiff was substituted; and the record introduced by defendant upon the hearing on the merits justifies the inference that in September, when the supply of cars was less complete, a river connection was resumed with still a third party, and deliveries made thereunder, presumptively at Pomeroy, for the purpose of shipment from that place. "Doing business" within a state does not necessarily require that it be done persistently and continuously. New Haven Co. v. Downington (C. C.) 130 Fed. 605. No all-embracing rule as to what is "doing business" has been laid down. St. Louis S. W. Ry. v. Alexander, 227 U. S. 218, 227, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1914C, 77. The question whether defendant was doing business in Ohio is one of fact. Oakland Co. v. Wolf Co. (C. C. A. 6) 118 Fed. 239, 55 C. C. A. 93. It does not follow from the fact that the contract was made in West Virginia that all business done under it must be regarded as done in that state. Lumbermen's Ins. Co. v. Meyer, 197 U. S. 407, 414, 25 Sup. Ct. 483, 49 L. Ed. 810. Even if no one of the things Hutchinson did for defendant in Ohio was enough to constitute doing business there, and while the question presented is a close one, we think the record, taken together, sustains the conclusion of the District Judge that defendant was doing business in Ohio. We think the case within the principle (although not within the facts) of such decisions as St. Louis S. W. Ry. v. Alexander, supra; Mutual Life Ins. Co. v. Spratley, 172 U. S. 603, 19 Sup. Ct. 308, 43 L. Ed. 569; Lumbermen's Ins. Co. v. Meyer, supra. The instant case is in important features distinguishable from cases specially relied on by defendant.

[7, 8] 2. *The Trial on the Merits.* Defendant had at Hugheston both a rail and a river tipple. It could ship to Toledo either by rail directly from Hugheston, or by river barge down the Kanawha river to the Ohio river and then up the Ohio to Pomeroy, and by rail from that place. Plaintiff had 14 barges, of an average capacity of more than 500 tons each, and a steamer. The contract contained the following provisions, omitting immaterial matter, and substituting the titles of the parties here for their designations there:

(a) For the expressed consideration of $1 ["and the further consideration of the right to handle all of the coal of the Empire Fuel Company, except as

hereinafter provided, which is run over the river tipple to the Kanawha river at the Empire Fuel Company's mine at Hugheston * * * which is hereby granted"] plaintiff bound himself "to furnish sufficient barges at the said mine in which to load not less than 350 tons of coal per day," and further "to transport all such coal to Pomeroy * * * by way of the Kanawha and Ohio rivers, and to load all such coal into such cars as may be furnished at Pomeroy, Ohio."

(b) Should plaintiff "at any time, fail to furnish sufficient barges, beyond the necessary barges to load the said 350 tons per day, to load all of the said coal which the [defendant] is able to run to the river * * *" defendant was given "the right at any time to load such coal into other barges which" defendant "may be able to procure, at all times, however, giving [plaintiff] the preference as to such barges as [plaintiff] may have at the tipple at such time."

(c) Defendant (1) assumed responsibility "for all barges" of plaintiff while being loaded and until removed by plaintiff, provided they be removed within a reasonable time after loading; (2) agreed to pay plaintiff "$1 per ton for all such coal transported and loaded as aforesaid, settlement therefor to be made by the 20th of each month for all coal shipped from said mine during the previous month"; (3) agreed "to furnish billing for all coal so transported by [plaintiff]"; (4) agreed "to sell to [plaintiff] run of mine coal for fuel purposes not to exceed 26 tons per day at the rate of $1.50 per ton at the tipple."

(d) The contract was declared "subject to all contingencies which might arise which are not within the control of either of the parties hereto." (Brackets and paragraph letters are ours.)

The rail rate from Hugheston to Toledo was 25 cents per ton more than from Pomeroy to Toledo. Shipment under the contract in suit would thus cost defendant 75 cents per ton more than by all rail route. On the other hand, the United States had but a few months before entered the war; there was a great demand for coal and the price was very high; there was a marked shortage of cars, the allotment to defendant when the contract was made being but 32 per cent. of its production, which was then between 500 and 600 tons per day, and defendant hoped to increase the capacity by at least 100 tons per day. On June 4th defendant's car allotment was increased to 100 per cent., and it stood at that figure almost constantly until October 8th; during the greater part of the remainder of the year it ranged from nothing to 100 per cent. This suit grew out of defendant's refusal to furnish coal for plaintiff's barges when it had sufficient cars.

Defendant contends that the contract clearly and unambiguously bound it to furnish plaintiff coal only when cars could not be had. If this contention is right, the judgment is wrong, and should be reversed; for it is a commonplace that the construction of an unambiguous contract is for the court, notwithstanding the construction involves a consideration of attendant conditions and circumstances not in dispute. Plaintiff, however, contends that the contract required defendant to provide the stipulated tonnage, without regard to car supply. The trial court thought the contract ambiguous in this respect, and submitted its construction to the jury. The verdict sustains plaintiff's construction. If that construction is right, defendant has nothing of substance to complain of, for all its assignments of error relating to the merits (except the sixth) are, in that event, concededly not well taken, and the sixth assignment is without apparent merit.

The writing, judged only by its language, is not in our opinion free from ambiguity. True, the clause in paragraph (a) which we have bracketed recites only a right on plaintiff's part to handle coal "which is run over the river tipple." But this clause is only a recital; it is not a positive limitation. Assuming, however, that the bracketed clause, standing alone, would limit defendant's obligation under the contract to such coal as it could not get cars for, yet there is opposed to this recital an absolute agreement on plaintiff's part not only "to furnish sufficient barges * * * in which to load not less than 350 tons of coal per day," but "to transport all such coal"; and this latter clause may as naturally refer to the "350 tons of coal per day" as to the earlier clause "which is run over the river tipple." The bracketed recital is not, in our opinion, necessarily inconsistent with an implied obligation on defendant's part to furnish as much coal as plaintiff was absolutely required to transport, especially in the absence of any mention whatever of car supply or car shortage, much less of a positive declaration—which it would be natural to make if such was the intention of the parties—that defendant was required to run to the river tipple only its surplus above what the car supply, as existing from time to time, would take care of. Furthermore, paragraph (b) gives defendant the right to use other barges in case of plaintiff's failure to furnish barges enough to load, not merely "the said 350 tons per day," but "all the coal which defendant is able to run to the river"—an expression which, standing by itself, naturally implies ability rather than choice. Provisions (1) and (2) of paragraph (c) also naturally imply that plaintiff was expected to transport coal each month.

Without discussing in detail each of the considerations advanced pro and con, we think the language of the contract, giving effect to all of its terms, is ambiguous in the respect mentioned.

It is urged, however, that it is unreasonable that defendant should agree to pay 75 cents more per ton for river and rail than for all rail transportation, or that it should trust to the uncertainties of river navigation due to winter ice, as well as low water and floods. But we cannot say, as matter of law, that defendant might not reasonably have been willing to bind itself, under existing market prices, to transport one-half its output at an advanced rate of 75 cents per ton, rather than take its chances of the continuance of the then existing car shortage, or that it would be more unreasonable that defendant should take chances on river navigation as to one-half its output than that plaintiff should tie up his 14 barges, said to have a rental value of $10 per day each, as well as his steamer (and defendant presented evidence that all plaintiff's equipment was required to transport 350 tons per day), on the chance of getting no coal to carry unless the car shortage should continue. Our conclusion is that the District Court was right in submitting to the jury the question of the actual intent of the contract.

[9, 10] As to the evidence of intention: Plaintiff testified that he refused to sign the contract as first drawn because "I did not think it specified the amount of coal I was to boat," and because of its omission of certain other provisions; that he stated he "had to know what

he was going to do, and how many tons he was to get per day, so he would know how much work he had for his steamboat and barges"; that "the lawyer took the original draft and interlined it and changed it, so it specified 350 tons," as well as covered the other omissions referred to. Opposed to this is the testimony of three witnesses, who, while agreeing that plaintiff made substantially the objections stated, declare that he was explicitly told that he was to get no coal when defendant had enough cars, and that the other criticized omissions only were covered by the redraft. There was also evidence of statements by plaintiff, both oral and by letter, and of other circumstances, more or less inconsistent with his present claim. Were we called upon to decide this question of fact from the printed record, we might think defendant's version the more reasonable one; but plaintiff's testimony was direct and unequivocal, and, if believed, supports the verdict. Moreover, the trial court denied a motion for a new trial. We cannot weigh the evidence or determine the question of fact.

[11] 3. *The Cross-Writ.* (a) On motion to discharge the attachment, the District Judge held the affidavit therefor insufficient. Plaintiff was, however, given permission to file another affidavit and "start anew his attachment proceedings"; in default thereof the motion to dissolve to be sustained; in either event plaintiff to pay the costs of the attachment and of motion to dissolve. Plaintiff thereupon filed a new affidavit and took out a new attachment. Under writ of error in No. 3255 plaintiff asks review of the judgment of dismissal. Practically a question of costs only is involved. We are not convinced that the criticized action constituted reversible error. If, as claimed, the affidavit was amendable, it does not affirmatively appear that plaintiff asked leave to amend.

[12] (b) Plaintiff also asks that this court enter judgment for $510 additional damages, for the expense of raising a sunken barge. The item was excluded from the jury's consideration, as "not in controversy in this case," plaintiff's counsel say, on the ground that the item was recoverable only in admiralty. It is said: "There is or can be no dispute" about the item. We are unable to direct a modification of the judgment in this respect, for the reason, if for no other, that we cannot say from the record that defendant's liability for the item was conceded, or that there was no room for contesting it.

[13, 14] (c) Plaintiff asked upwards of $87,000; he recovered $10,400. He now asks that this court "order an assessment of additional damages," on the ground that the verdict was insufficient, and was made smaller than it should have been because of alleged erroneous rulings and action of the trial judge. This we cannot do. There is authority for ordering a new trial upon a particular branch of a controversy. We have reversed judgments, with remand for trial upon an issue relating to jurisdiction, without setting aside the verdict for damages. Chicago, R. I. & P. R. R. Co. v. Stephens, 218 Fed. 535, 540, 134 C. C. A. 263; Fentress Co. v. Elmore, 240 Fed. 328, 333, 153 C. C. A. 254. The Circuit Court of Appeals for the First Circuit has awarded a new trial on the subject of damages alone. Farrar v. Wheeler, 145 Fed. 482, 75 C. C. A. 386. And see Calaf v.

Fernandez (C. C. A. 1) 239 Fed. 795, 152 C. C. A. 581, and Mine v. Mining Co. (D. C.) 254 Fed. 630.

But plaintiff does not ask to have the judgment in his favor set aside, except or unless for purpose of assessing additional damages; he apparently seeks to hold onto his present recovery, and, without jeopardizing that, to try to increase it. There may be cases where the recovery had is so palpably right so far as it goes, and yet so palpably insufficient in amount, as to justify the course asked here. We need not determine that question, for this case is not of that class in either of the two features mentioned.

The judgment of the District Court is affirmed. The defendants in error in the respective writs will recover costs thereunder

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ESCANABA TRACTION CO. v. BURNS et al.

BURNS v. ESCANABA TRACTION CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1919.)

Nos. 3213, 3214.

1. APPEAL AND ERROR ⟸1010(1)—REVIEW—FINDING OF FACT.
   Where there was express testimony supporting the District Court's conclusion on an issue of fact (where testimony was taken in open court), the Circuit Court of Appeals is bound to accept such conclusion, unless the evidence decidedly preponderates against it.
2. ATTORNEY AND CLIENT ⟸98—PAYMENT TO ATTORNEY UNDER AUTHORITY OF ASSIGNEE—LIABILITY OF SETTLOR FOR MISAPPLICATION.
   A traction company, which paid money due contractors to an attorney under authority therefor by a lender to and holder of an assignment from the contractors was not liable to the lender and assignee for the attorney's claimed misapplication of the funds in part.
3. SUNDAY ⟸11—CONSENT TO SETTLEMENT—INVALIDATION.
   Though a lender to and holder of an assignment from a firm of contractors which did work for a traction company gave his consent on Sunday to a settlement of the contractors' claim against the traction company, the settlement was not, under the facts of this case, invalidated, though the statutes of both states where the transactions occurred make Sunday contracts invalid.
4. SUNDAY ⟸15—CONSENT TO SETTLE JUDGMENT—RATIFICATION.
   Where the lender to and holder of assignment from a firm of contractors which had done work for a traction company on Sunday gave consent to his attorney, acting also for others interested, to settle the contractors' judgment claim against the traction company, and did not withdraw the authority given during the two days which elapsed until the settlement was actually made, such lender and assignee is estopped from denying, as against the traction company, in suit to set aside satisfaction of judgment by it, that his consent to the settlement had legal efficacy.
5. COMPROMISE AND SETTLEMENT ⟸19(2)—SETTING ASIDE SETTLEMENT—EQUITABLE CONSIDERATIONS.
   Equity would not set aside satisfaction of judgment in favor of contractors against a traction company, effected between the company and a lender to and holder of assignment from the firm of contractors, as well as others interested, where under the facts such action would not accord with equity and good conscience.

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6. ASSIGNMENTS ⟸38—PARTIAL ASSIGNMENTS IN EQUITY.
Though it is the general rule at law that a debtor will be protected against the splitting up of claims against him, the rule has no application in equity, which can adjust the rights of all interested in a single suit, and it is settled doctrine in the state and federal courts that partial assignments are enforceable in equity, irrespective of acceptance by the debtor, and though made only by way of security; the sole control of the claim so assigned, as regards its settlement, not being regarded as left with the debtor.

7. COMPROMISE AND SETTLEMENT ⟸19(2)—SETTING ASIDE—CONDITION PRECEDENT—REINSTATEMENT OF PROCEEDING TO REVIEW JUDGMENT SETTLED.
In suit to set aside settlement by a traction company of judgment against it in favor of a firm of contractors who had assigned to lenders to them, reinstatement of writ of error from the Circuit Court of Appeals for review of the judgment *held* not a condition precedent to relief to plaintiffs, the lenders to and holders of assignment from the contractors, who had nothing to do with the dismissal of the writ of error or the discharge of the judgment.

8. SUBROGATION ⟸1, 31(1)—FAILURE TO PAY CLAIM IN FULL—BENEFIT OF RELEASE OF SECURITY.
Where a traction company, which had employed a firm of contractors, did not pay in full the claim of a lender to and holder of an assignment from the contractors in settling with the attorney for the lender a judgment against it in favor of the contractors, as against other lenders to the contractors it was not entitled on any theory of subrogation to the benefit of the release of the security held by the lender, when judgment in favor of the contractors against the traction company was settled by the attorney for such lender; "subrogation" not being matter of legal right, but merely the mode which equity adopts to compel the ultimate payment of a debt by one who in justice should pay it.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subrogation.]

9. APPEAL AND ERROR ⟸977(1)—EQUITY ⟸392—APPLICATION FOR REHEARING—DISCRETION OF TRIAL COURT.
Application for rehearing was addressed to the sound discretion of the trial judge, a discretion not reviewable on appeal, in the absence of a showing of its abuse.

Appeals from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by Joseph Burns and others against the Escanaba Traction Company, the Escanaba National Bank, and others. From the decree, plaintiff Joseph Burns and defendant Traction Company appeal. Decree affirmed.

Eben R. Minahan, of Green Bay, Wis., for appellant Burns.

Thomas J. Riley, of Escanaba, Mich., and G. F. Clifford, of Green Bay, Wis., for appellant Escanaba Traction Co.

Thomas Clancey, of Ishpeming, Mich., for appellee Escanaba Nat. Bank.

Charles M. Owen, of Grand Rapids, Mich., for appellees Burns and others.

Before WARRINGTON and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge. John Brogan and one Rich, copartners as Brogan & Rich, had a contract with the Escanaba Traction

Company for certain construction work. In a suit on the law side of the court below, for breach of this contract, Brogan & Rich obtained verdict against the traction company on April 17, 1914, for $15,759.16 damages. Judgment was rendered on the verdict December 17th following, and from that judgment writ of error was taken from this court. In the performance of the construction contract, Brogan & Rich borrowed from the Escanaba National Bank $7,000, giving the bank therefor an order on the traction company April 6, 1912, which was accepted by the latter two days later. Brogan had borrowed from four of his relatives sums amounting to $16,000, as follows: From Joseph Burns $7,000, from Ellen Burns $3,000, from Catherine Kane $3,500, and from James Brogan $2,500. Part, at least, of these sums was used in performing the construction work in question. After verdict, and before judgment, Brogan & Rich, by Brogan, gave to each of the latter's four relatives a formal written assignment of their entire claim against the traction company, reciting the pendency of suit thereon in the United States court, each assignment stating that it was "given to secure" the person named "for a loan of money" made to the firm in the specific sum stated, which was in each case the principal of the loan. No question is made of Brogan's complete authority to so act for the firm. The assignment to Ellen Burns was in terms made "subject to a previous assignment of the same funds in favor of Joseph Burns," the assignment to Catherine Kane subject to the assignments to both Joseph and Ellen Burns, and that to James Brogan to the assignments to each of the other three. The traction company was fully informed of these assignments, being served with a copy of each.

On March 16, 1915, Brogan & Rich, through Brogan, and with the participation of the attorneys who had represented them in securing the judgment, effected a settlement with the traction company, whereby the latter paid $12,500, of which $7,700 was paid by the traction company to the bank in payment of its claim, with interest thereon, the remaining $4,800 being paid by the traction company to Messrs. Martin, Martin & Martin, attorneys for Brogan & Rich. The judgment against the traction company was thereupon formally discharged, and under stipulation of counsel the writ of error from this court was dismissed. No question of Brogan's authority to represent Brogan & Rich in making this settlement is involved. Martin thereupon paid Ryall $400 for his services as attorney for Brogan & Rich in the suit against the traction company, paid Calnan & Riley $723.38 in settlement of a claim presented by them as members of the firm of John Brogan & Co., for work done and materials furnished under a subcontract for the construction work in question, retained for themselves $1,835, partly for services rendered and expenses incurred in the suit against the traction company and partly for services and expenses in connection with other suits in which John Brogan and others were interested, and tendered to Joseph Burns the remaining $1,831.72, which Burns refused to accept.

Joseph and Ellen Burns, Catherine Kane, and James Brogan thereupon brought the instant suit, to set aside the satisfaction of the judgment against the traction company and for an accounting with the sev-

eral defendants. The traction company and the bank appeared and answered on the merits. Upon hearing on pleadings and proofs, the court below found, first, that the settlement was authorized by and is binding upon Joseph Burns, as a release of the security of his assignment of the judgment, entitling him to the remaining $1,831.72, and without prejudice to his right to recover, by suit or otherwise, from defendant Martin and defendants Calnan & Riley (who, being nonresidents and without the jurisdiction, were not served with process and did not appear), "any moneys which may have been unlawfully retained by the one or paid to the other out of the balance of $4,800 received from said defendant company"; second, that the settlement was without authority or consent of the plaintiffs Ellen Burns, Catherine Kane, and James Brogan, and that these three plaintiffs are entitled to have the settlement set aside as to the balance of the judgment, including costs and interest, after the application of the $12,500 actually paid thereon, and to receive such balance in the priorities before stated; and, third, that the national bank was authorized to receive the $7,700 in question out of the settlement, and was so authorized by plaintiff Joseph Burns. Decree was entered accordingly. The traction company appeals (No. 3213) from so much of the decree as requires it to pay the balance of the judgment against it. Joseph Burns appeals (No. 3214) from the refusal to allow him further relief than stated.

[1, 2] 1. *Joseph Burns' Appeal.* Previous to the settlement Burns' claim had been reduced by payment of $2,000 on the principal. Complete relief was denied him on the ground that he authorized the settlement at $12,500. He was present at a conference between Brogan and his counsel, at Martin's home in Green Bay, Wis., for the purpose of considering the question of settlement, which was accomplished two days later. Burns' express assent to a settlement at $12,500 is claimed to have been given at this conference. On this question of fact the trial court said:

"Did Joseph Burns authorize or consent to the settlement? Upon this question the testimony is in sharp conflict. Burns not only denies that he gave his consent to the settlement, but asserts that he refused to consent thereto. His testimony is corroborated to some extent by that of John Brogan and one other witness and by the fact that he refused to sign a power of attorney authorizing Brogan to act for him in the settlement. On the other hand, the two attorneys who negotiated the settlement are equally positive in their statements that Burns authorized them to act for him. These attorneys are men of integrity and high standing in their profession. That they believed themselves to be clothed with full power to act cannot be doubted. Burns knew approximately the amount of money which could be obtained; he did not openly object to the settlement until after it had been made and he had discovered the small amount he was to receive. From the whole record it fairly appears that the attorneys were authorized by Burns to settle the judgment for the sum of $12,500."

The entire testimony in the case, except that of Rich, who did not attend the conference, was taken in open court. There was express testimony supporting the court's conclusion; and this conclusion we are bound to accept, unless the evidence decidedly preponderates against it. Cleveland v. Chisholm (C. C. A. 6) 90 Fed. 431, 33 C. C. A. 157;

Pugh v. Snodgrass (C. C. A. 6) 209 Fed. 325, 126 C. C. A. 251. There is no such preponderance.

It seems reasonably clear that both Martin and Ryall understood Burns to give them the claimed authority. They say that both Brogan and Burns understood that $12,500 might prove to be all the traction company would pay; that Burns told them to "do the best you can, get $13,000 if you can, but do the best you can"; and that the settlement was made in reliance upon this authorization from Burns and a similar one from Brogan. While there is evidence of assertion by the attorneys that they would exercise the right to settle, even if the consent in question was not given, we think the testimony falls short of proving duress.

Burns was naturally disappointed with the amount left for him. The interest on the bank's claim made it $200 greater than treated at the conference; but the trial court was clearly right in recognizing the bank's lien at $7,700 and as prior to plaintiffs' liens. The claim of Calnan & Riley, however, was not mentioned at the conference. They had in fact no lien upon the judgment. Its payment is defended largely on the ground that the services it represented entered into the amount of the recovery against the traction company; and Martin, who represented Calnan & Riley also, had agreed to see to its payment. Brogan, however, had given what he asserts to be adequate security for the claim and was unwilling to have the deduction made. The services and disbursements of Martin's firm, for which he retained $1,835.00, included items amounting to several hundred dollars rendered in other matters, for which no lien could be claimed. The right to retain or disburse these items was open to controversy. But the traction company, having in good faith paid the money to Martin, under authority therefor by Joseph Burns, was not liable to him for Martin's claimed misapplication in part; and the proper course was taken in not passing upon those items, and in making the award to Burns without prejudice to future recovery on account of them.

[3-5] We see no merit in the contention that the fact that Burns' consent was given on Sunday is enough to invalidate the settlement. True, the statutes of both Wisconsin and Michigan make Sunday contracts invalid; although in Wisconsin the case would seem to fall within the rule that where both parties are equally guilty of a violation of law the courts will give relief to neither. Cohn v. Heimbauch, 86 Wis. 176, 180, 56 N. W. 638. Apart, however, from this consideration, the settlement was not made until two days after the authority was given, and meanwhile Burns made no attempt to withdraw his consent. In executing the settlement Martin claimed to act as attorney in fact for Burns as well as for several others interested, and signed the papers in such capacity. It is not claimed that the traction company had reason to believe that Martin's only authority from Burns was one given on Sunday. The settlement seems to have been made in good faith by both the traction company and the attorneys for the judgment plaintiffs. These circumstances should estop Burns from now denying, as against the traction company, that his consent had legal efficacy. Bronson's Executor v. Chappell, 12 Wall. 681, 20 L. Ed. 436; Gibbs Co. v. Bruck-

er, 111 U. S. 597, 4 Sup. Ct. 572, 28 L. Ed. 534. Moreover, Burns is in a court of equity asking equitable consideration. To set aside the settlement as to Burns would not, under the facts stated, accord with equity and good conscience. Blakesley v. Johnson, 13 Wis. 592. We think the decree as to Burns should be affirmed.

2. *The Traction Company's Appeal.* At the date of the decree below the balance of the Brogan & Rich judgment against the traction company, above the $12,500 paid on the compromise, was $4,547.97. This amount was ordered paid to Ellen Burns, Catherine Kane, and James Brogan, the face of whose claims aggregated $9,000, in the order of priority given by the respective assignments.

(a) The contention that these appellees consented to or authorized the settlement needs little attention. On this subject Judge Sessions said:

"The other plaintiffs [those other than Joseph Burns] not only were not represented and did not participate in the negotiations, but positively refused to appoint an agent to represent them or consent to the settlement."

The record so amply supports this conclusion as to make discussion or statement of evidence unnecessary.

(b) The traction company, however, urges that the assignment, being merely by way of security and not absolute, being not of the entire claim, but only of part thereof, and the control of the claim being left with the assignor, the transaction amounted to a splitting up of the claim and rendered the assignments unenforceable against the traction company, except so far as accepted by it. In a fair sense, the record indicates a practical, although not a formal, acceptance by the traction company of the assignments. The whole theory upon which its defense below was rested recognized that the assignments were valid and binding upon the traction company. Its answer admits notice of the assignments and the receipt of copies of the same, and alleged "that in making the settlement" it "relied expressly upon the terms and conditions of said assignments thus served upon" it.

The real contention in this respect is that each of the four plaintiffs authorized the attorneys for Brogan & Rich to make the settlement, but that, even if Catherine Kane and James Brogan did not give the authority, Joseph and Ellen Burns did, and that the traction company was protected by that consent, inasmuch as the claims of the two Burns were more than enough to exhaust the remnant of the judgment. The traction company's manager, who made the settlement, testified:

"I knew of these assignments before I went out. I knew, because they were served on me, sent by mail to me, copies of each assignment."

He also said he had read them, and knew they were expressly "subject one to the other after Joseph Burns," and again:

"I relied upon the statements in the assignments in making the release. I would not have made this settlement in the way we did, if it had not been that those assignments were made subject to Joseph Burns."

The learned counsel who represented the traction company on the hearing below stated, in answer to the court's question, that "we do not

make any claim as against assignees who are shown not to have authorized the settlement." The contention made here that the assignments are unenforceable is not well taken.

[6] While it is the general rule at law that a debtor will be protected against being harassed by a dividing up of the claim against him, this consideration has no application to equity, which can adjust the rights of all interested in a single suit; and it is the settled doctrine, not only of the federal courts but of the state courts generally, that such partial assignments are enforceable in equity, without regard to the question of acceptance by the debtor, and although made only by way of security. The sole control of the claim thus assigned, as affects its settlement, is not regarded as left with the debtor. Peugh v. Porter, 112 U. S. 737, 742, 5 Sup. Ct. 361, 28 L. Ed. 859; Fourth St. Bank v. Yardley, 165 U. S. 634, 644, 17 Sup. Ct. 439, 41 L. Ed. 855; Rogers v. Penobscot Mining Co. (C. C. A. 8) 154 Fed. 606, 615, 83 C. C. A. 380; Railway Co. v. Volkert, 58 Ohio St. 362, 50 N. E. 924; Line v. McCall, 126 Mich. 497, 507, 85 N. W. 1089; James v. Newton, 142 Mass. 366, 377, et seq., 8 N. E. 122, 56 Am. Rep. 692; Lanigan v. Bradley Co., 50 N. J. Eq. 201, 204, et seq., 24 Atl. 505; Exchange Bank v. McLoon, 73 Me. 498, 505, et seq., 40 Am. Rep. 388; Alexander v. Munroe, 54 Or. 500, 509, et seq., 101 Pac. 903, 103 Pac. 514, 135 Am. St. Rep. 840. And see The Elmbank (D. C.) 72 Fed. 610, 614 (opinion by Judge Morrow). On the point generally that an assignment of a chose in action as security merely is enforceable in equity, see Curtis v. Walpole (C. C. A. 1) 218 Fed. 145, 147, et seq., 134 C. C. A. 140. We find nothing to the contrary of this rule in the earlier cases of Kendall v. United States, 74 U. S. (7 Wall.) 113, 116, 19 L. Ed. 85, and Mandeville v. Welch, 5 Wheat. 277, 288, 5 L. Ed. 87, especially when the facts of those cases are taken into account.

[7] (c) The traction company contends that in any event equity requires, as a condition precedent to relief to those appellees, that the proceeding for review by this court of the judgment of the District Court should be reinstated. We cannot assent to this proposition. Appellees had nothing to do with the dismissal of the writ of error or with the discharge of the judgment entered in the District Court. Those steps were part and parcel of a settlement with which they had nothing to do, and as to which they were not consulted, except as some or all of them were asked to authorize John Brogan to act for them. It is true that before the settlement the judgment was subject to reversal, and in such event to the expense and risk of a new trial. But, as the case then stood, the plaintiffs in the judgment, as well as other claimants (thus including Joseph Burns, the bank, Calnan & Riley, and the attorneys for Brogan & Rich), were interested in sustaining the judgment, as well as in prosecuting a new trial in case of reversal. As the case now stands, appellees would be compelled to bear the sole burden, risk, and expense of defending the present judgment, as well as of prosecuting a new trial if ordered, all for a possible recovery of a margin above $12,500.

[8] (d) The traction company insists, finally, that the release of the security held by Joseph Burns inured to the benefit of the traction com-

pany to the full amount of the debt secured by the assignment to him. Had the traction company paid Joseph Burns' claim in full, it would be entitled to this benefit; but this it did not do, or even assume to do, and we therefore think the contention referred to was rightly overruled. The settlement was primarily of the traction company's debt to Brogan & Rich. The assignment of that debt to Burns was simply to secure him for what Brogan & Rich owed him. The traction company's only concern in respect to the assignees was to make sure that in settling with Brogan & Rich it was protected against further claims by the assignees. The settlement papers recited the payment of $7,700 to the bank and $4,800 to Brogan & Rich, Calnan & Riley, and Joseph and Ellen Burns. In consideration of these payments Brogan & Rich and the traction company formally released each other from all claims and demands, and the traction company was in addition released from all claims and demands "on account of said claim of Calnan & Riley and on account of said assignments herein referred to," viz. those to Joseph and Ellen Burns. The traction company was merely paying its own debt. The debt from Brogan & Rich to Burns was not paid, except to the extent of the moneys applied upon it. The theory on which one paying a debt is, under certain circumstances (as of suretyship, trust or other equitable relation), subrogated to the benefit of the security held for the debt has, in our opinion, no application to the present situation. Subrogation is not matter of legal right; it is merely "the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it." Arnold et al. v. Green, 116 N. Y. 566, 571, 23 N. E. 1, 2. It is impossible to bring this case within that definition. Judge Sessions well said:

"The release of the security did not constitute payment and discharge of the debt beyond the amount actually paid and applied thereon. The most that can be claimed for Joseph Burns' assent to the settlement is that, in consideration of the payment to him of whatever sum might remain from the $12,500 after the satisfaction of all valid prior claims or liens upon the fund, he released and discharged his lien upon the judgment. * * * Burns was the antagonist of the traction company, and, in agreeing to the settlement, was acting solely in the interest of himself and the other assignees. He agreed to and did release and surrender his security and nothing else. The traction company obtained from him such release and nothing else."

If Burns saw fit to release his security on receiving less than due him, there is, in our judgment, no more inequity as against the traction company in giving the subsequent security holders the benefit of the remaining security than if Burns' debt had been decreased by payment directly through Brogan & Rich, instead of indirectly through the traction company. The whole difficulty in this respect has grown out of the fact that the traction company mistakenly accepted the authority of Martin to act for both Joseph and Ellen Burns, coupled with the assumption that the other plaintiffs had no concern with what was done.

We are the better satisfied with this conclusion from the facts (not, however, forming its basis) that, although the traction company is protected by the form of the assignments to the extent of what was ac-

tually paid Burns, both Brogan and Joseph Burns seem to have regarded the assignments as intended, as between the assignees, to secure them ratably and without preference, and that, according to what was evidently Burns' understanding of the settlement, nearly $3,000, or more than 50 per cent., of the amount of his debt would have been paid.

While by the decree below the three appellees will normally receive through the traction company in the aggregate (one at least individually) more than they would had the judgment against Brogan & Rich been originally paid in full, yet not only is this result at the expense of Burns, and not of the traction company, but the remnants of their respective debts against Brogan & Rich are correspondingly decreased.

[9] The application for rehearing was addressed to the sound discretion of the trial judge, a discretion which is not reviewable here in the absence of showing of its abuse. Such showing is not made.

We have carefully considered all the criticisms made to the decree below, although we have not discussed them all. We find no error in the decree, and it is accordingly affirmed.

GILL et al. v. HALE & KILBURN CO.

(Circuit Court of Appeals, Sixth Circuit. January 10, 1919.)

No. 3166.

1. CONTRACTS ⟸261(5)—RESCISSION—AUTHORITY OF PARTIES.
If time was of the essence of plaintiff's subcontract to install the metal doors in a building, etc., so far as concerns plaintiff's right, as distinguished from its obligation, to complete its work by a certain date, and defendants, the general contractors, did not have the building ready for installation of the doors at the time fixed for completion of the subcontract, plaintiff had the right to cancel such contract at the expiration of that date.

2. TRIAL ⟸136(1)—PROVINCE OF COURT AND JURY—REASONABLE TIME.
It is a general rule that questions of reasonable time and reasonable delay are for the jury.

3. PRINCIPAL AND AGENT ⟸177(3)—NOTICE TO AGENT.
Where plaintiff's representatives consulted with defendant contractor as to details of the subcontract which plaintiff had undertaken, information and knowledge so acquired by such representatives as to progress of defendant's work was that of plaintiff.

4. CONTRACTS ⟸323(3)—CONSTRUCTION—TIME.
Where the general contractors were required to complete within a specified time, and they let a subcontract for the metal doors, etc., to be completed October 1, time was not of the essence of the contract, so far as concerned the subcontractor's right, as distinct from its obligation, and so the fact that the general contractor was unavoidably delayed, and did not have the building far enough advanced for the doors to be installed at the time fixed for completion of that work, did not, as a matter of law, warrant the subcontractor in canceling its contract.

5. CONTRACTS ⟸323(3)—CONSTRUCTION—REASONABLE TIME.
Whether the delay of the general contractor in completing the building to such a point as would allow subcontractor to install metal doors, etc.,

before expiration of the time for completion of the subcontract, was so unreasonable as to warrant the subcontractor in canceling its contract, *held*, under the evidence, for the jury.

6. CONTRACTS ⟸323(3)—QUESTION FOR JURY.
In subcontractor's action against contractor for damages for failing to permit plaintiff to perform prior to time when plaintiff's contract was to be completed, whether plaintiff had waived, or by its conduct was estopped to urge, defendant's failure to permit plaintiff to perform, *held* for the jury.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by the Hale & Kilburn Company against John T. Gill and Kermode F. Gill, copartners doing business under the name of John Gill & Sons, who counterclaimed. There was a judgment for plaintiff, the counterclaim being dismissed, and defendants bring error. Reversed and remanded, with directions.

W. C. Boyle, of Cleveland, Ohio, for plaintiffs in error.

Merle N. Poe and Ralph Burroughs, both of Cleveland, Ohio, for defendant in error.

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

KNAPPEN, Circuit Judge. Plaintiffs in error, whom we style defendants, had a contract for altering and extending a building in Cleveland, Ohio, which was to be completed January 1, 1916. In April, 1915, they made a subcontract with defendant in error (the plaintiff), whereby the latter agreed, for a stated price, to furnish and install the metal doors and trim, picture molding, and base, and to apply the hardware, such installation to be completed by October 1, 1915. On October 16, 1915, the building had not progressed far enough to permit plaintiff to begin its work, and on that date plaintiff gave defendants notice of its rescission of the contract, and brought this suit for the recovery of damages sustained by defendants' failure to permit plaintiff to perform. Defendants denied plaintiffs' right to rescind, and asked for damages by way of counterclaim for plaintiff's refusal to perform. The jury was instructed that under the undisputed testimony plaintiff had the right to refuse to go on with its contract, that defendants had thus no right of action under their counterclaim, and that plaintiff, if not then itself in default, was entitled to recover its damages. Plaintiff recovered verdict and judgment for $7,500. This proceeding is brought to review that judgment.

[1-6] 1. The question of prime importance is whether the court rightly held, as matter of law, that plaintiff had a right to rescind on October 16th. Defendants' construction was delayed several months by controversies with the city over questions arising under its building code relating to the height of the building and structural strength, by the unforeseen necessity of deeper foundations, the encountering of

quicksand and otherwise, all resulting in defendants' losing their order of priority with the steel manufacturers. For these delays plaintiff was in no way at fault. Its actual installation could not begin until the building was ready for the "bucks," which are heavy steel frames outlining the openings and into which the tile partitions enter, and which thus support the metal work. The bucks could not be put in until the lower floors were laid, and from one to three months thereafter would be required (according as the claims of plaintiff or defendants are accepted) for completing plaintiff's work.

On July 13, 1915, defendants replied to plaintiff's inquiry that—

"We expect the steel work to go right ahead now, and in all probability will not require the steel bucks before September or October, and will advise you later on when we receive the steel drawings and give you outlines as to dates of delivery."

On September 7th defendants replied to like inquiry:

"We expect to have the steel for approximately up to the third floor shipped and erected by the end of next month, and as soon as they start on the upper portion the tile floors will follow right along."

In the latter part of September plaintiff learned definitely that the building would not be ready in October for its installation, and it thereupon gave, on October 16th, its notice of rescission. As it turned out, the building was not ready for the bucks before December. It is enough, for present purposes, to say that it must be, and it is, conceded that as the result of the correspondence and dealings between the parties plaintiff waived whatever right it had, to complete the contract by October 1st.

Had time been of the essence of the contract, so far as concerns plaintiff's right (as distinguished from its obligation) to complete its work by October 1st, and had the waiver been for a definite period or to a definite date, plaintiff would have had the absolute right to cancel at the expiration of that date. General Elec. Co. v. Chattanooga Co. (C. C. A. 6) 241 Fed. 38, 42, 154 C. C. A. 38. But, in our opinion, neither of these conditions existed. The contract did not in terms make time of its essence, so far as concerns the plaintiff's right to complete by October 1st. Such was the implied effect as to its obligation. But the obligatory provision was for defendants' benefit. The reason for a difference between the rights of the parties in this respect is clear. Defendants were under contract with the owner to complete by January 1, 1916, with stipulation for damages at $100 per day for delay. The fact that the delay occurred through the fault of the subcontractor would not avoid defendants' liability. Plaintiff accordingly agreed to like stipulated damages in case of its delay, but for delays not occurring through its fault it would not be liable. The contract, moreover, expressly provided for a suspension from time to time of such parts of the work as defendants should require, and for a resumption of performance thereafter according to defendants' direction, no claim therefor to be made other than an extension of time for completion equivalent to the delay involved. It was also provided that plaintiff's work should be performed and completed as soon as the progress of the build-

ing should permit, "and at such times and places and in such quantities as may be directed by [defendants]." The only other express requirement as to the time of commencement of plaintiff's work is that the "steel bucks for doors shall precede, and metal grounds for base and picture molding will immediately follow, the erection of the tile partitions."

Moreover, the defendants had not in terms promised that the building would be ready for plaintiff by October 1st. At the most they had said (on July 13th) that it would not be ready before September or October, with promise of further advice, and (on September 7th) in effect that it was expected that the steel erection would by the last of October have proceeded far enough to permit the commencement of plaintiff's installation. However, the suspension and other provisions just referred to gave defendants no right arbitrarily or unreasonably to suspend the work. And, as the case shaped itself, the controlling question on this branch of the case is whether the court rightly held, as matter of law, that, under the circumstances mentioned, a delay by which plaintiff would be prevented from beginning work until December or later was an unreasonable delay, which would justify plaintiff in canceling the contract. If so, we are not prepared to say that the notice was invalid because stating, as ground for rescission, that there had been no extension of time for completion beyond October 1st.

We think that, upon this record, the peremptory instruction as to unreasonable delay was erroneous. It is the general rule that questions of reasonable time and reasonable delay are for the jury. The only exception is where the facts are not in dispute and where there is no room for differing inferences. International Co. v. Stadler (C. C. A. 6) 212 Fed. 378, 382, 129 C. C. A. 54; Marmet Co. v. Peoples Co. (C. C. A. 6) 226 Fed. 646, 651, 141 C. C. A. 402. Such is not the case here. The evidence was not in complete harmony. There was testimony (considering it, as we must, most favorably to defendants) tending to show that plaintiff was kept acquainted with the progress of defendants' work and had the means of knowing with reasonable accuracy what the prospects were from time to time. Notwithstanding the delays, it was in frequent conference with defendants throughout the summer regarding the progress of the work. Its representatives visited Cleveland as often as once a month until October; one of them consulting with defendants about details left open by the contract, at least one of which details was never settled. These representatives were to that extent plaintiff's agents, and their knowledge and information thus acquired was that of plaintiff. G. R. & I. Ry. Co. v. United States (C. C. A. 6) 212 Fed. 577, 583, 129 C. C. A. 113.

After the letter of September 7th, which stated defendants' expectation that the work would by the last of October have progressed far enough for the beginning of plaintiff's installation, it kept on with its preparations without intimating any intention to discontinue. As late as September 22d it wrote defendants regarding proposed "extra" partitions. On September 18th to 22d plaintiff's engineer consulted with defendants at Cleveland regarding the details of plaintiff's work,

reporting to plaintiff the results thereof, and on October 1st plaintiff wrote defendants referring to this visit of its engineer and confirming "certain information received and constructions decided upon" during the engineer's visit. The matters so formally confirmed included a checking of the quantities of certain openings, some of which were to be of special construction, "to be decided upon later by the architect," who had approved a schedule prepared for each of certain lower floor additions, accompanied by plaintiff's statement that "it is our understanding we are to proceed with this additional material," and asking to be immediately advised if its understanding was incorrect. Among other enumerations were special doors and their method of construction, with promise to "shortly send drawings of the sliding doors of this type in the basement for approval of sizes." It also asked whether a sketch which the architects were preparing of certain partition lights would "be ready shortly." There was also a request that the hardware schedule be promptly forwarded, with promise that the matter of finish "will be covered in a separate letter," and for the early submission of drawing for special closets. Reference was made to several other matters of a similar nature, followed by an express request for acknowledgment of the receipt of plaintiff's letter, "so that we may be sure all matters are understood between us."

It is because of the engineer's report of his visit referred to in the letter of October 1st, as to the then condition of the building, that the notice of rescission was given 15 days later. The letter of October 1st contained no reference to this subject, nor did plaintiff from the time of its engineer's visit in September until its cancellation letter of October 16th disclose to defendants any intention of rescinding the contract. After October 1st plaintiff wrote three letters, one acknowledging receipt from defendants of certain drawings, another asking for certain instructions from the architect, and the third to the hardware men, relative to certain doors and transoms. Plaintiff's fabrication of metal work continued up to October 16th, although the information conveyed in defendants' letter of July 13th, considered in connection with plaintiff's letter of August 30th, showed that plaintiff's installation could not be completed by October 1st. One item of the fabrication seems to have gone through the shops on October 29th.

What is reasonable time depends on a consideration of all the circumstances of the particular case. Without intimating any opinion upon the merits, and without setting out the testimony more at large or in detail, it seems enough to say that we think there was substantial evidence tending to support a conclusion that defendants were justified in relying upon an apparent intention on plaintiff's part to continue under the contract, and that a further delay of two or three months beyond October 1st would not be, under all the circumstances, unreasonable. The testimony thus presented a question of fact for the jury. The question whether plaintiff would have been entitled to damages for the delay, had it completed its contract, is not involved.

2. It follows from what we have said that the defenses of waiver and estoppel should have been submitted under appropriate instruc-

tions, and that, if the jury should determine that plaintiff was not entitled to rescind, the subject of counterclaim would remain in the case.

The judgment of the District Court is reversed, and the record remanded, with directions to award a new trial.

HEROLD et al. v. HEROLD CHINA & POTTERY CO.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1919.)

No. 3155.

1. INJUNCTION ⇐56—RIGHTS PROTECTED—SECRET FORMULAS AND PROCESSES.
Secret formulas and processes are property rights, which will be protected by injunction, not only as against those who attempt to disclose or use them in violation of confidential relations or contracts, express or implied, but against those participating in the attempt with knowledge of such relations or contracts, though they might in time have reached the same result by independent efforts.

2. INJUNCTION ⇐128—DISCLOSURE OF TRADE SECRETS AND PROCESSES—EVIDENCE.
In suit by a pottery company to enjoin use of its trade secrets and processes by defendants, its former manager and a competing company, evidence as to disclosure of trade secrets and processes by the manager *held* insufficient to sustain decree for plaintiff; there having been no disclosure in evidence of what each party claimed as a trade secret.

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

Suit in equity by the Herold China & Pottery Company against John J. Herold and the Guernsey Earthenware Company. From a decree for plaintiff, defendants appeal. Reversed, except so far as enjoining defendant company in a certain particular.

Charles Koonce, Jr., of Youngstown, Ohio, and Fred L. Rosemond, of Cambridge, Ohio, for appellants.

Ezra Keeler, of Denver, Colo., for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and COCHRAN, District Judge.

KNAPPEN, Circuit Judge. Appeal from a decree enjoining the disclosure or use of alleged secret formulas, and for an accounting.

Herold, a skilled potter of ten or more years' experience in Ohio, went to Colorado in the year 1909, on account of a tubercular affection, and there erected a small factory for making high-grade chinaware. He lacked capital, and after about three years' effort turned over his entire plant and formulas to the plaintiff company, in consideration of his employment and certain stock to be given him. It was at first thought that but little capital would be required, but the requirements increased from time to time until about $47,000 had been contributed by the Golden parties by way of stock subscriptions and $26,000 in the form of loans. In 1914 the Golden product had acquired a high reputation. Professor Fleck, of the Colorado School of Mines, located

at Golden, had found its chemical or laboratory ware equal to Royal Berlin ware, and had substituted the former for the latter. It seems to have been recognized, so far as it was known, as the highest grade of porcelain ware commercially made in America, and Herold as the expert maker of it.

The Guernsey Company had a large plant at Cambridge, Ohio, and was a wealthy and prosperous concern. It had successfully made high-fired china, especially that used for baking, such as casseroles, in which a red or brown body is lined with porcelain; the entire dish being then covered within and without with a glaze. It had also been for some time actively experimenting with white china and laboratory porcelain bodies, and had made some samples. It was perhaps close to the line of success, but seems not to have crossed it, at least so far as commercial production is concerned. In December, 1914, it employed one Frauenfelter, before then employed in a pottery at Roseville, Ohio. Frauenfelter seems to have recommended the employment of Herold, with whom Frauenfelter had been associated at Roseville before Herold went to Colorado. Herold had become dissatisfied with his relations with the plaintiff company; and, after finding that his resignation as general manager was satisfactory to plaintiff, and being given the position merely of modeler, designer, and decorator, although at the same salary, he in December, 1914, came to the Guernsey Company as factory superintendent, in complete charge of manufacturing, but without impairing the authority of the general manager. At the end of five years' performance Herold was to have 20 shares of the Guernsey Company's common stock, dividends thereon to be meanwhile paid him in addition to his salary, which was 60 per cent. larger than paid by plaintiff. There came with, or followed, Herold from Golden two or more of plaintiff's other skilled employés. Herold stayed with the Guernsey Company until the following May, when he retired and went to a pottery at Zanesville, Ohio, where Frauenfelter also went. On retiring, he conveyed to the Guernsey Company, for an expressed new consideration of $500, a so-called "Semmler" formula for making porcelain ware, which defendants claim Frauenfelter had obtained from one Semmler, of Derry, Pa., and had given to Herold while the latter was in the Guernsey Company's employ.

This suit was begun January 27, 1915. It was heard, not only on depositions taken in different parts of the United States, but on oral testimony consuming five days. The prominent issues were, first, whether the secret formulas and processes used at Golden belonged exclusively to plaintiff, and thus could not be lawfully disclosed by Herold; and, second, whether such disclosure had been made. The District Court found in favor of plaintiff on both propositions, and permanently enjoined defendants from disclosing or using "the whole or any part of the formulæ for manufacturing and producing either fireproof china cooking ware, or fireproof china or porcelain laboratory ware, or any knowledge or information relating thereto or connected therewith belonging to plaintiff, and which was developed and perfected by said Herold and became the property of and was used by the plaintiff." The injunction also ran against the use of the "Semmler

formula in the form in which it was when communicated, surrendered, and delivered by said Herold to * * * the Guernsey Earthenware Company, and as it has since been perfected and improved upon, and as it existed at any stage when it was being tested and adapted by said Herold," as well as against making and selling "any fireproof china cooking ware or fireproof china or porcelain laboratory ware manufactured and produced by plaintiff from said Semmler formula, or any of the formulæ, so owned or used by the plaintiff"; also from representing or advertising that the Guernsey Company was making the same fireproof cooking and porcelain laboratory ware as made by plaintiff.

[1] 1. Plaintiff's secretary testified that, as part of the contract whereby Herold's plant was turned over to plaintiff, the former agreed to give to the latter, as its exclusive property, all his secret processes and formulas obtained by previous experimentation, as well as those he might thereafter discover while with plaintiff company. This testimony was taken in open court. There was other testimony more or less corroborative. The secretary also testified that in the month preceding Herold's employment by the Guernsey Company he informed that company's manager, Mr. Casey, of Herold's relations to plaintiff and the acquisition by the latter of Herold's secret processes and formulas. This testimony was doubtless believed by the District Judge, and we see no reason to question his conclusion on this feature of the case. A contract for plaintiff's exclusive ownership of the formulas and processes was, under the existing circumstance, not unnatural.

The rule is well settled that secret formulas and processes, such as are claimed to be involved here, are property rights which will be protected by injunction, not only as against those who attempt to disclose or use them in violation of confidential relations or contracts express or implied, but as against those who are participating in such attempt with knowledge of such confidential relations or contract, though they might in time have reached the same result by their own independent experiments or efforts. The following are among the leading cases supporting this rule: Morrison v. Moat, 9 Hare, 241; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; O. & W. Thum Co. v. Tloczynski, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. Rep. 469, and cases there cited; Eastman Co. v. Reichenbach (Sup.) 20 N. Y. Supp. 110; Stone v. Grasselli Co., 65 N. J. Eq. 756, 55 Atl. 736, 63 L. R. A. 344, 103 Am. St. Rep. 794, and citations therein; Macbeth Co. v. Schnelbach, 239 Pa. 76, 86 Atl. 688. And see Pomeroy Ink Co. v. Pomeroy, 77 N. J. Eq. 293, 298, 299, 78 Atl. 698. We think the case made falls within the principle just stated. It follows that Herold had no right to disclose to the Guernsey Company the secret formulas and processes covered by the contract, and that, if he did make or threaten to make such disclosure, plaintiff was entitled to relief with respect thereto.

[2] 2. The question of disclosure presents greater difficulty. The circumstances immediately attending Herold's employment by the Guernsey Company strongly suggest such disclosure. Immediately upon his employment by that company, Herold was advertised as a

great find, a man with a national reputation as a ceramist. Simultaneously one of plaintiff's most important customers, which had given plaintiff a large order for porcelain ware, was applied to by the Guernsey Company for orders for the same kind of ware, and, on being told that it would be time enough to give orders when the Guernsey Company's samples were approved, replied that there was no question about production, that "Herold knows regarding costs and is familiar with the details of manufacture." Plaintiff accordingly lost the order. Plaintiff would seem to have been justified at the time it filed its bill in believing that Herold, who was by that time entirely out of harmony with, if not positively antagonistic to, plaintiff, had disclosed or was about to disclose its manufacturing secrets.

It developed on the trial that in his contract of employment with the Guernsey Company Herold had agreed to "constantly endeavor to improve the product and enlarge the variety of product in accordance with the policy of the company," and upon request, from time to time, to "communicate and demonstrate the formulas for any or all ware made in said factory, or known to or discovered or originated by him that may be available for said company, and keep a written record of all such formulas, and that such formulas and record [to] be a part of said company's private and secret record, and shall belong to said company only, and shall be kept secret from all others." As the factory referred to is evidently that of the defendant company, the agreement does not necessarily in terms call for a disclosure of the Golden formulas.

In the early summer of 1915 the Guernsey Company put on the market a line of porcelain ware of practically the same quality as plaintiff's. While there was no direct testimony of actual disclosure by Herold of plaintiff's secret processes and formulas, plaintiff's manager (Mr. Coors, Jr.), who succeeded Herold, and who had worked with the latter several months before Herold left plaintiff company, testified (by deposition taken out of court) to the existence of such formulas and processes, his knowledge of them derived from Herold, and that they related generally to the physical properties of the ingredients and the method of their preparation, the manner of applying the glaze to the pot, and the temperature in the firing kiln as relating to the composition of the body; also that the formulas, so far as written out by Herold, related only to the "percentage of the different sorts of clay that went into a given mix"; that the cards written out by Herold contained none of the secret processes, which, as again defined, were said to consist of "secret knowledge acquired by experience"—"methods and peculiarities which a man finds from time to time in the development." Further than this plaintiff refused to give or permit to be given any information of its claimed secret processes and formulas for which it asked protection. The witness further testified that, while all clays have different physical properties, the Golden process could be successfully used with the Ohio clays; that ware having the peculiar fireproof qualities of plaintiff's ware had not [before] been produced, and that the product ultimately put out by the Guernsey Company is identical in nature with plaintiff's latest product. There was other tes-

timony more or less corroborative of this testimony in some respects. If it be completely accepted, the court below was justified in giving plaintiff some measure of relief.

On the other hand, the testimony of nonuse and nondisclosure of plaintiff's alleged secret processes and formulas was overwhelming, if believed. Casey, the manager and principal owner of the Guernsey Company, is apparently a man of standing and affairs, as well as an expert potter of many years practical experience, a member of the American Ceramic Society and apparently interested in its publications. His standing as an expert has been recognized by his employment as such before the Board of Customs Appraisers, his appearance as an expert witness for the government in litigation over classifications and values, appearances before the Treasury Department and congressional committees, as well as consultation and working with government experts on development of pottery manufacture. He testified positively that he had never obtained any of plaintiff's claimed secrets from Herold or from any one else; that he never knew that Herold had or claimed to have secret processes, nor what plaintiff claimed its formulas or processes were; that he wished Herold's services as a superintendent on account of his supposed expertness a a potter; that Casey himself already had two formulas each for bodies and glazes, as well as a porcelain formula obtained from one Myers on August 28, 1914, from which latter formula satisfactory samples had already been made (porcelain seems not to have been produced by Myers commercially); that there are no secrets in pottery, except the formulas; that under Herold no new methods of manufacture were employed; and that both he and Herold worked in experimenting in the manufacture of porcelain. He claims to have in September, 1914, completed a costly addition to the plant, partly for the manufacture of porcelain laboratory ware, and to have exhibited to the trade samples of such ware in November following.

Herold, who, as before said, was a skillful ceramist, testified that there were at Golden no secret processes, as distinguished from formulas, unless as he perhaps may have meant that the secret processes involved merely mechanical skill and experience; that he used at the Guernsey Company no secret processes used at Golden; that the Golden secret related, not to the clay, but to an acid used in its treatment, and that the formula was in this respect secret so far as the Colorado clay was concerned; that the Colorado and Ohio clays were quite different; that no Colorado clay was used by the Guernsey Company; that at Golden there were used but two clays, together with a flint and a spar and one chemical; that at Guernsey there were used five clays, also a flint and a spar and two chemicals; and that the acid used at Golden could not be used at Guernsey, because it had the opposite effect on the Eastern clays.

Frauenfelter also testified that there were no secret processes in pottery, as distinguished from formulas; that the making of porcelain was practically a matter of experimentation; that the Semmler formula, which he claims to have obtained about November 15, 1914, and to have given to Herold in the latter part of the following January, was

a percentage formula of clays, feldspar, and flint, "given out in batch weights"; that he afterwards found that the Semmler formula was not secret, because "published in several works." He seemed willing to give the substance of the Semmler formula if desired; but plaintiff did not seem to desire it, possibly through fear it might by implication disclose plaintiff's formulas.

Brucker, Herold's brother-in-law, who had been with the latter at plaintiff's plant, and who went with him to the Guernsey Company, testified that the Golden formula covered the secrets at plaintiff's plant and related to the amounts of materials that went into the bodies and glazes and their mixing (to this extent partially corroborating plaintiff's present manager); that he did not know the chemical constituents of the ingredients used at either the Golden or the Guernsey plants, but that the "mixes" were not the same in the two plants; that at the Guernsey plant he knew the materials, but not the amounts, and at the Golden plant knew both materials and amounts; that at Golden there were but two clays, a flint and a spar, besides water and another chemical; and that at the Guernsey plant there were used five clays, a flint and a spar, water, and another chemical. (Of course, the mere fact that a change was made in the original formula, due to differences in clay available, would not necessarily prove that the Golden formulas or secret processes were not used.) He further testified that the Golden formula was changed by eliminating the acid after Herold left. (This latter statement seems not to have been denied, possibly through apprehension that denial would lead to a disclosure of the actual formula or process.) It further appeared by defendant's testimony that the perfection of the Guernsey Company's porcelain after Herold's acquisition was the result of long experimentation; 27 or more different experiments being tried by Herold before even approximately satisfactory results were obtained. This was perhaps due largely to differences in the clay available at Golden and at Cambridge respectively, to the differences in fuel used (coal at Golden, gas at Cambridge), and in the difference in atmospheric rarity at the respective places, due to altitude, and materially affecting the firing. There seems, also, to have been other difficulties in the way. The result was, according to defendant's testimony, that Herold had not succeeded in putting out porcelain for the Guernsey Company with complete commercial success. It appears, on the contrary, that kilns which under later operation netted $1,700 to $2,000, under Herold's operation netted but $300 to $400 each. In May, 1915, after about five months' service (perhaps four months after the injunction bill in this cause was filed), Herold severed his connection with the Guernsey Company, as did Frauenfelter. The Guernsey Company's first commercial porcelain was put out shortly after Herold left.

Manifestly the decree of the District Court entirely discredits the testimony of Casey, Herold, and Frauenfelter. Had the testimony of plaintiff's present manager been taken in open court,[1] and had both

[1] The witness testified very briefly on the hearing by way of rebuttal, as to a few items not important to our decision.

parties made full disclosure satisfactory to the trial court, of what plaintiff's claimed secret processes and formulas actually were, as well as the process employed by defendant (which the latter offered to disclose, provided plaintiff would disclose its own), we should probably be satisfied to adopt the conclusions of the District Judge, with possibly some modification. But the printed record of the testimony of the witness referred to is not entirely convincing, and the sharp conflict over the nature and extent of plaintiff's secret formulas and processes, and their comparison with defendant's methods—taking into account defendant's previous nearness to success and the competency of its manager, Casey, and the formulas already possessed—made disclosure thereof necessary, in our opinion, to a satisfactory decision. Without it the decree rests, we think, too largely on conjecture. The practical identity of ultimate product is not alone highly significant, inasmuch as even chemical analysis would not disclose either the original physical form of the ingredients used or the processes employed. We may add that no Colorado clay was used at the Guernsey plant as an ingredient of porcelain or china; that in modern porcelain manufacture generally clay, feldspar (one of the silicates of aluminium), and flint (silica) seem to be used; that different clays have different physical properties, which naturally affect the chemical combination; that the method of combining ingredients used so as to produce a satisfactory "mix" is an important problem; and that without knowing the process actually used it is impossible to know definitely how far they involve secret knowledge or information, as distinguished from mechanical skill and experience, as respects not only the "mix" but the glazing and firing.

The practice of making such disclosure in camera is well established. Taylor Co. v. Nichols, 73 N. J. Eq. 684, 689, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753. And disclosure can usually be made under such regulations on the part of the trial judge as will furnish reasonably adequate protection against publicity. Du Pont Powder Co. v. Masland, 244 U. S. 100, 37 Sup. Ct. 575, 61 L. Ed. 1016. Judge Sater recognized that "it would have been better, had there been a voluntary or compulsory disclosure in camera of what each party claims as a trade secret." We do not criticize plaintiff's unwillingness to have its formulas disclosed. It may have good reason to prefer the risk to its business from nondisclosure to the risk from disclosure. We base our action on the proposition that failure to make disclosure naturally impairs the weight of the testimony of plaintiff's manager; and in the absence of disclosure, especially in view of the limited acquaintance of the witness with pottery manufacturing processes before Herold left plaintiff's employ, we think the decree should not stand, except in one respect hereafter stated. Taylor Co. v. Nichols, supra; Baglin v. Cusenier (C. C. A. 2), 164 Fed. 25, 29, 90 C. C. A. 499. And see Sterling Varnish Co. v. Macon, 217 Pa. 7, 9, 66 Atl. 78.

We realize, however, that if plaintiff's claims are correct the equities are with it, and we shall therefore couple our reversal with a discretionary authority to the District Judge to entertain a motion on plaintiff's part (if such shall be made) for further hearing and the in-

troduction of further testimony on both sides, provided the application is accompanied by express offer to make and permit full disclosure (of course, in camera) of its alleged secret formulas and processes. We make this proviso because we realize that plaintiff may see nothing to be gained, at this stage of the case, by such disclosure. Defendant having offered below to disclose its processes and formulas (in camera), if plaintiff would do the same, and having obtained a reversal of the decree for want of such disclosure, could not well be heard to withdraw its consent.

This disposition makes it unnecessary to consider criticisms upon specific features of the decree, such as the running of the injunction against the use of the Semmler formula, the disclosure or use (as construed by defendant) of Herold's mechanical skill and experience, or the failure to identify the processes and formulas enjoined. If no rehearing is had, they are not important; if had, the grounds of criticism may be removed.

The decree of the District Court is reversed, with costs, except so far as it enjoins the Guernsey Company from representing or advertising that it is making the same fireproof china cooking ware or fireproof china or porcelain laboratory ware as is made by plaintiff.

HOWARD v. LEETE et al.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1919.)

No. 3143.

1. APPEAL AND ERROR ⊜334(3)—WRIT OF ERROR TAKEN BY TRUSTEE—ABATEMENT BY DEATH.
   Writ of error taken out by plaintiff, "D. R. Howard, trustee," *held* not taken by him as sole trustee so as to have been abated by his death, and not to be revived in the name of his personal administrator.
2. JUDGMENT ⊜531—JUDGMENT AGAINST TRUSTEE—PERSONAL LIABILITY.
   Where the decree did not run against plaintiff trustee in a representative capacity, he being styled therein "D. R. Howard, trustee," prima facie indicating the word "trustee" was merely descriptive, while the order for execution was directed against "D. R. Howard, trustee," he was personally liable.
3. EQUITY ⊜39(4)—RELIEF—JUDGMENT ON NOTES SOUGHT TO BE CANCELED—JURISDICTION.
   In suit by trustee to cancel promissory notes given for coal-mining property, and for relief from liability thereon, the District Court had jurisdiction, on finding for defendant holders of the notes, to render judgment against plaintiff trustee on the holders' counterclaim on the notes, since equity will retain jurisdiction of subject-matter properly acquired to do complete justice, though it involves determination of legal rights.
4. COURTS ⊜311—FEDERAL COURT—DIVERSITY OF CITIZENSHIP.
   District Court sitting in Kentucky *held* vested with jurisdiction over plaintiff, a trustee, and a citizen and resident of Ohio, suing to cancel notes given for the purchase price of coal-mining property, on the cross-suit of defendants, the holders of such notes, residing in and citizens of Virginia, to recover thereon against plaintiff trustee.

5. COURTS ⇐332—POWER OF SUPREME COURT—GENERAL EQUITY RULE.
The Supreme Court of the United States has power to confer by general equity rule No. 30 (118 C. C. A. v, 201 Fed. v) a right to relief on counterclaim which the trial court has undoubted power to give on actual hearing, and which it is its settled practice to give without its being affirmatively asked for.

6. COURTS ⇐347—EQUITY RULE—COUNTERCLAIM—SUIT TO CANCEL NOTES.
In view of the policy disclosed by general equity rules Nos. 22, 23 (115 C. C. A. xxiv, 198 Fed. xxiv), under No. 30 (118 C. C. A. v, 201 Fed. v), as to counterclaims, the District Court had jurisdiction to entertain defendant holders' counterclaim on the notes sought to be canceled in suit by plaintiff trustee, the purchaser of mining property, to rescind the purchase and cancel the purchase-money notes.

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit in equity by D. R. Howard, trustee, against R. H. Leete, Gallie Friend, individually and as trustee, and others. From a decree for Gallie Friend, as trustee, against plaintiff, the latter appeals. Affirmed.

Frank W. Cottle, of Cincinnati, Ohio, for appellant.

John F. Hager, of Ashland, Ky., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. On September 26, 1914, appellant purchased from the Mary Luck Coal Company its coal mine and mining properties, real and personal, at the price of $31,500, for which he gave, to the order of the coal company, his 21 negotiable promissory notes, each for $1,500, with interest, to secure which a vendor's lien was retained in the deed of conveyance of the coal properties. The coal company was to pay all its debts existing as of October 1, 1914. By agreement between appellant and the other interested parties, at least 9 of the notes were delivered to Gallie Friend, as trustee, to secure payment of indebtedness of the coal company. The latter's stockholders were to receive nothing on account of any of the notes until the company's debts were paid. Later certain of the company's creditors took proceedings in a state court of Kentucky for the appointment of a receiver over the coal properties, and for their subjection to the payment of asserted indebtedness.

Thereupon appellant filed his bill in the court below, alleging his purchase of the properties, their conveyance to him, and his consequent possession of the same, and asserting that the receivership suit resulted from the refusal of Friend, trustee, to apply the 9 notes in question, or their proceeds, to the payment of the company's indebtedness, averring appellant's readiness and willingness to pay into court the remainder of the purchase price as it became due, and asking for decree requiring the defendants (all of the individuals being stockholders of the coal company) to interplead for the settlement of their conflicting claims to the purchase money represented by appellant's notes, and for restraint meanwhile of the receivership proceeding.

Gallie Friend, individually and as trustee, and one other stockholder, answered, admitting the purchase by appellant on the terms stated, the conveyance to him of the coal properties, his possession thereunder, the coal company's agreement to pay its debts existing as of October 1, 1914, and the delivery to Friend, trustee, of the nine notes to secure such payment, but denying that the receivership proceedings were instituted on account of debts which it was the duty of the coal company to pay, or by reason of any failure of Friend, trustee, to perform his obligations, and asserting that appellant had already defaulted in the payment of about $6,000 of notes so far matured, and was attempting to induce the discounting of his notes at about 50 per cent. of their face value.

By counterclaim it was asked that appellant be required to pay into the court's registry the amount of his matured notes, that his bill be thereupon dismissed, and in default of such payment, or of payment of his notes subsequently maturing, that judgment be entered in the trustee's favor, and for disclosure by appellant of the names of those beneficially interested in his trust. The counterclaim also asked that the coal company's indebtedness be held to be in the amount asserted by defendants, unless appellant put such question in issue. Upon the maturing of further notes, an amended answer and counterclaim of the same nature were filed as to them. This counterclaim was followed by motion for judgment thereon. Appellant's motion to strike out the answers and counterclaims was denied. The other defendants seem not to have answered.

A few days after the filing of this bill, suit by another creditor was brought against the coal company in the Kentucky state court. As the result of these two creditors' suits (both for royalties under leases), the coal properties in question passed into the hands of a receiver appointed by that court on February 25, 1915, about a month after the filing of appellant's bill below. On June 13th following, appellant made and had recorded a deed of reconveyance of the coal properties from himself to the coal company. The coal properties were sold under the state court receivership proceedings to satisfy judgments against the coal company in the two cases named, at an unnamed date between July 13, 1915, and May 20, 1916, at which date appellant filed in the court below a new bill, in declared nature supplemental to the original bill, averring the receivership proceedings just mentioned, the possession of the coal properties thereunder and the making and recording of the reconveyance referred to; and asking that the contract of purchase and sale of the coal properties be canceled and that the 19 unpaid notes (2 notes had been paid) be delivered into court, canceled, and destroyed, upon grounds which, so far as material, we summarize as follows:

First, that appellant was induced to take the conveyance of the coal properties by certain material misrepresentations as to their character, quantity, and value, made by the defendant B. P. Friend, the secretary and former manager of the coal company, while acting, as alleged, for the coal company and under authority from the other defendants to negotiate the sale on their behalf; that by the agreement with said Friend appellant was to and did hold the legal title to such property as

trustee, and as such was to convey the same under such terms and conditions, at such price above $31,500, and to such persons or corporation, as Friend should direct; appellant to pay to Friend, or under his direction, the proceeds of such resale, less expenses of operation, the balance, if any, due on the notes (which he alleged were made by him as such trustee), and reasonable compensation to appellant for his services as trustee; second, the company's agreement to pay all its debts existing on October 1, 1914, and representation by defendants Gallie Friend and another stockholder that such debts were small; third, the transfer and indorsement to Gallie Friend, trustee, for the purpose before stated, of appellant's 21 notes, in accordance with resolution of the company's directors; fourth, the carrying on of the business of the coal company after October 1, 1914, in the company's name and under the direction and management of B. P. Friend, and the payment from the proceeds of operation of the first two maturing of appellant's notes; and, fifth, the sale of the coal properties for liabilities of the company existing October 1, 1914.

The contract of purchase and sale was alleged to be broken by defendants' breach of their agreement to pay all liabilities of the company existing on or before October 1, 1914, and of their covenant to deliver possession of the properties free from liens or obligations of the company as of that date.

The defendants, other than B. P. Friend, answered, fully controverting all equities and merits alleged in the bill; denying generally and specifically all fraud and misrepresentation charged on their part, or that of the coal company, or on the part of B. P. Friend, so far as they had information and belief, specifically denying that the latter represented the company or its stockholders, other than himself, in the negotiations for the sale of the property, or that he made any misrepresentations while acting in such representative capacity; denying all knowledge and information of the alleged agreement relative to the nature of plaintiff's holding of the properties, and his agreement to sell and convey as directed by B. P. Friend, or of any agreement not embraced in the coal company's deed of conveyance to plaintiff; alleging unsuccessful attempts to induce plaintiff to pay his notes; denying any right on his part to rescind the contract of purchase; alleging that the execution sale was due entirely to his own fault, in his deliberate election not to pay royalties after October 1st. Defendants also asserted that plaintiff, in his holding of the properties, was a mere dummy for certain others, not parties to the suit, who were alleged to have full knowledge of all the existing facts and equities. There was prayer for affirmative relief substantially as contained in the answer and counterclaim to plaintiff's original bill.

Plaintiff's renewed motion to strike out the counterclaims was denied. His motion to dismiss his own bill without prejudice was granted, but without prejudice to the maintaining of the counterclaims. Plaintiff having failed to deny or reply to the answers and counterclaims, and it appearing that plaintiff had not paid the 19 notes in question, in whole or in part, there was interlocutory decree fixing the amount due thereon, with award of personal judgment in defendants'

favor, unless plaintiff should pay the amount into the registry of the court within a specified period. Plaintiff having failed to make payment, judgment was entered in favor of Gallie Friend, as trustee, against the plaintiff, for the amount so due and unpaid on the notes in question.

[1, 2] 1. The motion of appellees to dismiss the writ of error (which, under the act of September 6, 1916, we treat as an appeal), on the ground that it was taken by "D. R. Howard, as sole trustee," and so was abated by his death, and cannot be revived in the name of his personal administrator, must be denied. The notes were signed by "D. R. Howard, trustee," and the conveyance apparently ran to appellant under that designation, and without disclosure of his principal, if any. The decree below did not run against appellant in a representative capacity. He is styled therein "D. R. Howard, trustee," which prima facie indicates that the word "trustee' is merely descriptive. Moreover, the order for execution, while in favor of Gallie Friend "*as* trustee," is directed against "D. R. Howard, trustee," and the execution itself demands the collection of the judgment "from the estate of D. R. Howard, trustee," who was then still living. Under the applicable law appellant was personally liable upon the judgment. See Carroll's Ky. Stat. 1915, vol. 3, § 3720b, subsec. 20; Riordan v. Thornsbury, 178 Ky. 324, 198 S. W. 920; Taylor v. Davis, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163. The writ of error was taken out by "D. R. Howard, trustee," and the suit was thus properly revived in the name of his personal representative.

[3] 2. Appellant denies the jurisdiction of the District Court to render judgment against him upon the counterclaim, because (a) defendants' cause of action was not the subject of counterclaim, and (b) the court below, sitting in Kentucky, had no jurisdiction over appellant, a citizen and resident of Ohio, at the suit of appellees, residing in and citizens of Virginia.

We see no merit in this contention. We assume, for the purposes of this case, that such judgment could not be rendered in a purely interpleader suit, where the plaintiff was merely seeking to pay a fund into court and to compel claimants thereto to litigate as between themselves a controversy with which he had no concern. Wakeman v. Kingsland, 46 N. J. Eq. 113, 18 Atl. 680. In such case the sole primary issue would be whether plaintiff was entitled to a decree that defendants interplead. If so, he would step out; if not, his bill would be dismissed. But such was not the situation at least under the new bill, which we identify as "supplemental," and by which, on a complete change of front, appellant sought cancellation of his notes and relief from all liability thereon. The sole ultimate issue, then, was whether or not he was bound to pay his notes. If so, it logically followed that their holders were entitled in some proceeding to enforce their payment. Long before the adoption of general equity rule No. 30 (201 Fed. v, 118 C. C. A. v), it was the established rule that a court of equity, which has properly acquired jurisdiction of the subject-matter for a necessary purpose, ordinarily should, for the purpose of putting an end to litigation, proceed to do final and complete justice between the parties,

even though this required it to determine purely legal rights that otherwise would not be within the range of its authority—provided such relief could as well be given there as by a proceeding at law. Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 404, 13 L. Ed. 187; Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298; Camp v. Boyd, 229 U. S. 530, 552, 33 Sup. Ct. 785, 57 L. Ed. 1317; Springfield Co. v. Barnard Co. (C. C. A. 8) 81 Fed. 261, 263–265, 26 C. C. A. 389.

The principles declared in these cases apply to the case before us. In Tayloe v. Insurance Co., under a bill in equity involving the establishment of a contract of fire insurance, the plaintiff was awarded recovery for the fire loss occurring after the contract was found to have been completed. Eames v. Insurance Co. is of a similar nature. In Camp v. Boyd, where suit was brought to restrain an ejectment suit, it was said (229 U. S. 551, 33 Sup. Ct. 793, 57 L. Ed. 1317) that the appellees therein, if driven to invoke the aid of equity because they had an equitable and not a legal title to two of the three parcels involved, "were fairly entitled to bring the entire controversy into the court of equity, so that it might be adjudicated in a single suit." Neither of these cases involved the question of counterclaim. In Springfield Co. v. Barnard Co. the defendant to a bill for the foreclosure of a mechanic's lien was held entitled to maintain cross-bill for damages to its mill, which ordinarily would be the subject of an action at law. Further illustrations of the general rule are found in Pease v. Rathbun-Jones Co., 243 U. S. 273, 279, 37 Sup. Ct. 283, 61 L. Ed. 715, Ann. Cas. 1918C, 1147, and Cincinnati, etc., Traction Co. v. Amer. Bridge Co. (C. C. A. 6) 202 Fed. 184, 186, 120 C. C. A. 398.

Insurance Co. v. Dick, 117 Mich. 518, 76 N. W. 9, 44 L. R. A. 846, and New Era Association v. MacTavish, 133 Mich. 68, 94 N. W. 599, are directly in point upon the broad principle that a court of equity has power to decree payment of a debt under circumstances involved here. In those cases the insurers filed bills in equity to cancel policies of life insurance for alleged fraud in their procurement, and to restrain actions at law thereon. Defendants, by answer, asked judgment upon the policies under a state practice which permitted a defendant to claim by answer the benefit of cross-bill whenever, by established chancery practice, a cross-bill would lie; the usual equity practice otherwise prevailing and the distinction between law and equity being sharply defined. Fraud not being established, the defendants had decrees for the amounts of the policies apparently as matter of course, and doubtless by the simple application of the rule that a court of equity "will not do justice by halves." In the instant case there is no room for doubt that, had the case gone to final hearing upon the supplemental bill, and had the court then held that appellant was not entitled to rescind or to have his notes canceled, it could and should have rendered judgment for repayment to parties before the court shown to be entitled thereto. Under such circumstances, to have remitted the defendants to another suit would have been an idle ceremony.

[4] That the court had jurisdiction over the parties is equally plain. It is a mistake to say that this jurisdiction was acquired merely because the original action was local. Embracing, as it did, the right to rescind

a purchase of real estate, the action was, even under the supplemental bill, a local action in a proper enough sense, whether or not the second bill was rightly labeled "supplemental." But there was all the time diversity of citizenship of the parties, and appellant could not be allowed to question a jurisdiction he had himself invoked. His inability to get the counterclaim to the original bill of interpleader dismissed did not alter the situation. The difficulty was that by that time he wished other and wholy inconsistent relief. The fact that he was not a resident of Kentucky, thus making suit at law against him in that state difficult, if not impracticable, would have furnished additional reason for the exercise of complete jurisdiction in the equity suit. Caflisch v. Humble (C. C. A. 6), 251 Fed. 1, 5, 163 C. C. A. 251. And see Springfield Co. v. Barnard Co., supra, 81 Fed. at pages 264 and 265, 26 C. C. A. 389.

[5, 6] Is the situation altered by the fact that plaintiff did not go to hearing on his bill? General equity rule No. 30 expressly provides that:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit on both the original and cross claims."

The second clause of this paragraph, which permits the pleading of "any set-off or counterclaim * * * which might be the subject of an independent suit in equity, * * *" has been the subject of differing constructions. But we are not concerned with this clause, for the appellees' demand for judgment against appellant on the notes is based upon the first clause. The term "counterclaim," as there used, is broad enough to embrace any counterdemand; that is to say, any demand directly opposed to plaintiff's demand. As used in the first clause, such "counterclaim" is not required to be capable of being "the subject of an independent suit in equity," but only that it be one "arising out of the transaction which is the subject-matter of the suit." To our minds there can be no doubt of the power of the Supreme Court to confer upon a defendant, by general rule, a right to relief which the court has undoubted power to give on actual hearing, and which, indeed, it is its settled practice to give without its being affirmatively asked for. See Boothe v. Armstrong, 76 Conn. 530, 57 Atl. 173.

Nothing could be more directly opposed to plaintiff's demand for the cancellation of his notes than defendants' demand for judgment thereon. That the latter demand arose "out of the transaction which is the subject-matter of the suit" needs no argument; and, as already said, ultimate judgment on the notes was the natural and logical outcome of a refusal to cancel them. A construction of the first clause as relating only to demands "which might be the subject of an independent suit in equity" cannot be accepted. To do so would not only require the interpolation bodily of a clause in terms made applicable only

to the second branch of the rule, but would ignore the existing equity practice. The object of the rule was to simplify and extend, not to curtail, an existing practice designed to prevent multiplicity of suits.

The cases of Caflisch v. Humble, supra, and Knupp v. Bell (C. C. A. 4) 243 Fed. 157, 156 C. C. A. 23, are in point. In the Caflisch Case we held that the defendant's claim for damages for breach of a contract of purchase and sale of lumber, on account of which plaintiff was seeking to establish an equitable lien, was a counterclaim arising out of the transaction which was the subject-matter of the suit, and, indeed, one which the defendant was obliged to set up or waive. True, such demand for damages might be said to be germane to the accounting and so of an equitable nature, but the decision invoked the proposition that, "whenever practicable to do so, a court of justice should do justice completely and not by halves." Knupp v. Bell, however, is on all fours with the instant case. There, in a suit to rescind a contract for the purchase of land, judgment for defendants (the vendors) for the amount of the purchase-money notes (on denial of relief to plaintiff) was affirmed, as on a "counterclaim arising out of the transaction which is the subject-matter of the suit"; doubt being also expressed whether defendants would not have waived such right of recovery, had it not been set up in the answer.

In the instant case we are not called upon to decide whether, in view of the word "must" in the first clause, as distinguished from the word "may" in the second clause, appellees by failing to ask judgment on the notes would have lost the right to sue upon them elsewhere, after a decision in the equity suit denying appellant any relief; for it is clear that the words "and such * * * counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims," apply to "any counterclaim arising out of the transaction which is the subject-matter of the suit"; and we think that to deny to appellees at least the absolute right to present in the equity suit their claim to affirmative relief would violate the spirit and intent of the rule, construed in the light of the policy disclosed by rules 22 and 23 (198 Fed. xxiv, 115 C. C. A. xxiv), as well as by recent legislation designed to simplify practice.

It is not, and could not well be, urged that if appellees were entitled to make the counterclaim there was lack of jurisdiction to render judgment against appellant in some amount. There was thus no error in refusing to dismiss the counterclaim to the second bill, and, as the case finally shaped itself, there was no reversible error, to say the least, in the like refusal as to the first bill.

3. The criticism that it does not appear that Gallie Friend, as trustee, owned or held more than 9 of plaintiff's notes is not, to our minds, well taken. The supplemental bill alleges, not only that by the terms of the contract all of the 21 notes *were to be* transferred to Friend as trustee for the stockholders, but that upon the delivery of the conveyance to appellant, on his execution of the 21 notes, "that same and all of them *were* duly indorsed and received by Gallie Friend as trustee, as aforesaid, to hold same in accordance with the resolutions above

referred to." We find nothing in the answers which we think necessarily inconsistent with this allegation, so far as it concerns the right of Friend, *as trustee,* to be awarded recovery on the notes.

The decree of the District Court should be affirmed, with costs to appellees. But, while we see no reason to apprehend danger that appellant's estate will be twice subjected to double liability on any of the notes, yet, to eliminate possibility thereof, the affirmance will be with the proviso that the District Court take such action, by amendment of its decree or otherwise, as that the moneys paid or collected by virtue of the decree be paid into court, and thereafter paid out only to the extent that appellant's notes for which recovery has been had are duly surrendered to the registrar of the court, for delivery to appellant's representative or representatives, provided such action is not forbidden or made unnecessary by a state practice requiring the actual filing of the notes before judgment, as basis thereof, and an effective cancellation resulting from their merger in the judgment.

CASCADEN v. BELL.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3226.

1. PLEADING ⟸367(2)—COMPLAINT—MOTION TO MAKE MORE DEFINITE.
   Where the matters involved were within defendant's knowledge, and after the opening statement of counsel defendant was granted a continuance, on the ground that matter had been brought out which was not anticipated, the denial of defendant's motion for plaintiff to make the complaint more definite and certain *held* not an abuse of discretion.
2. PLEADING ⟸367(6)—COMPLAINT—MOTION TO MAKE MORE DEFINITE AND CERTAIN.
   A motion to require plaintiff to make his complaint more definite and certain is addressed to the court's sound discretion.
3. FRAUDS, STATUTE OF ⟸49—AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR.
   Defendant's agreement that, if plaintiff would reduce the price of a mining claim in favor of the holder of an option to purchase, defendant would pay to plaintiff the amount of the reduction, as soon as the holder of the option paid a debt due to defendant, though oral, was not within the statute of frauds, as one not to be performed within a year, as payment might be made immediately.
4. FRAUDS, STATUTE OF ⟸33(2)—PROMISE TO ANSWER FOR DEBT OF ANOTHER.
   Where defendant, to protect his interest in a mining claim from relocation by the holder of an option to purchase plaintiff's claim, agreed that, if plaintiff would reduce the price, he would make up the same, such agreement, though oral, was not within the statute of frauds, for, whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary purpose of his own, the promise, though it may be in form a promise to pay the debt of another, is not within the statute.
5. EVIDENCE ⟸419(1), 461(1)—PAROL EVIDENCE RULE—RECEIPTS—CONSIDERATION—INTENT.
   Although plaintiff executed a receipt reciting payment of part of the consideration by the holder of an option to purchase a mining claim, parol

evidence is admissible to show that the consideration named was not paid, but that he received a note or assignment from defendant and his oral promise to pay balance, and that the intention was to reduce the sum payable under the option.

6. APPEAL AND ERROR ⇐1054(1)—REVIEW—REVERSAL.

Where a case is tried by the court without a jury, the improper admission of evidence is no ground for reversal, where there was other evidence in the record sufficient to sustain the court's finding.

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge.

Action by Albert Bell against D. H. Cascaden. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff, Bell, in an action to recover money from the defendant, Cascaden, set forth sufficient of the facts which were found by the court below to constitute a cause of action, but erroneously alleged that the payment received by him from the defendant was $500, instead of $1,000, and he demanded judgment for $4,500. A jury trial was waived, and the cause was tried before the court. As found by the trial court the facts are these:

On November 30, 1914, Cascaden and Sherry located the Leitrim association placer mining claim, under an agreement whereby Bell owned an equal interest with Cascaden and O'Connor owned an equal interest with Sherry. On December 16, 1914, Bell entered into a prospecting agreement with Cascaden for a period of one year, under which all properties acquired during that period were to be owned jointly by them. Thereafter, while that agreement was in effect, Bell, with the consent of Cascaden, staked the Totem fraction off the lower end of the Leitrim claim, they believing that the Leitrim claim contained an area in excess of 40 acres, and they became joint owners of said Totem fraction. Thereafter, on March 14, 1915, Bell entered into a written agreement with McCarty, whereby he granted to McCarty the exclusive right to purchase all his right, title, and interest in and to certain placer mining claims, including the one-half interest in the Totem, for the sum of $10,000, $200 of which was paid at that time, and the remainder was to be paid on or about October 1, 1916, and Bell attempted to include in that agreement an undivided one-fourth interest in the Leitrim claim, claiming to be the owner thereof, and Cascaden acknowledged to McCarty that Bell was entitled to a one-fourth interest in that claim, and that he would try to get it from Sherry, in whose name one-half interest of the claim then stood, and told McCarty that, if he did not get said one-fourth interest from Sherry, he (Cascaden) would make it good to him. After staking the Totem fraction, Bell failed to do the development work thereon, and, after the expiration of 90 days from the staking of the Totem, McCarty restaked it, retaining the name thereof, and thereafter performed the development work thereon as required by law. Bell and Cascaden attempted to do the development work on the Leitrim claim, but by a mistake did the work on an adjacent prior claim, which overlapped a portion of the Leitrim.

After the relocation of the Totem, McCarty relocated the remainder of the Leitrim claim. Thereafter O'Connor ascertained that the Totem fraction had been located off the lower end of the Leitrim, and that the Leitrim claim as originally staked did not contain an excess of 40 acres, and he protested to McCarty against the restaking of both claims. McCarty refused to surrender his rights unless the option price set forth by Bell in his agreement with him be reduced by $5,000. O'Connor communicated this to Cascaden. Immediately thereafter Cascaden told Bell of the relocation of the Leitrim claim by McCarty, and the protest made by O'Connor against the restaking of the Totem fraction, and told Bell that the only way in which the Leitrim could be saved would be for Bell to reduce his option price in his agreement with McCarty by $5,000, and also said that McCarty owed him (Cascaden) a large sum of money, in excess of $11,000, and that, if Bell would reduce his option price to McCarty by the sum of $5,000, he would pay

Bell the sum of $5,000, that he would give him an order for $1,000, payable from the output of the Leitrim claim, and would pay him the remaining $4,000 as soon as he collected said money from McCarty, which would be paid by McCarty not later than the summer of 1916. In consideration of that promise Bell agreed to reduce by $5,000 the amount McCarty would be required to pay him under the option agreement, and Bell, in fulfillment of his agreement with Cascaden, on or about May 15, 1915, delivered to McCarty a formal receipt and release for the sum of $5,000, reciting that he had received said sum from McCarty; but no money was paid to him at that time, and said receipt was given for the purpose of releasing McCarty from obligation to pay Bell $5,000, and for no other reason.

Immediately after the delivery of the receipt to McCarty, and in fulfillment of his agreement with O'Connor, McCarty removed from the Leitrim claim the stakes of the Totem fraction, surrendered to Cascaden and his co-owners possession of the ground covered by the Totem, and abandoned all claim to any part of the Leitrim as originally staked. On or about May 17, 1917, Cascaden and O'Connor delivered to Bell an order for $1,000, payable out of the gold extracted from the Leitrim claim, and on May 26th following the assignment was typewritten in a more formal manner than the order, and was signed by Cascaden and Sherry, through his attorney in fact, and was accepted by Bell for the sum of $1,000 in part payment of the $5,000 to be paid by Cascaden to him. Thereafter Cascaden received payments from McCarty from time to time on account of the latter's indebtedness to him, and by the expiration of the summer of 1916 the indebtedness was fully paid.

Upon these findings the court found as conclusion of law that the plaintiff was entitled to a judgment against the defendant for the sum of $4,000, with interest from October 1, 1916, and costs.

Morton E. Stevens and A. R. Heilig, both of Fairbanks, Alaska, and Thomas R. White, of San Francisco, Cal., for plaintiff in error.

McGowan & Clark and Leroy Tozier, all of Fairbanks, Alaska (De Journel & De Journel, of San Francisco, Cal., of counsel), for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] In the complaint it was alleged that certain difficulties arose between McCarty and the defendant, and that for the purpose of settling and adjusting said difficulties the defendant applied to the plaintiff for the reduction of the option price in the plaintiff's agreement with McCarty by the sum of $5,000. The defendant moved that the plaintiff be required to make his complaint more definite and certain, and to set forth the nature of the difficulties between defendant and McCarty. The motion was denied, and that ruling is assigned as error. It is not shown, nor can it be deduced from anything in the record, that the denial of the motion prejudiced the defendant in any way. The difficulties which he had with McCarty were within his own knowledge, and it is not shown that he was taken by surprise by the evidence which was adduced. After the opening statements of counsel for the plaintiff, the defendant asked for a continuance on the ground that matter had been brought out that had not been anticipated, and he was granted a continuance for the time he asked for. The motion was addressed to the sound discretion of the court below, and it is clear that there was no abuse of discretion. 31 Cyc. 645; Cathcart v. Peck, 11 Minn. 45 (Gil. 24); City of Lawton v. Hills, 53 Okl. 243, 156 Pac. 297.

[3] It is contended that the defendant's promise to the plaintiff was void under the statute of frauds of Alaska. Comp. Laws 1913, §§ 1875–1880. That statute makes void an agreement, unless the same or some note or memorandum thereof expressing the consideration be in writing and subscribed by the party to be charged, or his lawfully authorized agent:

"(1) An agreement that by its terms is not to be performed within a year from the making thereof; (2) an agreement to answer for the debt, default, or miscarriage of another." Section 1876.

This case comes within neither of those provisions. In the first place, the agreement was not one which by its terms was not to be performed within a year from the making thereof. No time was specified for the payment of the balance of $4,000. It was to be paid as soon as McCarty paid the defendant what he owed him. McCarty then owed the money and he might have paid it at any time when he chose to do so. This clause of the statute has been construed in many decisions. It is sufficient to refer to McPherson v. Cox, 96 U. S. 404, 416, 24 L. Ed. 746; Walker v. Johnson, 96 U. S. 424, 427, 24 L. Ed. 834, and Warner v. Texas & Pac. Ry., 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495, in all of which cases it is held that the statute applies only to contracts which by their terms are not to be performed within a year, and not to contracts which may or may not be performed within that time.

[4] In the second place, the defendant's agreement was not to answer for the debt, default, or miscarriage of another. On the receipt of the defendant's promise, the plaintiff reduced his demand against McCarty by $5,000, a demand which was evidenced by an instrument in writing, and in lieu thereof accepted the defendant's oral promise as to $4,000 of that sum. The defendant made the promise, not for the purpose of answering for McCarty's debt, but to subserve his own interests. In Emerson v. Slater, 22 How. 28, 43 (16 L. Ed. 360), the court said:

"Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

To the same effect is Davis v. Patrick, 141 U. S. 479, 488, 12 Sup. Ct. 58, 35 L. Ed. 826.

[5] Numerous assignments of error are directed to the rulings on the introduction of testimony. In none of them do we find merit. One error assigned and principally relied upon is that parol testimony was admitted to contradict the terms of the written instrument executed and delivered by the plaintiff to McCarty of date May 15, 1915, reciting the disputes that had arisen concerning the Totem fraction and the Leitrim claim, and the desire of the parties to compromise, and continuing:

"Now, therefore, witnesseth: That whereas, Albert Bell would receive $10,000 for the property involved, and in compromise of said controversy the parties hereto agree that said Albert Bell hereby acknowledges the receipt of $5,000 in hand paid as part payment of said option, and is willing to take $5,000 at the expiration of said option as payment in full."

The plaintiff was permitted to testify, over the objection of the defendant, that he did not receive $5,000 at that time, that the intention of the instrument was to reduce the sum payable under the option, and that what he did receive was a note or assignment from the defendant for $1,000, payable out of the output of the Leitrim claim, and the defendant's oral promise to pay him $4,000. The effect of the testimony was but to explain the nature of the transaction as between the plaintiff and McCarty, and it was permissible. 17 Cyc. 629. McCarty corroborated the plaintiff's testimony. It would serve no useful purpose to review further the exceptions taken to the introduction of testimony.

[6] The case having been tried by the court without a jury, the improper admission of evidence, if any such was admitted, is not ground for reversal, where, as here, there is other evidence in the record sufficient to sustain the findings of the court. Streeter v. Sanitary Dist. of Chicago, 133 Fed. 124, 66 C. C. A. 190; West v. East Coast Cedar Co., 113 Fed. 737, 51 C. C. A. 411; Oates v. United States, 233 Fed. 201, 205, 147 C. C. A. 207. We find in this case ample evidence to sustain all the findings. The court below was called upon to ascertain the truth from the conflicting testimony of the plaintiff and the defendant. The plaintiff's testimony is largely corroborated by that of the other parties who were interested in the transactions referred to in the findings.

We find no error. The judgment is affirmed.

CASCADEN v. O'CONNOR.

(Circuit Court of Appeals, Ninth Circuit. May 5, 1919.)

No. 3227.

1. TRUSTS ⟸110—CONSTRUCTIVE TRUSTS—EVIDENCE.
   Where complainant and defendant started out on a joint adventure for the location of mining claims, and together located and staked a claim in the name of both, and thereafter discovery was made, but before discovery defendant erased complainant's name from the claim and substituted the name of another, the rule that, in order to establish a constructive trust by parol evidence as against the holder of the legal title, the proof must be clear, definite, and satisfactory, does not apply, for complainant's rights do not rest alone upon evidence of a parol agreement, but upon joint acts of the parties, etc.
2. JOINT ADVENTURES ⟸4(1)—RIGHTS OF PARTIES.
   Where complainant and defendant, joint adventurers, located a mining claim, and defendant, after erasing the name of complainant and substituting that of another, who disposed of a one-fourth interest to a bona fide purchaser, made discovery, *held* that, as the discovery by defendant inured to the benefit of both parties, and defendant's act alone made

possible the conveyance of a one-fourth interest, complainant is entitled to recover a half-interest in the claim.

3. APPEAL AND ERROR ⇐1047(1)—REVIEW—RULINGS ON EVIDENCE.

Where rulings on the admissibility of evidence would not have affected the decree, which was based solely on a question of veracity of two witnesses, such rulings will not be reviewed on appeal.

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

Suit by Pat O'Connor against David H. Cascaden. From a decree for complainant, defendant appeals. Affirmed.

The appellee brought a suit against the appellant to recover an undivided one-half interest in and to the Gold Dollar association placer claim, alleging that on November 30, 1914, the appellant and the appellee located said claim as joint owners thereof, and that thereafter the appellant wrongfully and unlawfully erased the appellee's name from the monuments and stakes on the ground, and inserted thereon the name of another as joint locator with the appellant. The facts as found by the court below are in substance the following:

On November 30, 1914, the appellant and the appellee located the Gold Dollar association placer mining claim, and the location was witnessed by Albert Bell and J. J. Sherry. Thereafter the development work required by law was done on said claims for the joint use of the locators. At some time between the date of the location and February 14, 1915, the appellant wrongfully and unlawfully erased the name of the appellee as one of the locators and substituted therefor the name of Albert Bell. On February 20, 1915, notice of location of the claim was filed in the office of the recorder for the precinct in which the property was situated, in which notice the appellant and Bell were named as the locators of the claim, which notice was prepared by the appellant, and by him caused to be recorded. On or about December 16, 1914, the appellant and Bell entered into an agreement, whereby the latter, in consideration of the cancellation of certain indebtedness due from him and other considerations, covenanted and agreed to deed to the appellant an undivided one-half interest in all his property interests then acquired or to be acquired during the life of the agreement in the "Tolovana country," in which country was the property in controversy here. On or about May 21, 1915, to carry out that agreement, the appellant caused Bell to deed to him undivided interests in and to the properties referred to in the agreement, in which was included a one-fourth interest in the Gold Dollar claim. Thereafter Bell transferred to one McCarty the remaining one-fourth interest in the Gold Dollar, and McCarty was an innocent purchaser for value, and without knowledge of the change made of the locators of the claim.

As conclusions of law the court found that the appellee was entitled to receive from the appellant a deed to an undivided one-half interest in the Gold Dollar placer claim, and to an accounting for the gold extracted therefrom. The accounting was had, and final judgment was entered that the appellant pay the appellee $9,524.15, net proceeds of the undivided one-half of that claim.

The answer of the appellant denied that the Gold Dollar claim was located by him and the appellee, and alleged that the same was located by the appellant and Bell, and that the name of the appellee was never written and never appeared on the monuments of the claim. For an affirmative defense, the appellant alleged that in the month of November, 1914, the appellee went into the Tolovana country, the value of which for mining purposes was then unknown, and acquired certain rights in certain claims there which were of little value, as no discovery of gold had been made thereon, and thereafter, in January, 1915, he declared to the appellant that he had not returned to the Tolovana country, and he did not intend to return thereto or protect any interest therein; that he then and there abandoned whatever mining interest he may have had in that country, and he did not return thereto until May,

1915; and that by reason of his abandonment thereof none of the mining claims attempted to be located by the appellee in the Tolovana country ever became valid mining claims.

Morton E. Stevens, of Fairbanks, Alaska, and Thomas R. White, of San Francisco, Cal., for appellant.

Leroy Tozier and McGowan & Clark, all of Fairbanks, Alaska (De Journel & De Journel, of San Francisco, Cal., of counsel), for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant points to the language of the opinion of the court below, in which it was said that the facts set forth in the complaint were proved "by a fair preponderance of the evidence," and invokes the rule that, in order to establish a constructive trust by parol evidence as against the holder of the legal title, the proof must be clear, definite, unequivocal, and satisfactory. 39 Cyc. 192. We think it should not be held that the expression quoted from the opinion of the trial court indicated that the proof was not of that satisfactory and convincing kind required to sustain a decree in such a case as this. This is not a case in which the legal title stood in the name of the defendant at the time of the initiation of the plaintiff's rights. Here, according to the evidence, the appellant and the appellee started out on a joint venture, traveled and camped together, and, as the court below found, together located and staked the claim in the name of both. There was testimony, which the trial court credited, that they made an agreement, upon which the appellee relied, that the appellant was to complete the location for their joint benefit. Each thereafter made discovery on the claim, but before discovery the appellant, unknown to the appellee, had erased the appellee's name from the claim and substituted the name of another. The rights of the appellee here do not rest alone upon evidence of a parol agreement with the appellant. They rest also upon proof of the joint acts of the parties, whereby the original rights were acquired. As to those acts the testimony of the parties is in direct conflict. The court below rejected that of the appellant and credited that of the appellee. We have no warrant for saying that the court did not find the evidence "clear," "definite," and "unequivocal," and it is clear that the court found it "satisfactory." In Schwartz v. Gerhardt, 44 Or. 425, 75 Pac. 698, the court said that the evidence to establish a constructive trust must be clear and cogent, and such as to satisfy the mind fully. In the present case the court in the opinion said:

"To believe the testimony of the plaintiff is to believe what is reasonable, logical, and probable. It is consistent with what the average prospectors would do under the same circumstances. The plaintiff is also entitled to that full measure of consideration which, since the establishment of courts, has been accorded to the witness who, by his demeanor and manner of giving his testimony, convinces the court of the truthfulness of his statements."

[2] The appellant contends that, inasmuch as the location made on November 30, 1914, was unaccompanied by discovery, and the

possession was abandoned by the locators, he had the right thereafter to enter upon the ground, and make a new location, and change the name of one of the locators, and that, in any view of the case, the most that a court of equity could award to the appellee would be the one-fourth interest which inured to the appellant by the substitution of Bell's name for O'Connor's, in accordance with the appellant"s general agreement with Bell, by which they were to share equally in all locations made in the name of either. This contention ignores the essential facts upon which the appellant's rights are founded. The appellant and the appellee, as we have found, were engaged in a joint venture, and a fiduciary relation existed between them. The appellant, according to the appellee's testimony, and as the court below found, had agreed to look after the interests of the appellee in this particular mining claim. When the appellant made discovery on the claim, it resulted in validating the location for the benefit of both locators. If the appellant caused the alienation of a one-fourth interest in the claim to an innocent purchaser, so that the same may not be recovcovered, it must be held that he thereby deprived himself, and not the appellee, of a one-fourth interest, and that the appellee was entitled to an undivided one-half interest in the claim, he not having parted with any portion of his interest, and not having been a party to the transaction by which a one-fourth interest was conveyed away.

[3] Other assignments of error present the rulings of the court below on the admission and exclusion of evidence, and refusal to find as requested by the appellant. We find no error in any of them. It is not necessary to review them, for the reason that the court below found on the conflicting testimony that the appellant wrongfully erased the appellee's name as one of the locators and substituted the name of Bell. On that question of fact the whole merits of the controversy rested. It was a question of veracity. The court believed the appellee and his witnesses, and the conclusion reached could not have been affected by any different rulings on the admissibility of evidence. Mining Co. v. Taylor, 100 U. S. 37, 25 L. Ed. 541; Engelstad v. Dufresne, 116 Fed. 582, 54 C. C. A. 38.

We find no error. The decree is affirmed.

PUBLIC SERVICE ELECTRIC CO. v. POST.

(Circuit Court of Appeals, Third Circuit. May 2, 1919.)

No. 2423.

1. DEATH ⇐31(1)—ACTION FOR WRONGFUL DEATH—WHO MAY MAINTAIN.
   Since a right of action for wrongful death is wholly statutory, only the person designated by the statute may maintain an action thereunder.
2. DEATH ⇐9—ACTION FOR WRONGFUL DEATH—WHO MAY MAINTAIN—AMENDMENT OF STATUTE.
   Act March 27, 1917, N. J. (P. L. N. J. p. 531), supplementary to the Death Act, but which makes no change therein, except by providing that actions thereunder shall be brought by an administrator ad prosequendum,

affects the procedure only, and applies to an action brought after its passage for a death which occurred prior thereto.

3. DEATH ⊂⇒31(4)—ACTION FOR WRONGFUL DEATH—QUALIFICATION OF PLAINTIFF UNDER NEW JERSEY STATUTE.

An administrator with limited letters, appointed under Code Civ. Proc. N. Y. § 2559, to prosecute a right of action, has the same or equivalent powers as an administrator ad prosequendum, appointed under the New Jersey Death Act, as amended by Act March 27, 1917 (P. L. N. J. p. 531), to bring an action thereunder.

4. EXECUTORS AND ADMINISTRATORS ⊂⇒22(2)—APPOINTMENT TO BRING SUIT—NEW YORK STATUTE.

Code Civ. Proc. N. Y. § 2559 et seq., authorizing appointment of an administrator with limited letters, "where a right of action is granted to an executor or administrator by special provision of law," is not limited to cases where the right of action is given by the law of New York.

5. DEATH ⊂⇒31(4)—ACTION FOR WRONGFUL DEATH—ACTION BY FOREIGN ADMINISTRATOR.

Under Act March 26, 1896 (P. L. N. J. p. 173; 2 Comp. St. 1910, p. 2265, § 21), providing that "any executor or administrator by virtue of letters obtained in another state may prosecute any action * * * in any court of this state as if his letters had been granted in this state," an administrator with limited letters, appointed under the New York statutes, may maintain an action under the New Jersey Death Act, as amended by Act March 27, 1917 (P. L. p. 531).

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

Action at law by Catherine Post, as administratrix, against the Public Service Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Leonard J. Tynan, of Newark, N. J., for plaintiff in error.

Irving W. Teeple, of Newark, N. J., for defendant in error.

Before WOOLLEY, Circuit Judge, and THOMPSON and MORRIS, District Judges.

MORRIS, District Judge. Joseph Post, a resident of New York, met his death in New Jersey through the alleged wrongful act of Public Service Electric Company, hereinafter referred to as the company, a corporation of the latter state. The decedent left to survive him his widow and three minor children as his next of kin. His widow, Catherine Post, also a resident of New York, presented to the surrogate of the county of their residence a petition setting forth, among other things, the death of her husband in New Jersey; that he was not at the time of his death seized or possessed of any real or personal property; that "a right of action exists, granted to the administrator of the decedent by special provision of law, * * * and that it is impracticable to give a bond"—and praying for limited letters of administration. Such letters were granted to her, and she as such administratrix subsequently instituted suit in the District Court of the United States for the District of New Jersey against the company to recover damages for her husband's death. The suit resulted in a judgment for the plaintiff.

The case is brought here by the defendant on a writ of error; the company alleging that the court below erred in holding that the administratrix of the decedent, appointed in a state other than New Jersey, "had a good standing in court as plaintiff to sue for damages for the death of the decedent on an alleged cause of action under the New Jersey Death Act based upon wrongful death in New Jersey."

[1] As there is no right of action at common law for death caused by wrongful act or neglect, the cause of action for the death of Post springs solely from the statute of New Jersey, the state in which the injury resulting in death occurred. Spokane Inland R. R. v. Whitley, 237 U. S. 487, 494, 495, 35 Sup. Ct. 655, 59 L. Ed. 1060, L. R. A. 1915F, 736. And since the action is based entirely upon statute, and the statute designates the person who may sue, only the person so designated may bring such action. Fithian v. St. Louis & S. F. Ry. Co. (C. C.) 188 Fed. 842; Fitzhenry v. Consolidated Traction Co., 63 N. J. Law, 142, 42 Atl. 416. We must therefore look to the statute of New Jersey to determine by whom this action must be brought. We find that at the time of the injury and death of the decedent the Death Act of New Jersey provided:

"Every such [action] shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person," etc. (2 C. S. of N. J. 1908.)

After the grant of the letters of administration to the plaintiff, but before this suit was brought, the following supplement to the above-quoted statute went into effect, viz.:

"Every action, proceeding or claim brought, instituted or made under and by virtue of the remedy given by the act to which this is a supplement shall be brought, instituted or made in the name of an administrator ad prosequendum of the decedent whose death gives rise to the claim under the act to which this act is a supplement; * * * the amount recovered in every such action shall be for the exclusive benefit of the widow, surviving husband, and next of kin. * * *" (Laws of N. J. 1917, ch. 180.)

[2] Who was the proper person under this state of the statutory law to bring this suit—a general administrator, as required by the statute in force at the time the injury and death occurred, or an administrator ad prosequendum, as provided by the statute in effect at the time the suit was instituted? If the latter statute merely changed the mode of procedure—the method of enforcing the right—and did not affect the right itself, it applied to causes of action which accrued before its enactment as well as to those accruing thereafter. Wood v. Westborough, 140 Mass. 403, 5 N. E. 613; Lewis' Sutherland, Stat. Const. § 674. An examination of the two statutes discloses that the supplemental act in no wise affected the liability of the defendant and that it changed neither the persons for whose benefit recovery might be had in this suit nor their respective interests in such recovery. The amount recovered does not go into the personal estate of the deceased, to be applied to the payment of his debts, but is for the exclusive benefit of the widow and next of kin. The administrator upon the record, whoever he is, is therefore merely a formal party for the main-

tenance of the action. Pisano v. Shanley Co., 66 N. J. Law, 1, 48 Atl. 618. The supplemental act, in substituting one person for another as the formal party to prosecute the action, consequently did not affect rights theretofore existing, but only the manner or method of their enforcement. We therefore think that the supplemental act applied to this case, and made it necessary that the suit be brought by an administrator ad prosequendum.

[3] Is the plaintiff such an administrator? The sections of the New York Code of Civil Procedure under which the letters of administration were granted to the plaintiff are:

"2559. Letters may be granted limiting and restricting the powers and rights of the holders thereof as follows:

"To an executor or administrator where a right of action exists."

"2592. Where a right of action is granted to an executor or administrator by special provision of law, * * * and it appears to be impracticable to give a bond * * * the surrogate may dispense with a bond, * * * and issue letters which as to such cause of action shall be limited to the prosecution thereof, and restraining the executor or administrator from compromise of the action or the enforcement of any judgment recovered therein until the further order of the surrogate made upon filing satisfactory security."

The purpose of the appointment in New York of an administrator with limited letters is the same as the purpose of the appointment of an administrator ad prosequendum in New Jersey. The powers of each are substantially, if not entirely, the same. The only difference suggested by counsel is in the power to agree upon a settlement of a claim. But in view of the provisions of section 2720 of the New York Code of Civil Procedure we do not find a difference even here, and we must conclude that the plaintiff is an administrator ad prosequendum.

[4] The plaintiff in error contends, however, that only an administrator ad prosequendum appointed in the state of New Jersey may bring this suit, and that the New York statute providing for limited letters, "where a right of action is granted to an executor or administrator by special provision of law" necessarily refers to a special provision of New York law. We think neither of these contentions can be sustained in view of Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439. In that case the plaintiff, a New York administrator, brought suit in the state of New York to recover damages for the death of her husband resulting from an injury in New Jersey. The objection now raised as to an administrator ad prosequendum was there interposed as to the general administrator, viz. that, conceding the statute of the state of New Jersey established the liability of the defendant and gave a remedy, "the right of action is limited to a personal representative appointed in that state and amenable to its jurisdiction." The Supreme Court overruled that contention, and we think its reasoning as to a general administrator equally applicable to an administrator ad prosequendum. The Supreme Court likewise held that the liability for wrongful death, arising under the New Jersey statute, could be enforced and the right of action pursued by the New York administrator in any court of New York having juris-

diction of such matters and obtaining jurisdiction of the parties. We therefore see no reason why such right of action is not within both the letter and spirit of the New York statute providing for limited letters of administration, "where a right of action is granted to an executor or administrator by special provision of law." To construe the statute as applying only where a right of action is granted to an executor or administrator by special provision of New York law would require us to interpolate into the statute something that is not there and which would be unduly restrictive of its purpose.

[5] But could this plaintiff, as administratrix appointed in New York, prosecute this action in New Jersey? It is true that letters of administration have no extraterritorial force. Story's Conflict of Laws, p. 425. But the authority of the plaintiff to prosecute this action in New Jersey is not dependent on extraterritorial force of the New York statute. Such authority, if any, must be found in the laws of New Jersey, and a statute of that state expressly provides:

"*Any* executor or administrator by virtue of letters obtained in another state may prosecute any action * * * in any court of this state as if his letters had been granted in this state." P. L. 1896, p. 173; 2 C. S. of N. J. 2265.

It appearing from the foregoing considerations that the plaintiff has title to this cause of action, and that, though a foreign administratrix, she was authorized to prosecute it in the state of New Jersey, we find there was no error in permitting her to maintain this suit.

The judgment below is affirmed.

SCANDINAVIA BELTING CO. v. ASBESTOS & RUBBER WORKS OF AMERICA, Inc. *

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

No. 49.

1. TRADE-MARKS AND TRADE-NAMES ⟸97—NATURE—RIGHT TO INJUNCTION.
The right to a trade-mark is a property right entitled to the same protection as any other property right, and equity can restrain the use of such trade-mark by another under its power to protect property from irreparable damage.

2. TRADE-MARKS AND TRADE-NAMES ⟸1, 3(2, 4), 7—"TRADE-MARK"—DESCRIPTIVE WORDS.
A word merely descriptive of an article or the current name of an article, or of a general character of a business, cannot be used as a "trade-mark," which is a mark or symbol used by one who manufactures or sells goods to distinguish them from similar goods manufactured or sold by another.

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

3. TRADE-MARKS AND TRADE-NAMES ⟸9—GEOGRAPHICAL NAMES.
A geographical name which does not indicate the origin or ownership of the goods and can be truthfully used by any other manufacturer or trader

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 250 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

of the same locality cannot be a common-law trade-mark, unless there is no other who can truthfully use the name, or unless from the name, as applied to the article, it is manifest that it is used in a purely arbitrary sense.

4. TRADE-MARKS AND TRADE-NAMES ⟸67—UNFAIR COMPETITION—USE OF GEOGRAPHICAL NAME.

Where a geographical name originally used to indicate place of origin has acquired a secondary significance, indicating the name of the manufacturer or seller, and the excellence of the thing made or sold, it does not thereby become a common-law trade-mark, but its unfair use by others to deceive the public as to the origin or ownership of goods may be restrained as unfair competition.

5. TRADE-MARKS AND TRADE-NAMES ⟸9—GEOGRAPHICAL NAMES—DESCRIPTIVE MEANING.

The word "Scandinavia" applied to the belting of a particular manufacturer is a descriptive geographical name, which cannot be a common-law trade-mark, though the belting is made in England; since it does not appear from the name itself that it is not the designation of the place of manufacture.

6. TRADE-MARKS AND TRADE-NAMES ⟸45—REGISTRATION—EFFECT.

The registration of a trade-mark under Act Feb. 20, 1905 (Comp. St. §§ 9485–9511, 9513–9516), does not validate a trade-mark not previously valid, unless the trade-mark comes within the provision for the registration of any trade-mark exclusively used for ten years.

7. TRADE-MARKS AND TRADE-NAMES ⟸21—USE IN FOREIGN COUNTRY.

The use of a word as a trade-mark for a particular kind of belting manufactured in a foreign country does not preclude the courts of this country from protecting the trade-mark in so far as the goods to which it applied were sold here.

8. TRADE-MARKS AND TRADE-NAMES ⟸43—REGISTRATION—"OWNER."

A corporation, to whom a foreign manufacturer had agreed to sell its products exclusively in this country and to give exclusive use of its trade-mark for a period longer than the period of registration, is an "owner" of the trade-mark entitled to register it under Act Feb. 20, 1905 (Comp. St. §§ 9485–9511, 9513–9516), the word "owner" in statutes being given a varied significance according to the context, and, even if the corporation is an agent of the manufacturer, it is an agent with an interest and a special owner entitled to the benefit of the act.

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

9. STATUTES ⟸184—CONSTRUCTION—PURPOSE.

Statutes are to be given a rational and sensible construction, in view of the object sought to be obtained and the evil to be remedied.

10. TRADE-MARKS AND TRADE-NAMES ⟸43—REGISTRATION—GEOGRAPHICAL NAMES—EXCLUSIVE USE.

One who had exclusively used the word "Scandinavia" as his trade-mark for belting since 1892 is entitled, under the provision of the act of February 20, 1905 (Comp. St. §§ 9485–9511, 9513–9516), that nothing in the act should prevent the registration of a mark used exclusively as a trade-mark for more than 10 years preceding the act, to register it as a trade-mark; though it is a geographical word which could not be a trade-mark at common law.

11. TRADE-MARKS AND TRADE-NAMES ⟸85(1)—UNFAIR COMPETITION—DEFENSES—ATTEMPT TO REGISTER.

An attempt to register a trade-mark by one who was not the owner is not a fraud which bars the user's remedy for unfair competition, where he acted on a mistaken view of the law honestly entertained.

12. TRADE-MARKS AND TRADE-NAMES ⟸85(1)—UNFAIR COMPETITION—DEFENSES—FRAUD OF PLAINTIFF.

The use of the word "Scandinavia" as a trade-mark for belting manufactured in England by the successors of one who had previously worked in Sweden is not a fraud, which prevents the owners of the trade-mark from seeking relief in equity; there being no evidence of intention to deceive or of deception as to the place of manufacture.

13. TRADE-MARKS AND TRADE-NAMES ⟸11—EXTINGUISHMENT—USE WITH PATENTED ARTICLE.

The use of the word "Scandinavia" as a trade-mark of a patented belting does not give the public the right to use the trade-mark after the expiration of the patent, in the absence of evidence that the manufacturer had expressly or impliedly consented that such word should become the descriptive generic name of the article patented.

14. TRADE-MARKS AND TRADE-NAMES ⟸45—REGISTRATION—NAME OF PATENTED ARTICLE.

The failure of the public to use the trade-mark of a patented article after the expiration of the patent, until after the trade-mark had been registered under the 10-year clause of the act of February 20, 1905 (Comp. St. §§ 9485–9511, 9513–9516), prevents the use of such trade-mark thereafter by any one but the owner.

15. TRADE-MARKS AND TRADE-NAMES ⟸70(3)—UNFAIR COMPETITION—IMITATION OF TRADE-MARK.

Where it was shown that the term "Scandinavia" applied to belting was understood to mean plaintiff's product, in which it had built up a large business, and that defendant, in response to requests for such belting, had put out a product similar in appearance and designated as "Scandinavian belting," complainant was entitled to an injunction to restrain unfair competition.

16. TRADE-MARKS AND TRADE-NAMES ⟸66—INFRINGEMENT OF TRADE-MARK—LOSS TO PLAINTIFF.

The owner of a registered trade-mark can restrain its use by another, though no loss of sales is shown and there may be no fraud between the original seller and buyer of the infringing article.

17. TRADE-MARKS AND TRADE-NAMES ⟸69, 93(1)—UNFAIR COMPETITION—PROOF OF FRAUD.

Actual fraud must be shown in a suit to restrain unfair competition, but the simulation of well-known and distinctive features of complainant's goods may be so close that the court can assume an intent to defraud.

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

Suit by the Scandinavia Belting Company against the Asbestos & Rubber Works of America, Incorporated, for an injunction to restrain the use of a trade-mark and unfair competition. From a decree denying complainant's right to a trade-mark, but granting injunction on the ground of unfair competition, both complainant and defendant appeal. So much of the decree as dismissed the cause of action as to the trade-mark reversed, with directions to sustain the trade-mark, and decree, as modified, affirmed.

This cause comes here on appeal from the United States District Court for the Southern District of New York.

The plaintiff is a corporation organized and existing under the laws of the state of Maine and has its principal place of business in the borough of Manhattan in the city of New York. It is engaged in the business of selling throughout the United States woven textile belting known in the trade as "Solid Woven Belting." The largest part of the plaintiff's goods are sold by it

under the trade-mark "Scandinavia," of which trade-mark it claims the ownership within the United States. The belting which the plaintiff sells is manufactured for it in England by the Scandinavia Belting, Limited, a British corporation.

The plaintiff's trade-mark is registered in the plaintiff's name in the Patent Office of the United States under the act of Congress of February 20, 1905.

It is alleged that because of the great use by the public of the plaintiff's belting, and because of the information the plaintiff has conveyed to the public regarding its belting and trade-mark, the trade-mark "Scandinavia" has come to mean the particular belting manufactured for and sold by the plaintiff.

The defendant is a corporation organized and existing under the laws of the state of New York and has its principal place of business in the borough of Manhattan in the city of New York. It is engaged in the manufacture of belting and manufactures a brake band lining for automobiles. It is using the words "Scandinavian Woven Lining," "Ford Scandinavian Woven Lining," and "Ford Scandinavian Brake Lining" to designate its brake linings.

The plaintiff alleges that defendant's goods are a cheap imitation of the plaintiff's, and that, closely resembling them in outward appearance, they are of a greatly inferior quality, and are sold at a less price than the plaintiff's goods.

The plaintiff alleges that defendant fraudulently adopted the word "Scandinavian" for the purpose of inducing the public to purchase defendant's belting in the belief that it is the belting of the plaintiff, the belting of both being sold and used for the same purpose; and that defendant willfully adopted such name for the purpose of defrauding the public and the plaintiff, selecting such name because the name itself would mislead and deceive the public into purchasing and using defendant's belting under the mistaken belief that the same was the product of the plaintiff, and for the purpose of thereby depriving plaintiff of its lawful rights under its trade-mark, and in infringement of plaintiff's rights, both at common law and under its registered trade-mark; and that the said acts of defendant tend to deceive and have actually deceived the public and led it to believe that the belting so sold by the defendant under the name Scandinavia or Scandinavian is that originating with the plaintiff.

The plaintiff asks for an accounting of the profits and for damages and for an injunction.

The decree dismissed the cause of action as to the registered trade-mark holding the registration invalid; and it dismissed the cause of action as to the common-law trade-mark on the ground that the word "Scandinavia" is a geographical word and therefore cannot be acquired as a common-law trade-mark. The decree, however, sustained the cause of action as to unfair competition, and it directed that a perpetual injunction issue directing the defendant to desist:

"(a) From manufacturing, billing, cataloguing, selling, offering for sale or advertising belting or brake lining, not of plaintiff's manufacture, under the names or designations 'Scandinavian Woven Lining,' 'Ford Scandinavian Woven Lining,' 'Ford Scandinavian Brake Lining,' 'Scandinavian Weave,' 'Scandinavian Woven Type,' 'Scandinavian' and the abbreviated form of the word 'Scandinavian,' to wit, 'Scand,' or under any of such names or designations, or under any word or words of like import, and from using or causing to be used orally or in written or printed matter or in any bills or correspondence such names or designations, or any of them, for belting or brake lining, not of plaintiff's manufacture, and from causing confusion in the trade by any false use or imitation of plaintiff's trade-name 'Scandinavia,' calculated to mislead or deceive. And

"(b) from manufacturing, billing, cataloguing, putting up, selling, offering for sale, disposing of or advertising cartons or packages containing brake lining or belting and bearing the name 'Scandinavia' or 'Scandinavian,' or any imitation thereof, or word of like import, and particularly cartons like the carton identified as plaintiff's Exhibit No. 14, carton containing brake lining

of defendant sold under the name 'Scandinavian Woven Type,' and from disposing of all cartoons like plaintiff's Exhibit No. 14."

The decree also directed that plaintiff recover any and all profits accruing from defendant's violation of plaintiff's equitable rights and referred the same to a master to state an account of the damages and profits.

Both parties have appealed to this court.

William A. Redding and Nicholas M. Goodlett, both of New York City, for plaintiff.

Munn, Anderson & Munn, of New York City (T. Hart Anderson, of New York City, of counsel), for defendant.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This suit is brought in an attempt to secure to the plaintiff the exclusive use of the name "Scandinavia" as applied to belting. The plaintiff claims that it has a trade-mark in that name, both by virtue of the common law and by the registration of the name under the act of Congress providing for the registration of trade-marks.

[1] It has been said frequently that the doctrine of exclusive property in trade-marks has prevailed from the time of the Year Books. But an examination of the record hardly justifies the statement, in the opinion of Mr. Upton, who nevertheless declares that—

"Property in trade-marks, exclusive and absolute, has existed and been recognized as a legal possession, which may be bought and sold and transmitted, from the earliest days of our recorded jurisprudence." Upton on Trade-Marks, p. 10.

However early property in trade-marks may have been recognized, it is only in comparatively recent times that courts of equity have interfered by injunction for its protection. For in Blanchard v. Hill, 2 Atkyns, 484, in 1742, an application was made to Lord Chancellor Hardwicke for an injunction to restrain the defendant from making use of the Great Mogul as a trade-mark upon cards. The Lord Chancellor declared:

"There is no foundation for this court to grant such an injunction. Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here, to restrain one trader from using the same trade-mark with another; and I think it would be of mischievous consequence to do it."

But it is now and for many years has been well-established doctrine that the exclusive property of a proprietor of a trade-mark by virtue of the manufacture or offering for sale of his goods is entitled to the protection which the highest powers of the courts can afford. And the power of the court in such cases is exercised, not only to do individual justice, but to safeguard the interests of the public by preventing one's passing off his goods as the goods of another. The right of property in trade-marks has come to be recognized as of immense and incalculable value. Trade-marks, it has been truthfully said, are the only means by which the manufacturer and the merchant are enabled to inspire and retain public confidence in the quality and integ-

rity of things made and sold, and the only means by which the public is protected against the frauds and impositions of the crafty and designing who are always alert to appropriate to themselves the fruits of the reputation of others.

The jurisdiction of an equity court to restrain by injunction the passing off by A. of his own goods as being the goods of B. is in aid of the legal right and is founded on the equity of protecting property from irreparable damage. In such a case, the court acts on the same principles upon which it interferes in other cases in protecting legal rights to property. Kerr on Injunctions, p. 357.

The court below has held that the plaintiff is entitled to an injunction, but that it is entitled to it on the ground of unfair competition, and not because it has a trade-mark which has been infringed.

[2] The law recognizes the right of every one who manufactures or sells goods to affix to them a mark or symbol which may distinguish them from similar goods manufactured or sold by another. The mark or symbol so used is known as a "trade-mark." While any name, symbol or emblem may in general be a trade-mark, yet the law does not allow a word to be so used which is merely descriptive of an article, or which is the current name of an article, or which merely denotes the general character of a business. And one of the questions raised in the case now under consideration is whether the word "Scandinavia" used by the plaintiff as a trade-mark is one which can be so employed.

[3] In 38 Cyc. 722, it is said that—

"Geographical terms and words in common use to designate a locality, a country, or a section of a country cannot be monopolized as trade-marks. In some cases geographical names have been protected nominally upon the ground of trade-mark, but these cases must be supported, if at all, upon the ground of unfair competition."

In 28 Am. & Eng. Encyc. of Law, 377, the rule is stated as follows:

"It is well settled that a geographical term, by which is meant a term denoting locality, cannot be exclusively appropriated as a trade-mark or trade-name, because such a term is generic or descriptive, and any one who can do so truthfully is entitled to use it. Geographical terms may, however, by long and exclusive user acquire a secondary significance as denoting the goods or business of the particular trader who has so used them, and under such circumstances a subsequent trader will not be permitted to use such terms in a manner that will be likely to deceive the public, and pass off his goods or business as being the goods or business of his rival, for this would constitute unfair competition."

In Browne on Trade-Marks the law is thus stated:

"Sec. 182. *Geographical Names.*—Instances are not rare where these have been sustained as technical trade-marks. But in every case of the adoption of the name of a country, nation, region, or place, such name has been used in an arbitrary sense, and not adjectively; except where the owner of the mark was also sole possessor of the place of origin, or had the monopoly of the vendible product, as for example, of a mineral spring, or an established place of manufacture. Under circumstances of an exclusive right of sale, such a name cannot be said to be merely geographical. To be such, all or many others than the claimant, should have a right equal to his own to apply a trade-mark."

The House of Lords in 1872 decided the well-known case of Wotherspoon v. Currie, L. R. 5 H. L. Eng. & Ir. App. Cases, 508. In that case a bill had been filed to enjoin the respondent from using the geographical name "Glenfield" in connection with the manufacture of starch. The complainants had formerly carried on the business of starch makers at Glenfield which was a small place, not even a hamlet, in the neighborhood of Paisley in Scotland. The starch they manufactured was commonly known as "Glenfield Starch." The business was, after some years, removed to a larger place called "Maxwelltown," which was also near Paisley, and the starch there manufactured continued to be sold as "Glenfield Starch." The respondent had for many years lived at Glenfield, but had carried on his business of manufacturing starch in his works at Paisley. Some time after the complainant's removal of his business from Glenfield to Maxwelltown, the respondent began making starch in Glenfield, calling his product "Glenfield Starch," and selling it under that name in Scotland and in England. The respondent's label stated that it was manufactured by "Currie & Co.," and the complainant's label stated that its starch was manufactured by "Robert Wotherspoon & Co." The suit was brought on the theory that the geographical name "Glenfield" had become the trade-mark of the complainant's business, and that, although the complainant had ceased to manufacture his product in Glenfield, he was entitled to restrain the respondent from using the same trade-mark, although the respondent actually made his starch in Glenfield. The House of Lords, reversing the court below, granted the injunction and restrained the respondent from using the word "Glenfield" in or upon any labels affixed to his packets of starch, and from in any other way representing the starch manufactured by or for him to be "Glenfield Starch." It is not suggested in any of the opinions delivered in the House of Lords that a trade-mark could not be had in a geographical name. Lord Chelmsford in the course of his opinion puts the question involved in this way:

"Has the respondent then been proved to have infringed the appellant's trade-mark within the established principle?"

And Lord Westbury in his opinion states that the word "Glenfield" had acquired a secondary meaning and had become "the trade denomination" of the starch made by the appellant, and he declares that the case comes within the principle that a party should be prevented from fraudulently availing himself of the trade-mark of another which has already obtained currency and value in the market. Notwithstanding what two of the Lords said as to the validity of the trade-mark, it does not certainly appear whether the decision went upon the ground that there was a valid trade-mark which had been infringed or upon that of unfair competition. That the plaintiff was entitled to the injunction upon the latter ground can be readily perceived. But one cannot help wondering whether all the Lords agreed that the trade-mark was valid. Then nearly 20 years later the House of Lords had before it Montgomery v. Thompson (1891) A. C. 217. Thompson and his predecessors had bottled ale, at a town in England called Stone,

for 100 years or more. This ale had become known as "Stone Ale." During the above period the brewery of Thompson had been the only one in town. In 1890 Montgomery, who had been a publican at Liverpool, removed to Stone and set up "Montgomery's Stone Brewery." He claimed he had a legal right to use the name "Stone Brewery" so long as he used it in combination with other words which sufficiently distinguished his manufacture from that of Thompson. The court below had issued an injunction restraining him from carrying on his business of a brewer at Stone either under the name "Stone Brewery," or under that of "Montgomery's Stone Brewery," or under any other title so as to represent that the Montgomery Brewery was the brewery of Thompson, and from selling or causing to be sold any ale or beer not of Thompson's manufacture under the term "Stone Ales" or "Stone Ale," or in any way so as to induce the belief that such ale or beer was of Thompson's manufacture. The House of Lords affirmed the injunction. Lord Herschell in his opinion said:

"It appears to me idle to argue in opposition to the injunction that it is against the public interest to permit a monopoly of the use of the name of a town for trade purposes, when the only effect of allowing its use by the person and for the purpose sought to be restrained would be to deceive the public."

In Wotherspoon v. Currie the trade-mark was not actually copied, and while, as the quotations above made show, there are in the opinions rendered by two of the Lords expressions which seem to indicate that in their opinion the trade-mark was not invalid, the case was really decided on the ground that the respondent was acting with the fraudulent design of passing off his own goods as those of the complainant's. And Thompson v. Montgomery does not assert an exclusive right to the use of the word "Stone Ale" as against the world, but as against the defendant who was shown to be engaged in fraudulently using the words for the purpose of passing off his goods as the goods of the plaintiff, as most clearly appears in the opinion of Lindley, L. J., in the Court of Appeal, 41 Ch. Div. 35, 50.

We come now to consider the cases in the Supreme Court of the United States. In Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581 (1871), the complainants claimed an exclusive right to the use of the words "Lackawanna Coal" as a trade-mark for the coal mined by them, and their bill alleged that they had appropriated the word "Lackawanna" as a trade-mark for their coal before any one else had applied it as a trade-mark for any kind of coal. In affirming the court below which had refused the injunction, the court said:

"And it is obvious that the same reasons which forbid the exclusive appropriation of generic names or of those merely descriptive of the article manufactured and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer, and could they be appropriated exclusively, the appropriation would result in mischievous monopolies." 13 Wall. 324, 20 L. Ed. 581.

In Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144 (1893), the complainant, a manufacturer of flour at Minneapolis, sought to restrain the defendants from using the word "Columbia" in a brand placed on flour sold by them. The court below had dismissed the bill. The Supreme Court in an opinion in which it stated that the general principles of law applicable to trade-marks, and the conditions under which a party may establish an exclusive right to the use of a name or symbol were well settled by its decisions, then went on to say that these decisions establish the following general propositions:

"* * * (4) Such trade-mark cannot consist of words in common use as designating locality, section, or region of country."

In Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365 (1901), the Supreme Court had before it the question whether the plaintiff had a trade-mark in the geographical name "Elgin" which it had registered under the act of Congress of 1892. The court held:

"That the general rule applied, and that this geographical name could not be employed as a trade-mark and its exclusive use vested in appellant, and that it was not properly entitled to be registered as such."

In French Republic v. Saratoga Vichy Co., 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247 (1903), the plaintiff claimed a trade-mark in the geographical name "Vichy," which was the name of a commune of France whose springs for several hundred years had been famous for their medicinal qualities. The trial court had dismissed the bill upon the ground that the plaintiff had no exclusive right to the use of the word "Vichy" and that defendant had never been guilty of an attempt to palm off its waters as the imported article (C. C.) 99 Fed. 733. The case was brought to this court, where it was reversed and an injunction was ordered in an opinion which will be subsequently considered. 107 Fed. 459, 46 C. C. A. 418, 65 L. R. A. 830. The Supreme Court did not agree that a case had been made out justifying the issuance of an injunction, as the use of the word "Vichy" on defendant's label was so different in style, language, and form from that of the complainant that it would not deceive the public, and there had been acquiescence for a period of nearly thirty years. Mr. Justice Brown writing for the court said:

"1. As the waters of Vichy had been known for centuries under that name, there is reason for saying the plaintiffs had in 1872 acquired an exclusive right to the use of the word 'Vichy' as against every one whose waters were not drawn from the springs of Vichy, or at least, as observed by a French court, 'from the same hydrographical region which may be called generally the basin of Vichy.'

"True the name is geographical; but geographical names often acquire a secondary signification indicative not only of the place of manufacture or production, but of the name of the manufacturer or producer and the excellence of the thing manufactured or produced, which enables the owner to assert an exclusive right to such name as against every one not doing business within the same geographical limits; and even as against them, if the name

be used fraudulently for the purpose of misleading buyers as to the actual origin of the thing produced, or of palming off the productions of one person as those of another."

We do not understand that the court in the above case decided that a trade-mark exclusive as to some but not as to all is a technical trade-mark valid at common law. What the court said is entirely consistent with the theory that the owner of the mark might be protected under the law of unfair competition.

In Baglin v. Cusenier Co., 221 U. S. 580, 31 Sup. Ct. 669, 55 L. Ed. 863 (1911), the court had before it the validity of the word "Chartreuse" as a trade-mark. For several hundred years the Order of Carthusian Monks had occupied the Monastery of the Grande Chartreuse near Voiron in France. They there made by a secret process the liqueur which in time became known throughout the world as "Chartreuse." They first manufactured it in the monastery, and later at a place near by called "Fourvoirie." These monks having been forcibly expelled from France set up their factory at a place in Spain where they continued to manufacture the liqueur according to their secret process, and continued its sale on the market as "Chartreuse." The French undertook to produce at Fourvoirie a liqueur resembling as nearly as they could make it the "Chartreuse" of the monks, and they placed their product on the market under the old name. A suit was brought in the Southern district of New York to restrain the use of the name by injunction. The Circuit Judge held that the word "Chartreuse" was a valid trade-mark and was infringed and awarded an injunction. 156 Fed. 1019. On appeal to this court (164 Fed. 25, 90 C. C. A. 499) Judge Coxe writing for this court said:

"Its ['Chartreuse'] primary meaning was undoubtedly geographical, but it acquired afterwards a secondary meaning, so that a purchaser prior to 1901 ordering a case of 'Chartreuse' would expect to receive liqueur made by monks at the French monastery."

We sustained the right to the injunction. In the Supreme Court it was insisted that the judgment was erroneous in holding that the word "Chartreuse" constituted a valid trade-mark. It was argued that "Chartreuse" is a regional name; that the characteristic qualities of the liqueur were due to certain local advantages by reason of the herbs found and cultivated within the district described; that even as used in connection with the monks' liqueur it was still a description of place; and hence that, at most, so far as this word is concerned, the question could be one only of unfair competition. In an opinion written by Mr. Justice Hughes it was declared that the validity of the argument could not be admitted. He said:

"It is not necessary for us to determine the origin of the name of the order and its chief monastery. If it be assumed that the monks took their name from the region in France in which they settled in the eleventh century, it still remains true that it became peculiarly their designation. And the word 'Chartreuse' as applied to the liqueur which for generations they made and sold cannot be regarded in a proper sense as a geographical name. It had exclusive reference to the fact that it was the liqueur made by the Carthusian Monks at their monastery. So far as it embraced the notion of place, the

description was not of a district, but of the monastery of the order—the abode of the monks—and the term in its entirety pointed to production by the monks."

In Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629 (1916), an injunction was sought to restrain infringement of an alleged trade-mark for shoes consisting of the words "The American Girl," by the use of the words "American Lady." The Circuit Court of Appeals in the Eighth Circuit held that the term "The American Girl" used to designate women's shoes was a geographical and descriptive, rather than an arbitrary and fanciful name, and was not the subject of a valid trade-mark. But it ordered an injunction to issue on the ground of unfair competition. 165 Fed. 413, 91 C. C. A. 363. The Supreme Court declared that it did not regard the words "The American Girl" as used by the complainant in connection with the manufacture of shoes as being a geographical or descriptive term. "It does not signify," said the court, "that the shoes are manufactured in America, or intended to be sold or used in America, nor does it indicate the quality or characteristics of the shoes. Indeed, it does not, in its primary signification, indicate shoes at all. It is a fanciful designation, arbitrarily selected by complainant's predecessors to designate shoes of their manufacture." It held that the trade-mark was good and infringed, and that the injunction should issue on that ground and not on the ground of unfair competition. The Chief Justice and Mr. Justice Van Devanter dissented on the ground that the term was geographical and descriptive and not subject to exclusive appropriation as a trade-mark.

We shall not attempt an examination of all the cases decided in which the validity of geographical terms used as trade-marks have been considered, but shall refer to some of them.

In Coffman v. Castner, 87 Fed. 457, 31 C. C. A. 55, the Circuit Court of Appeals in the Fourth Circuit said:

"A geographical name cannot be appropriated to the exclusive use of any person or company as a trade-mark."

In Genesee Salt Co. v. Burnap, 73 Fed. 818, 20 C. C. A. 27, the Circuit Court of Appeals in the Sixth Circuit said:

"The name 'Genesee,' when used in connection with complainant's salt, obviously refers to the place of its production. The complainant could, therefore, assert no trade-mark property in it."

In Illinois Watch-Case Co. v. Elgin National Watch Co., 94 Fed. 667, 35 C. C. A. 237, the Circuit Court of Appeals for the Seventh Circuit said:

"It is not now a question that no one can acquire an exclusive right to the use of geographical names as trade-marks."

In Allen B. Wrisley Co. v. Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54, the Circuit Court of Appeals for the Eighth Circuit declared that—

"Geographical terms and words in common use to designate a locality, a country, or a section of a country, cannot be monopolized as trade-marks."

And the same court had previously made the same statement in Shaver v. Heller & Merz Co., 108 Fed. 821, 831, 48 C. C. A. 48, 65 L. R. A. 878.

In La Republique Française v. Saratoga Vichy Springs Co., 107 Fed. 459, 46 C. C. A. 418, 65 L. R. A. 830 (1901), this court said:

"It is true that a mere geographical name, without attending facts which have caused the name to become significant of a particular manufacture and to identify the manufacture as the product of a particular person, is not the subject of a trade-mark."

The court then continued:

"The distinction, however, between mere names of a locality and the secondary signification of names which identify an article with its manufacturer or producer, and which tell the public that an article so produced is of singular excellence, with the result that the use of the name by a nonresident producer is unfair to the competitor and fraudulent to the public, has been long recognized."

In other words, if a geographical term acquires a secondary meaning, there may be a remedy under the doctrine of unfair competition.

In Siegert v. Gandolfi, 149 Fed. 100, 79 C. C. A. 142, this court held that the complainants could not obtain a monopoly in the use of a geographical word as a trade-mark. An injunction was issued, but it went on the ground of unfair competition.

In Wertheimer v. Batcheller Importing Co., 185 Fed. 850 (1911), Judge Lacombe, sitting in the Circuit Court for the Southern District of New York, granted a preliminary injunction preventing the defendant from calling its product "Poudre de Riz de Java," which words constituted the complainant's trade-mark. The court said:

"The phrase 'Poudre de Riz de Java' is apparently no more a statement that the rice used in it was grown on the Island of Java than the use of the phrase 'Eau de Cologne' imports that the liquid perfume thus designated was made at Koln am Rhein."

The phrase had acquired a secondary meaning. And the case may have been decided under the principle of unfair competition. In Stein & Co. v. Liberty Garter Mfg. Co., 198 Fed. 959 (1912), the same judge, sitting in the District Court, granted a preliminary injunction against the use of the word "French" as applied to garters, and in doing so declared that the complainant had "shown its ownership in a valid trade-mark in the word 'Paris' as applied to garters." But as the circumstances are not fully disclosed the exact signification of the decision is not clearly understood.

In 1846, Taylor v. Carpenter, 3 Story, 458, the plaintiffs were manufacturers in Leicester, England, of "Taylor's Persian Thread" and had established agencies in New York, Boston, and other places in this country, for the sale of their threads. They complained that the defendant imitated their names, trade-marks, and labels, and asked for an injunction. Judge Story granted the injunction, saying:

"I have not the slightest doubt, in the present case, that a perpetual injunction ought to be granted."

Nothing was said either upon the argument or in the opinion as to the use of a geographical term as a trade-mark. The case appears

to have been one of unfair competition, although the exact ground upon which it was decided is not disclosed.

In 1844 the same parties had been before Chancellor Walworth in New York, and he granted an injunction, but did not discuss the question whether a geographical name could be used as a trade-mark. Taylor v. Carpenter, 11 Paige (N. Y.) 292, 42 Am. Dec. 114. The case was carried to the Court for the Correction of Errors (2 Sandf. Ch. 604), where it was affirmed, but without discussion as to the validity of a trade-mark consisting of a geographical name.

In Walter Baker & Co. v. Baker (C. C.) 77 Fed. 181, the words "German Sweet Chocolate" were held to be a valid trade-mark and infringed by the words "Germania Sweet Chocolate." The case was decided by a judge sitting in the Circuit Court for the Western District of Virginia. The objection was made that the word "German," the name of the individual manufacturer, was also a geographical name, but the court disregarded the objection, saying: "It is the name of an individual, adopted as an arbitrary or fancy name."

In Wolfe v. Goulard, 18 How. Prac. (N. Y.) 64, "Schiedam Schnapps" was held not to be a good trade-mark; "Schiedam" being the name of a town in Holland, and "Schnapps" being adopted from the German language meaning a dram. The plaintiff used the words to designate the liquor which he sold.

In Lea v. Wolf, 13 Abb. Prac. N. S. (N. Y.) 389, it was held that "Worcestershire Sauce," "Worcestershire" being the name of the place where the plaintiff had carried on the business for 30 years, was not a valid trade-mark, and Ingraham, D. J., said that—

"The whole course of authority on this subject is uniform against the right of any party to obtain a trade-mark by such words."

The injunction was denied. On appeal to the General Term of the Supreme Court the injunction was ordered, the court saying that—

"Where words, and the allocation of words, have, by long use, become known as designating the article of a particular manufacturer, he acquires a right to them, as a trade-mark, which competing dealers cannot fraudulently invade." Abb. Prac. N. S. (N. Y.) vol. 15, p. 3.

In Newman v. Alvord, 51 N. Y. 189, 10 Am. Rep. 588 (1872), the right of the plaintiff to use the word "Akron" as a trade-mark in connection with the production and sale of cement was before the court. It was held that as against the defendants the plaintiff had the right to the exclusive use of the word. The court thought that it was unnecessary to show that the plaintiff had the exclusive right to the word; that it was enough if he had an exclusive right as against the defendant. The case is usually understood to have been decided on the principle of unfair competition.

In Kayser & Co. v. Italian Silk Underwear Co., 160 App. Div. 607, 146 N. Y. Supp. 22 (1914), an injunction issued to protect the trade-mark "Italian" as applied to silk underwear, the court holding that the word had acquired a secondary meaning. Neither plaintiff nor de-

fendant used any Italian silk in the manufacture of the underwear. The case was decided as one of unfair competition.

In Phenix Cheese Co. v. Kirp, 176 App. Div. 735, 164 N. Y. Supp. 71 (1917), the court issued an injunction to protect the name "Philadelphia Cream Cheese," and the defendants were restrained from using those words. The court thought the name had acquired a secondary meaning, and the injunction went on the ground of unfair competition.

The objection to the use of a geographical name as a trade-mark is twofold:

(1) It does not indicate the origin, manufacture, or ownership of the goods.

(2) There can be no exclusive right to make use of it as any other manufacturer or trader from the same country or section of the country has an equal right to use it.

Thus in the English Court of Chancery Vice Chancellor Wood declared that, if the first importer of wine from Burgundy called it "Burgundy," he could not prevent anybody else from calling a wine produced in Burgundy by the name of the place from which it was imported, although he had stamped "Burgundy" on his corks for 20 years. McAndrew v. Bassett, 4 De G. J. & S., 380. This rests upon the principle that no person has the right to the exclusive use of a mark which is of such a character that others may employ it with equal truth. It was for that reason that the word "Lackawanna" as applied to coal was not a good trade-mark for any one whose coal came from the "Lackawanna Valley" could truthfully designate and sell his coal as "Lackawanna Coal."

That there may be exceptions to the rule that a geographical word cannot be a valid trade-mark is conceded. If one should own the only coal mine situated in a place and should give his coal the name of that place, there is no reason why the name should not be recognized as a valid trade-mark. Newman v. Alvord, 51 N. Y. 189, 193, 10 Am. Rep. 588. Upon that principle was decided Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82, as the plaintiff owned the sole place where the water was found so that none other could use the trade-mark with truth. And this doctrine was recently recognized in Manitou Springs Mineral Water Co. v. Schueler, 239 Fed. 593, 152 C. C. A. 427 (1917).

The courts, too, have sometimes justified a purely arbitrary use of a geographical name where such use could not possibly mislead or deceive any one. Thus in Fleischman v. Shuckmann, 62 How. Prac. (N. Y.) 92 (1881) Judge Van Vorst sitting in the Supreme Court of New York, Special Term, held that a manufacturer of bread in New York City had clearly a right to call it by way of distinction "Vienna Bread," and an injunction was ordered restraining the defendant from applying the word "Vienna" to baked articles. The argument was advanced by the defendant that the plaintiff could have no exclusive right to the use of the name of the capital of Austria, as a trade-mark. But the court rejected it, saying that as a mark for bread it was purely arbitrary and in no manner descriptive either of the ingredients or quality of the article. No deception was practiced by its use "because the place

of its manufacture is given and it is known that bread cannot be imported from abroad for use here." In the course of his opinion Judge Van Vorst said:

> "I presume that a baker in Paris or Vienna could manufacture bread there and introduce it under the name of 'New York bread' and use it arbitrarily, and be protected under the laws of their country if he was first to apply 'New York' in such connection."

And where a dentist in St. Louis placed over his office the words "New York Dental Rooms," the court held that he had a proprietary right in the title "New York," as no one would understand that the business was done in the city or state bearing the name used, or that either of those geographical divisions was in any way connected with it. Sanders v. Utt, 16 Mo. App. 322. But the use of the name "Scandinavia" in connection with either the manufacture or the sale of belting does not come within either of these two exceptions.

[4] That geographical names, primarily indicative of place, often acquire a secondary signification indicative of the name of the manufacturer or seller, and the excellence of the thing manufactured or sold, and which enables the manufacturer or seller to assert an exclusive right, is familiar learning supported by a long line of decisions. And that the trade-mark herein involved has acquired such a secondary meaning cannot be disputed upon this record. But the fact that the geographical term has come to have a secondary meaning does not, in the opinion of the court, constitute it a valid trade-mark at common law. The writer understands the law to be that geographical names do not constitute a valid trade-mark at common law unless they have been selected, used, and appropriated under such special circumstances as to point distinctively to origin or ownership. In Baglin v. Cusenier Co., supra, the trade-mark "Chartreuse" was not merely a regional name, but it was peculiarly the designation of the monks (221 U. S. 592, 31 Sup. Ct. 669, 55 L. Ed. 863), and the term pointed to the liqueur manufactured by the monks. This led the court to say that the term as applied to the liqueur could not be regarded in a proper sense as geographical. We may observe in passing that the court in its opinion, written by Mr. Justice Hughes, mentions the fact that it was insisted at the argument that the word did not constitute a valid trade-mark so that at the most the question could be one only of unfair competition. The court did not say that such a conclusion would not follow from such a premise, but denied the premise. If it had denied the conclusion, the claim that a geographical term becomes a valid technical trade-mark at common law when it acquires a secondary meaning indicating origin or ownership would have become the established law so far as the federal courts are concerned, but we are unable to find any such doctrine enunciated in any decision that court has made. In the absence of any such authoritative statement, the court holds that the geographical term "Scandinavia" is an invalid trade-mark at common law as indicating the notion of place and not that of origin and ownership. And see Manitou Springs Mineral Water Co. v. Schueler, 239 Fed. 593, 601, 152 C. C. A. 427.

[5] The question then arises whether we must regard "Scandinavia" as a geographical term or whether we are at liberty to regard it as having been applied in an arbitrary or fanciful sense and on that ground can sustain it as a valid trade-mark. For a word in common use but applied in an arbitrary or fanciful sense may be a good trade-mark. But in 1887 in a case in England before the Court of Appeal where the question was whether the name of a place, "Melrose," could be registered as a trade-mark, Cotton, L. J., said:

"We were asked by the Attorney General * * * to hold that no geographical expression can come within the description in section 64 * * * as a 'fancy word or words not in common use.' In my opinion that would be wrong. I do not think one could say that no geographical term could possibly be a 'fancy word or words' as applied to a particular article."

He declared that to be a fancy word the word must be one "which obviously cannot have reference to any description or designation of where the article is made or of what character it is." And that it is not enough that it should be shown by evidence that it, in fact, has no such reference, and the incorrect or inappropriate user of a word which is descriptive does not make it a fancy word. "We ought not to consider" he said, "what the result is when that evidence is given, but ought to consider whether, from the name, and from the description of the article to which it is applied, it is obvious, that is to say, whether any ordinary person would understand, that the name could not be intended to designate the place where this was produced." In re Van Duzer's Trade-Mark, L. R. 34 C. D., 623. We think in accordance with the views above expressed that we are not at liberty to regard the term "Scandinavia" as having been used in a fanciful sense, even though it should appear from the evidence that the word was not adopted to signify the place of manufacture, or the place from which the materials were brought, or any process of manufacture peculiar to Scandinavian countries.

[6, 7] It appears, however, that the plaintiff registered the trade-mark under the Act of Congress of February 20, 1905, c. 592, 33 Stat. 724, U. S. Comp. Stat. Ann. 1916, vol. 9, p. 10645. That act does not prescribe what may be valid trade-marks, but simply permits the registration of trade-marks, and such registration in no way validates a trade-mark which was not previously valid, subject to an exception in what is known as the "Ten Years' Clause," which will be considered later. The act provides that "the owner of a trade-mark used in commerce with foreign nations, or among the several states, or with Indian tribes," may obtain registration for such trade-mark by complying with the requirements of the act provided such owner is domiciled in the United States or resides in a foreign country which affords similar privileges to the citizens of the United States. And before considering the effect of this registration we may remark in passing that the use of the word "Scandinavia" as a trade-mark for the particular species of belting manufactured in England by the plaintiff's predecessors did not preclude the protection of the trade-mark in the courts of this country in so far as the goods to which it applied were sold here. In Kidd v. Johnson, 100 U. S. 617, 619, 25 L. Ed. 769, the court de-

clared that the right to use a trade-mark extends everywhere. And in Hanover Milling Co. v. Metcalf, 240 U. S. 403, 416, 36 Sup. Ct. 357, 60 L. Ed. 713, this doctrine is explained and qualified, and the court cites with approval the following statement made by the court below (208 Fed. 519, 125 C. C. A. 51, L. R. A. 1916D, 136):

"Since it is the trade, and not the mark, that is to be protected, a trade-mark acknowledges no territorial boundaries of municipalities or states or nations, but extends to every market where the trader's goods have become known and identified by his use of the mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article."

There is, of course, no question but that the English owner of the trade-mark, if it had not assigned its rights to use it in this country to the complainant, might have registered the trade-mark under the act of Congress, as it had made exclusive use of it in England for almost forty years. But the question is whether the plaintiff was entitled to register it in its own name as owner. The defendant asserts that it had no such right and that it has perpetrated a fraud, in that it represented that it was the owner and failed to disclose its relations with the Scandinavia Company, Limited, of England, which was in fact the owner. The questions now to be considered, therefore, are whether the plaintiff was entitled to register the trade-mark, and, if it was, what is the effect of the registration upon the plaintiff's rights?

[8] The plaintiff and the owners of the trade-mark in England entered into an agreement of May 24, 1904, in which the latter company agreed to sell its belting to the plaintiff at prices which were to be determined from time to time and to no other party in the United States for a period of 10 years. That agreement said nothing as to the trade-mark. A second agreement was entered into between the same parties in May, 1907. The second agreement expressly cancels the contract of May 24, 1904, and provides that the English company "covenants and agrees not to sell, rent or consign its belting to any party, person, firm or corporation other than said second party (the plaintiff herein), for use, rental, sale or resale in the United States of America." It also contains a covenant which reads:

"(5) Said first party (the English company) further covenants and agrees that the said second party shall have the exclusive use in said United States of America of any and all trade-marks and (or) trade-names connected with its belting or used by said first party in the marketing of the same."

And it provided that the agreement should cease and terminate on May 24, 1934. This agreement made in effect the plaintiff the exclusive agent of the English company for the sale of its goods in the United States, and it gave the plaintiff the exclusive use of its trade-mark in this country until 1934. So that the question is whether this made the plaintiff the "owner" of the trade-mark for registration purposes under the statute. In Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, Saxlehner, a resident of Hungary, had agreed with the Apollinaris Company of London that the latter should have the exclusive right to sell Hunyadi water in Great

Britain and the United States, and the court thought that the agreement did not constitute the company Saxlehner's agent, and that the company had no power to bind Saxlehner by its conduct or its admissions as respects his trade-mark. But the agreement between the Apollinaris Company and Saxlehner differed essentially from the agreement in the case under consideration. In that case no agreement was made as to the trade-mark, and the company reserved the right to cancel the contract upon notice. In this case the right to the exclusive use of the trade-mark in the United States is expressly granted and no right to cancel the contract existed in either party. And in the bill of complaint in this case it is alleged that the plaintiff was the agent for the English company for the sale of its goods in the United States and the agency is conceded. In Saxlehner v. Eisner & Mendelson Co. supra, the plaintiff himself registered his trade-mark in this country as unquestionably he had a right to do. That the English company had the right in this case to transfer for a period of years to the plaintiff whatever right in its trade-mark it possessed, and that the plaintiff could protect its right is clear. Estes v. Williams (C. C.) 21 Fed. 189.

The word "owner" varies in its significance according to context and subject-matter and when found in statutes is "given the widest variety of construction." Peterson v. Johnson, 132 Wis. 280, 282, 111 N. W. 659. In America Woolen Co. v. Town of North Smithfield, 29 R. I. 93, 94, 69 Atl. 293 (16 Ann. Cas. 1227), the court comments on "the versatility of the word to suit the circumstances in which it is used," and declared that the word is not "a technical term, but one of wide application in various connections." In Carter v. Bolster, 122 Mo. App. 135, 141, 98 S. W. 105, 106, the court says:

"The word 'property,' as well as 'owner,' may be used to convey a meaning sometimes broad and sometimes quite restricted. In its general and commonly accepted sense, ownership and property would necessarily imply the power of sale—jus disponendi. * * * Doubtless it may and is frequently used in a more restricted sense."

[9] It is an established rule governing the construction of statutes that they are to have a rational and sensible interpretation. The object which the legislative body sought to attain and the evil which it endeavored to remedy may always be considered to ascertain its intention and to interpret its act. United States v. Ninety-Nine Diamonds, 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185. And in Maxwell on the Interpretation of Statutes (4th Ed.) p. 101, the rule is laid down that—

"Even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to it, if fairly susceptible of it."

The exact meaning of the term "owner" as used in the statute under consideration does not appear to have been determined. In Gretsch Mfg. Co. v. Schoening, 6 T. M. Rep. 224 (S. D. N. Y. 1916), Mueller in Germany gave Schoening in the United States the exclusive agency to import and sell the violin strings made in Germany by Mueller and identified by his trade-mark "Eternelle." Schoening registered the

mark in the United States under the act of 1905 relying upon his agency agreement. The District Judge (Judge Hough) held the registration valid, stating that he perceived no objection to Schoening's registering Mueller's trade-mark as long as Mueller gave to him a monopoly of his (Mueller's) business in America. He said:

"The very object of the contract between Schoening and Mueller was to carve out of Mueller's business a portion thereof and confer it upon Schoening, and it seems to me to necessarily follow from that business arrangement between these two men that when Schoening had the business he had the right to protect it pursuant to the act of 1905."

The lower court entered an order granting a preliminary injunction requiring Schoening to withdraw his notice of ownership of the trade-mark "Eternelle" filed with the Department of the Treasury so far as it applied to violin strings manufactured under that name by Mueller in Germany. That case was brought into this court on appeal. 238 Fed. 780, 151 C. C. A. 630. In affirming that order this court, speaking through Judge Ward, said:

"We assume that Schoening has a valid trade-mark, even if he does not manufacture the strings."

Counsel for plaintiff in the case now under consideration understands from the statement above quoted that this court decided that Schoening had the right to register his trade-mark. In this he is mistaken, for the order entered below was right whether Schoening's registration was valid or invalid, and all that was meant was that, conceding for the purposes of the argument that his trade-mark was valid, the injunction was nevertheless properly ordered to issue against him. But in the case now before us this court holds that one who has the exclusive right to use a trade-mark in the United States has such a special ownership therein as entitles him to its registration during the period of his exclusive use. "Ownership" is the right by which a thing belongs to some one in particular to the exclusion of all others. And the right to the exclusive use of this trade-mark in this country was in this plaintiff for a period of 27 years or 7 years beyond the registration period fixed by the statute. To say that the relation which existed between the English and the American company was that of agency does not help the defendant, for if it be conceded that the relation is that of agency it must also be conceded that it is an agency coupled with an interest, and the right to the exclusive use is one which cannot be withdrawn, and an interest sufficient to prevent revocation is sufficient to make the plaintiff such a special "owner" of the trade-mark as entitled it to register the same under the provisions of the act. To hold that one who has the exclusive right to use a trade-mark has no right to have it registered under the act would be, in our opinion, subversive of the policy and intent of the statute.

If A., the owner of an English trade-mark, assigns the exclusive use of it in the United States for a period of years to B., and C. infringes, the party damaged is B., and he is the party entitled to sue for and to recover the damages, and not A. And we are not prepared to hold that Congress did not intend to give B. the right to protect

his trade-mark by registration under the act unless we are compelled to that conclusion by the wording of the statute. And as we read the statute we think it was intended that one who has the exclusive use of a trade-mark in this country is the "owner" of the trade-mark for the purposes of registration and protection thereunder during the period within which he has such right to the exclusive use.

It is not necessary to say, and we express no opinion upon the question, whether the English owner of the trade-mark could, if it had elected to do so, have registered this trade-mark at any time during the period within which the right to the exclusive use was in another. But we may call attention to the fact that, if the English owner should make application to register the trade-mark at any time after it had granted the exclusive use to the plaintiff, it would be obliged to file along with its application a written declaration and to verify it stating:

"That no other person, firm, corporation, or association, to the best of the applicant's knowledge and belief has the right to use such trade-mark in the United States, either in the identical form or in such near resemblance thereto as might be calculated to deceive." U. S. Compiled Statutes (Compact Edition) 1918, p. 1533, § 9487.

In concluding this particular phase of the subject we may observe that the English company in its assignment to the plaintiff of the exclusive right to the use of the trade-mark in this country did not in terms restrict its use to goods manufactured by it in England, and that in this court it was argued that the plaintiff had thereby acquired the right to use the mark on belting obtained by it from any source whatever, whether English, French, domestic, or otherwise. Under the law of both countries a trade-mark is not the subject of property except in connection with an existing business. The plaintiff obtained no right in the mark otherwise than with reference to its trade. The right to use the mark in this country was a right to use it as applied to the goods which the plaintiff manufactured or otherwise acquired and sold. The function of the trade-mark being to identify either origin or ownership, it may be that the plaintiff acquired a right to use the mark on any belting it owned, from whatever source obtained. That question is not here and is not decided. If the plaintiff did acquire that right, it would afford a conclusive reason for holding that the plaintiff had such ownership of the trade-mark in the United States as entitled it to its registry.

[10] We come next to consider the effect the registration of the trade-mark has upon the plaintiff's rights. The act contains in section 5 an important provision which reads as follows:

"And provided further, that nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations and among the several states, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of this act."

If therefore the plaintiff has shown an actual and exclusive use of the word, for 10 years next preceding the passage of the act, by itself or its predecessors from whom it derived title, the above provi-

sion would entitle it to the protection of the word "Scandinavia" as a trade-mark without regard to whether it is or not a "merely geographical" term. The purpose of the above proviso, as this court declared in Thaddeus Davids Co. v. Davids, 178 Fed. 801, 102 C. C. A. 249, was to permit the registration of marks not amounting to technical trademarks where they had been exclusively used as such for more than 10 years prior to the passage of the act and in which the user had thereby acquired property rights. The case was affirmed upon that point in 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046, Ann. Cas. 1915B, 322. See to the same effect Manitou Springs Mineral Water Co. v. Schueler, 239 Fed. 593, 152 C. C. A. 427; Merriam Co. v. Syndicate Publishing Co., 237 U. S. 618, 35 Sup. Ct. 708, 59 L. Ed. 1148; Coca-Cola Co. v. Nashville Syrup Co. (D. C.) 200 Fed. 153; s. c., 200 Fed. 157. The testimony shows that the word "Scandinavia" has been used in this country as a trade-mark upon belting manufactured in England for the plaintiff and its predecessors and sold here under that name in 1892, or for 13 years prior to the passage of the act, and that the sale under that name has been continuous in this country ever since by the plaintiff and its predecessors in title. Paragraph 5 of the bill of complaint avers that in January, 1892, Beach & Co. obtained from the English company "the exclusive agency for the importation and sale" in the United States of the belting manufactured by it, and that it continued "importing and selling such goods under the trade-mark 'Scandinavia' until in or about September 1899." Paragraph 6 avers that in September, 1899 the Beach & Treiber Company "succeeded to the business, good will, and trade-mark rights of said Beach & Co. in the importation and sale of said Scandinavia belting," and that it continuously carried the business on until May 18, 1904. And paragraph 7 avers that the plaintiff "succeeded to the business, good will, and trade-mark rights of the said Beach & Treiber Company pertaining to the importation and sale of the said belting." And there appears in the record a stipulation, signed by counsel for both parties to this suit, that the above averments may be received with the same force and effect as though proven by competent evidence. We are therefore to proceed upon the assumption that competent evidence shows that from 1892 to 1904 the plaintiff's predecessors made use of the word "Scandinavia" as a trade-mark, and that the plaintiff then succeeded to their rights in the use of that word. In what manner the plaintiff succeeded to their rights the paragraphs of the bill agreed to in the stipulation do not disclose, and with that we are not now concerned.

The question then becomes important, whether this use of the word "Scandinavia" in the United States as a trade-mark for 10 years prior to the passage of the act was an exclusive use. The following excerpt from the record gives the testimony of a witness who stated that he had been engaged for 34 years in the manufacture and sale of cotton belting:

"Q. What kind of belting have you known for the past 35 years associated with the name 'Scandinavia'? A. Only one manufacturer used that name.
"Q. Who is that? A. The Scandinavia Belting Company."

And asked how generally "Scandinavia" belting was known in the United States, he replied that it was known to all users of belting. The plaintiff's manager, being asked whether he had ever heard of any one who prior to the defendant had undertaken to dispute his title to the mark "Scandinavia," answered:

"We only had one case where anybody sold any other belting than 'Scandinavia' under our name (trade-mark), and that was a company in Philadelphia by the name of Osgood, Sayen Company."

That happened, he said, in 1908. That was three years after the passage of the act, and therefore without effect upon the proviso giving a right to registration of a trade-mark exclusively used for ten years prior to the passage of the act. When the attention of the Osgood, Sayen Company was called to their use of the trade-mark, they apologized, said it was a mistake, and discontinued it. And it was not until 1915, 10 years after the act was passed, that the defendant first put on the market its "Scandinavian" brake lining.

The stipulation admits that since 1892 this belting has been imported into the United States by the plaintiff and its predecessors under the trade-name of "Scandinavia," and the record discloses that orders for the belting so imported come "from here and from there and all over the country." The defendant has not contended, and the record would not support the contention if made, that the mark had not been used in commerce with a foreign nation or among the several states for the statutory period. We must therefore hold that as the plaintiff is the "owner" of the trade-mark within the meaning of the Registration Act, and as it and its predecessors from whom it derived title made actual and exclusive use of the word "Scandinavia" as a trade-mark for 10 years, next preceding the passage of the Registration Act, and has been so used in foreign commerce as well as in commerce between the states, and the word has been registered under the act, it is entitled to protection thereunder as a valid trade-mark, without regard to whether it was or not valid at the common law, and prior to its registration.

[11] If we are mistaken in holding that the plaintiff had the right to register the trade-mark as "owner," there is not the slightest ground, in the opinion of the court, for charging the plaintiff with an attempt to defraud the United States or the public because it represented itself as the owner of the trade-mark. A party who acts upon a mistaken view of the law honestly entertained is not guilty of fraud, entitling a party whose own fraud is manifest to defraud the other of that to which in all justice he is entitled. To attribute such a result from such a cause would bring the law itself into disrepute.

[12] In this connection we should perhaps refer to another like ground of defense based on the original adoption of the term "Scandinavia." In Reddaway v. Banham (1896) A. C. 199, 212, Lord Herschell said that where the name of a place precedes the name of an article sold it prima facie means that this is its place of production or manufacture. The plaintiff's belting, however, is not manufactured and never has been manufactured in any of the Scandinavian countries, Ice-

land, Norway, Sweden, or Denmark. It is manufactured in England and is there marked with the trade-mark "Scandinavia" and shipped to the United States.

The defendant claims that the plaintiff's trade-mark is deceptive, and that no protection will be accorded to a trade-mark which involves a false assertion calculated to deceive the public. It is undoubtedly true that he who comes into equity must come with clean hands. In The Leather Cloth Co., Ltd., v. The American Leather Cloth Co., Ltd., 10 Jurist (N. S.) 81, Lord Chancellor Westbury held that a false statement that goods were made by an American firm and in part at a place in America would bar relief. And in Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706, the Supreme Court declared:

"A court of equity will extend no aid to sustain a claim to a trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine."

But if a trade-mark is to be invalidated for fraud because of misrepresentation, the representation should have been made with a fraudulent intent or it should at least appear that some one has been defrauded or is likely to be defrauded. We fail to discover any evidence to that effect in this record. In adopting the word "Scandinavia" there was no ulterior purpose to be served and the parties were innocent of all wrongdoing. It does not appear that the original use of the term added anything whatever to the value of the belting sold under that mark. There is nothing in the record which shows that belting of any sort was even manufactured in any Scandinavian country, or of its having any reputation of particular excellence. The use of the term seems originally to have been due to a fanciful or sentimental reason. The history of the trade-mark is that the inventor of the belting which the plaintiff sells as "Scandinavia Belting" was one William Felton, a Scotchman who lived and worked for some years in Sweden. He no doubt was actuated by an honorable purpose in adopting his trade-mark when he commenced the manufacture of the goods in England. That he who comes into equity must come with clean hands is, of course, true. But it is equally true that a court of chancery is open to redress the wrongs of any one who has not himself been guilty of willful misconduct in regard to the matter in litigation, and no willful misconduct is shown on the part of the plaintiff's predecessors in title, or on the part of the plaintiff, in the original adoption or subsequent use of the trade-mark.

[13] The defendant claims that the mark "Scandinavia" having been used in England on belting made by the English manufacturers under a British patent to Cobbett, a predecessor of the Scandinavia Company, Limited, was descriptively used by the patentee and is now publici juris and became so at the expiration of that patent in 1892. The argument seems to be that because the English company owned a patent which supposedly covered its belting and sold such belting under the mark "Scandinavia," ipso facto, all rights in such mark ceased

when the patent expired and that the mark has ever since been open to the public under the doctrine announced in Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 199, 16 Sup. Ct. 1002, 1014 (41 L. Ed. 118). The doctrine was there stated as follows:

"The result, then, of the American, the English, and the French doctrine universally upheld is this: That where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created."

[14] The doctrine was followed in Merriam Co. v. Syndicate Publishing Co., supra. The doctrine is without application, however, to the facts of the present case. In the Singer Case the patents gave to the Singer Manufacturing Company a substantial monopoly, and the word "Singer" had been adopted by the company as designative of their distinctive style of machines rather than solely indicating the origin of manufacture. So that the word "Singer" came to indicate the class and type of machines that that company made and constituted their generic description. And the court held that on the expiration of the patent the right to make the patented article and to use the generic name passed to the public. The underlying reason upon which the decision rested was the prevention of a perpetuation of the monopoly. Where there has been no patent monopoly, the doctrine does not apply. And in the case at bar there was never any monopoly in the manufacture of the plaintiff's belting. The testimony is that the term "Scandinavia" was not used to indicate a particular weave. There is no proof that the mark was ever used descriptively so as to become a generic or identifying name of the goods. And the evidence shows that both in England and in the United States others were making the same goods and selling them under various trade-marks during the life of the Cobbett patent and long before that patent was applied for. But there is another and conclusive reason why this claim that the name "Scandinavia" became open to the public on the expiration of the patent is of no avail to the defendant, for if it were to be conceded that the doctrine of the Singer Case originally applied the evidence shows that the public did not avail itself of the right, and that now because of the registration of the trade-mark under the 10 years' clause it is not at liberty to violate the plaintiff's exclusive right.

[15] The defendant is charged with unfair competition. The law of unfair competition is broader than is the common law or the statute law of trade-marks, so that one may be entitled to relief on the ground of unfair competition who is denied relief under the law of trade-marks, and that is what happened in the court below. That court granted the plaintiff an injunction, although it held its trade-mark void because the judge concluded the charge of unfair competition was sustained by the evidence. In view of the fact that this court holds the registered trade-mark valid, little need be said as to the unfair competition, although if the court had not sustained the validity of the registered trade-mark we should have found no difficulty in affirming that portion of the decree dealing with the question of unfair com-

petition. The charge is that the defendant sells in interstate commerce, and under the name "Scandinavian" belting, which is identical in appearance with that which the plaintiff sells under the name "Scandinavia," and that in soliciting sales and in advertising, selling and billing its goods under the name it has adopted it is trading unfairly. The plaintiff's business in its "Scandinavia" belting last year is shown to have amounted to about $700,000. The treasurer of the company testified that in his opinion its trade-mark is worth to the company at least $500,000, and that the plaintiff expends something like $200,000 a year for the creation and upkeep of the good will that is crystallized in the trade-mark. The defendant commenced its business in 1906, and in 1908 it began selling brake lining similar to the plaintiff's in that it was solid woven. This, of course, it was entitled to do, and it put its product on the market under the trade-mark "Raybestos." In a short time it put on the market a solid woven asbestos brake lining like the plaintiff's under the trade-mark of "Motobestos." This also it had a right to do. Then in 1914 it put on the market a solid woven brake lining under the name "Scandinavian." The plaintiff had been selling under the name "Scandinavia" its solid woven brake lining for Ford cars, and for the cars of other manufacturers, selling to the Ford Automobile Company alone 1,925,000 feet in 1914. The president of the defendant company testified that before he put on the market this "Scandinavian" brake lining he recognized that there was a demand in the trade for the plaintiff's "Scandinavia" brake lining, and that he adopted the designation to sell his brake lining for Ford cars which the plaintiff had been furnishing, and that he visited and solicited orders from the same trade the plaintiff had supplied. The following excerpt from the record is illuminating:

"Q. Did anybody ever inquire of you for 'Scandinavia' lining before you began to use this name? A. Oh, yes; we had numbers of inquiries if we could make a brake lining somewhat on the same order as the 'Scandinavia' lining made by the 'Scandinavia' Belting Company and we said we would try."

That the defendant intended to appropriate the plaintiff's trade by a fraudulent use of the plaintiff's trade-mark is so clear that no one reading the evidence, it seems to us, can doubt it. It adopted the trade-mark "Scandinavian" for no other purpose than to obtain an unfair and fraudulent share of the plaintiff's business, knowing that its use of the trade-mark would mislead the public into the belief that in purchasing the "Scandinavian" product it was obtaining the "Scandinavia" brake lining of the plaintiff. It copied the plaintiff's goods. This, as we have said, it had a right to do. But when it copied the plaintiff's trade-mark, simply changing a substantive into an adjective, it failed to take into account the powers of a court of equity whose highest office it has always been to thwart fraud and to compel the fruits of fraud to be restored to the party defrauded. That the trade-mark is infringed goes without saying.

[16, 17] But the objection had been made that the record does not disclose any loss of sales to the plaintiff or that any one has been actually deceived by what the defendant has done. The objection is

without merit. It is without merit because, if the plaintiff used a trade-mark to distinguish its goods, neither the defendant nor anybody else has a right to use that mark upon the goods which he sells. As James, L. J., said in Singer Manufacturing Company, 2 Ch. Div. (L. R. 1875–76) 434, although as between the first vendor and the purchaser there may be no fraud, the mark is capable of being used for the purpose of fraud afterwards. To prevent the fraud at once the law does not allow the defendant to put the plaintiff's mark upon its goods. That is the rule in the case of a trade-mark. When it is not the case of a trade-mark, then ordinarily actual fraud must be shown. But even in unfair competition cases the simulation of the well-known and distinctive features of one's goods may be so close that the court will assume an intent to defraud. This court so declared in Enterprise Mfg. Co. v. Landers, Frary & Clark, 131 Fed. 240, 65 C. C. A. 587. And see Collinsplatt v. Finlayson (C. C.) 88 Fed. 693.

So much of the decree as dismissed the cause of action as to the registered trade-mark is reversed, with directions to reinstate the same and sustain the trade-mark. As thus modified, the decree is affirmed, with the costs in both courts to plaintiff-appellant.

WARD, Circuit Judge (concurring). The relation between the English company which manufactures the belting and the plaintiff company which has the exclusive right to sell it in the United States is described throughout the record as an agency. The proof, however, as to the nature of this agency, is so vague that I think it worth while to say something on the subject.

If the plaintiff company is merely the exclusive agent of the English company to sell its product in this country for its benefit upon a fixed commission or for any sum it can get in excess of a fixed price, I think the English company is the owner, both of the trade-mark and of the business to be protected, and is alone entitled to register the trade-mark under the United States statute and to sue for infringement of it or for unfair competition in business here. On this state of facts, the bill should be dismissed.

On the other hand, if the plaintiff company purchases the English company's product outright and sells it for its own benefit, and is given the exclusive right to do so in this country, together with the right to use the trade-mark for that purpose which has come to indicate the plaintiff company as the source and origin of the goods, then the business to be protected is the plaintiff company's business, and it has the right to register the trade-mark under the United States statute and to sue for infringement of it or for unfair competition in business here. Because I assume this to be the true relation between the English and the plaintiff company, I concur in the judgment of the court.

BOONE v. UNITED STATES. *

(Circuit Court of Appeals, Eighth Circuit. March 8, 1919. Rehearing Denied April 28, 1919.)

No. 4912.

1. INDICTMENT AND INFORMATION ⟸125(19)—OFFENSES BY OFFICERS OF NATIONAL BANK—MAKING FALSE REPORT.
An indictment against an officer of a national bank, under Rev. St. § 5209 (Comp. St. § 9772), for making a false entry in a report, is not duplicitous because it charges that the entry was made with intent to injure and defraud the bank and to deceive the Comptroller of the Currency and any agent appointed to examine the affairs of the bank.

2. BANKS AND BANKING ⟸257(1)—OFFENSES BY OFFICERS OF NATIONAL BANKS—INDICTMENT.
An indictment against the president of a national bank *held* to properly charge him, not as principal, but as accessory to the making of a false entry in a report to the Comptroller, in that he abetted, aided, counseled, and procured such entry to be made by the cashier.

3. BANKS AND BANKING ⟸257(3)—OFFENSES BY OFFICERS OF NATIONAL BANK—TRIAL—EVIDENCE.
On trial of the president of a national bank, charged with aiding and abetting the making of false reports to the Comptroller, evidence of the condition of his account and his indebtedness to the bank, although as it stood at a later date than the reports, *held* admissible.

4. BANKS AND BANKING ⟸257(4)—OFFENSES BY OFFICERS OF NATIONAL BANK—TRIAL—SUFFICIENCY OF EVIDENCE.
Evidence on trial of the president of a national bank for violation of the statute *held* sufficient to require submission of the case to the jury.

5. CRIMINAL LAW ⟸1186(1)—REVERSAL—SUFFICIENCY OF EVIDENCE.
That the evidence in support of the charges in certain counts of an indictment, on which defendant was acquitted, was stronger than that under the single count, on which he was convicted, is not ground for reversal.

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Criminal prosecution by the United States against T. W. M. Boone. Judgment of conviction, and defendant brings error. Affirmed.

Joseph M. Hill, of Ft. Smith, Ark. (Henry L. Fitzhugh and John Brizzolara, both of Ft. Smith, Ark., and Jeptha H. Evans, of Boonville, Ark., on the brief), for plaintiff in error.

J. V. Bourland, of Ft. Smith, Ark. (Emon O. Mahony, U. S. Atty., of El Dorado, Ark., on the brief), for the United States.

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

TRIEBER, District Judge. The plaintiff in error, hereinafter referred to as the defendant, was indicted with three other officers of the American National Bank, of which he had been president, for violations of section 5209, Rev. St. (Comp. St. § 9772). There were nine counts in the indictment. On the first eight the jury returned a verdict

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

*Certiorari denied 250 U. S. —, 39 Sup. Ct. 495, 63 L. Ed. —.

of not guilty, and a verdict of guilty on the ninth count. It is therefore only necessary to pass on this one count. That count charges:

"And the grand jurors aforesaid, inquiring as aforesaid, upon their said oaths, do further present that the said P. A. Ball, heretofore, to wit, on the 29th day of June, 1915, in the division and district aforesaid, the said P. A. Ball being then and there the said cashier of the American National Bank of Ft. Smith, Ark., and which said bank was established and then existing and doing business as a bank, under and by virtue of the national banking laws of the United States, unlawfully, willfully, and feloniously did make, in a certain report of the condition of the affairs of the said bank at the close of business on, to wit, the 23d day of June, 1915 (which said report then and there purported to be made to the Comptroller of the Currency of the United States, in accordance with section 5211 of the Revised Statutes of the United States[1]), a certain other false entry under a certain head designated in said report as 'Resources' and opposite items '16' and '17' therein, to wit, 'Lawful Money Reserve in Bank,' and in column therein headed 'Dollars Cts.,' which said false entry was and is in figures following, to-wit:

"'34 179 35
15 000 00'

—and which said entry so made then and there purported to show, and did in substance, intent, and effect state and declare, that the lawful money reserve in said bank was in the sum of $49,179.35; and the grand jurors aforesaid further say that the entry was and is false in this, to wit, that the lawful money reserve in said bank was not $49,179.35, but was a much less sum, to wit, the sum of $29,179.35; and the grand jurors aforesaid do further say that the said P. A. Ball, cashier as aforesaid, then and there, at the time and place of making said false entry in said report as aforesaid, well knowing the said entry to be then and there false as aforesaid, thereby intended to injure and defraud the said bank, and to deceive the said Comptroller of the Currency and any agent appointed by said Comptroller to examine, and in any examination by said Comptroller, and agent so appointed, of the affairs of said bank—contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

"And the grand jurors, upon their oaths, do further present that the said T. W. M. Boone, being then and there president, and the said A. S. Dowd and the said F. M. Dickenson, being assistant cashiers of said bank, heretofore, to wit, at divers and sundry times before and on the said 29th day of June, 1915, in the said city of Ft. Smith, Ark., within the jurisdiction of said court, unlawfully, willfully, and feloniously, and with intent to injure and defraud said bank, and to deceive the said Comptroller, and any agent by him thereunto appointed, in examining the affairs of said bank, did aid, abet, incite, counsel, and procure the said P. A. Ball, cashier as aforesaid, to make said false entry in manner and form as aforesaid, to do and commit—contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States."

There was a demurrer to each count of the indictment. That relating to the ninth count assigns two grounds—the first, that it is duplicitous, in charging two separate and distinct offenses, to wit, the offense of making a false entry in a report with the intent to injure and defraud the bank and of making the false entry in the report with the intent to deceive the Comptroller of the Currency and any agent appointed by him to examine the affairs of the bank; second, that the allegations in the indictment charged the defendant with being an accessory, and the allegations show that, if he were guilty of any offense, it would be that of principal and not that of an accessory. The demurrer having been overruled, the defendant at the beginning of the trial

[1] U. S. Comp. St. 9774.

objected to the introduction of any evidence upon the ground that the indictment did not charge a public offense, which objection was by the court overruled. After rendition of the verdict, motions in arrest of judgment and for a new trial were filed and overruled. Proper exceptions to these rulings of the court were saved and are assigned as errors in the assignment of errors.

It has been repeatedly held by this court that the practice of objecting to the introduction of evidence upon the ground that the indictment or complaint fails to state a cause of action does not prevail in the courts of the United States, either in civil or criminal causes, except under circumstances of an extraordinary nature. Morris v. United States, 161 Fed. 672, 678, 88 C. C. A. 532, 538; United Kansas Portland Cement Co. v. Harvey, 216 Fed. 316, 132 C. C. A. 460; McSpadden v. United States, 224 Fed. 935, 140 C. C. A. 413; Estes v. United States, 227 Fed. 818, 142 C. C. A. 342; McKnight v. United States, 252 Fed. 687, — C. C. A. —.

[1] Is this count of the indictment duplicitous by reason of the allegations that the false entry in the report was made with the intent to injure and defraud the bank and to deceive the Comptroller of the Currency, or any agent appointed to examine the affairs of the bank?

Counsel rely on what they presume was decided by Judge Adams, speaking for this court, in Billingsley v. United States, 178 Fed. 653, 101 C. C. A. 465, and United States v. Norton (D. C.) 188 Fed. 256, decided by Judge Campbell, who was of the opinion that the Billingsley Case sustained the contention now made.

A careful reading of Judge Adams' opinion does not warrant this construction. The issue in that case was whether the indictment charging a false entry in the books of the bank, with the intent to deceive any agent appointed to examine the affairs of the bank, without charging that the false entry was made with the intent to defraud the association, or any other bank or person, was sufficient to charge an offense. The court held the indictment sufficient, saying:

"There are apparently two separate intents contemplated by this section, either of which, when accompanying a forbidden act, constitutes an offense."

It was not held that the making of a false entry to defraud and to deceive constituted separate offenses. The intents were separate, but they might both concur in the making of a single false entry and thereby constitute a single crime. That allegations in an indictment charging both intents in one count are not duplicitous has been decided in McKnight v. United States, 97 Fed. 208, 215, 38 C. C. A. 115, 123, in which the opinion was delivered by Judge (now Mr. Justice) Day, and was concurred in by Judge (later Mr. Justice) Lurton and Circuit Judge Taft. In United States v. Britton, 107 U. S. 655, 665, 2 Sup. Ct. 512, 27 L. Ed. 520, a count charging the acts of the defendant to have been with the intent to injure and defraud the said association and certain persons to the grand jurors unknown was held good and not duplicitous. The same conclusion was reached in Morse v. United States, 174 Fed. 539, 548, 98 C. C. A. 321, in Richardson v. United States, 181 Fed. 1, 8, 104 C. C. A. 69, and in effect in United States v. Corbett, 215 U. S. 233, 30 Sup. Ct. 81, 54 L. Ed. 173.

In Crain v. United States, 162 U. S. 625, 636, 16 Sup. Ct. 952, 40 L. Ed. 1097, a similar question was before the court. A count in the indictment charged three acts, made separate offenses by section 5421, Rev. St. (Comp. St. § 10193), and it was held that a motion in arrest of judgment on that count, on the ground of duplicity, was properly denied. The court said:

"We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute."

The general rule is that in a criminal pleading, when the statute makes either of two or more distinct acts connected with a more general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes when committed by different persons or at different times, they may, when committed by the same person at the same time be coupled in one count as constituting one offense. Lehman v. United States, 127 Fed. 41, 45, 61 C. C. A. 577; May v. United States, 199 Fed. 53, 117 C. C. A. 431; Clark v. United States, 211 Fed. 916, 918, 128 C. C. A. 294, 296; Glass v. United States, 222 Fed. 773, 138 C. C. A. 321.

Another ground urged is that the indictment, after charging the making of the report of the condition of the bank, inserted in parenthesis these words:

"(Which said report then and there purported to be made to the Comptroller of the Currency of the United States, etc.)."

It is claimed that this count fails to charge that the report was made to the Comptroller of the Currency, but only that it purported to be made. What the pleader of the count meant was that the report, being false, only purported to be a report. In what manner this tended to the prejudice of the defendant we cannot conceive. It is therefore clearly within the provisions of section 1025 Rev. St. (Comp. St. § 1691). The court committed no error in overruling the demurrer or the motion in arrest of judgment.

[2] Nor is this count defective for charging the defendant as an accessory, instead of a principal. The report was made by the cashier of the bank, and the indictment charges the defendant to have abetted, aided, counseled, and procured the said P. A. Ball, cashier as aforesaid, to make said false entry, etc. As the defendant did not make the report, he could only be held responsible if he aided and abetted the person who made it.

[3] It is next claimed that the court erred in the admission as evidence statements made by the defendant to Mr. Machen in relation to matters existing at a later date than any of the reports charged to have been false. These statements relate to large loans to and overdrafts by the defendant, and corporations and firms in which the defendant was interested, which existed at a later date than any of the alleged false reports set out in the indictment. The court in overruling the objections to this testimony, said:

"I think this particular testimony is within the boundaries of that rule. It tends to show the knowledge which Mr. Boone had at that time; the knowledge that he had, and at least forms a starting point to go backwards over the period covered by this indictment. I believe it is within the field of collateral facts that may be properly introduced."

It must not be overlooked that the defendant is not charged with having made these reports, but to have aided, abetted, incited, and counseled P. A. Ball, the cashier of the bank, of which the defendant was president, to make these false reports. It was therefore essential to prove his knowledge of the falsity of the reports, and his intent to deceive the Comptroller. Besides, the defendant was tried on all nine counts of the indictment, some of which charged the falsity of the reports to consist in the failure to report defendant's overdrafts. There was no error in admitting this testimony. In Allis v. United States, 155 U. S. 117, 119, 15 Sup. Ct. 36, 37 (39 L. Ed. 91), a similar question was before the court, and it was held:

"There are two sufficient answers to these objections: (1) While the defendant was found guilty only on one, he was being tried on 25 counts, which counts charged false entries at different times running from February to December, and therefore testimony was competent as to the condition of his account stretching through the entire time. (2) The gravamen of this offense is the false entry with intent to injure, defraud, or deceive, and it was competent to show the state of the defendant's account, not merely at the very day the false entry was made, but also before and after that date, for the purpose of throwing light on the intent with which it was made."

The authorities that such evidence is admissible for the purpose of proving the intent of the defendant, where intent is an essential ingredient of the charge are practically uniform. Alexander v. United States, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954; Clune v. United States, 159 U. S. 593, 16 Sup. Ct. 125, 40 L. Ed. 269; Spurr v. United States, 87 Fed. 701, 710, 31 C. C. A. 202. In Moffatt v. United States, 232 Fed. 522, 533, 146 C. C. A. 480, 491, this court, after saying that "the intent with which an accused does a subsequent act cannot be imputed to him as of the prior date of the crime charged," proceeds by holding:

"These rules, however, do not conflict with or impair the long-established doctrine that in cases involving fraud, or the intent with which an accused does an act, collateral facts and circumstances, and his other acts of a kindred character, both prior and subsequent, not too remote in time, are admissible in evidence."

A large number of special instructions were asked in behalf of the defendant and by the court refused. Some of them referred to the counts on which the defendant was acquitted, and therefore are not involved on this writ of error. Those relating to the ninth count were all included in the charge of the court, although not in the language of the requested instructions. This is not necessary. One of the requests was for a directed verdict of not guilty, on this as well as the other eight counts. This makes it necessary to determine whether there was substantial evidence to warrant the submission of the case to the jury on this count.

[4, 5] In view of the fact that the defendant's liberty is involved, we have read and reread the testimony, and without prolonging this opinion by setting it out herein, which can serve no useful purpose in determining any question of law, we are of the opinion that there was ample and substantial evidence to make it the duty of the court to submit it to the jury. It is true, as claimed by counsel, that the evidence as to some of the other counts, especially the sixth and eighth, on which the defendant was acquitted, is stronger against the defendant than that on this count; but it was for the jury to determine on what counts, if any, the defendant should be found guilty, and he certainly cannot complain of not having been found guilty on these counts. It is a well-known fact that juries frequently hesitate to return verdicts of guilty on a large number of counts, when the punishment which may be imposed on each count is as severe as that provided for violations of this statute (the minimum punishment on each count is five years). They therefore satisfy their consciences by a verdict of guilty on one or two counts, and not always on the counts supported by the strongest evidence.

There was a motion for a new trial on the usual grounds, and also upon the ground that the jurors were improperly influenced by newspaper articles, highly prejudicial to the defendants. Motions for a new trial are addressed to the sound discretion of the trial court, and are not the subject of an assignment of error. The newspaper articles complained of were no doubt of an inflammatory nature, and if the evidence had shown that they were read by the jurors, or any of them, the trial court would have been justified to have set the verdict aside. But a careful reading of the evidence, some of which was by ex parte affidavits, and a great deal of it by witnesses appearing in court and testifying orally, satisfies us that the finding of the court that none of the jurors had read the articles is fully sustained. Counsel in their brief say:

"The jurors were kept together and quarters for them provided at the Hotel Goldman in the city of Ft. Smith. They were placed in rooms connecting with each other, and the marshal's room in an entry that had no other rooms than those occupied by the jurors and the marshal. The telephones of all the rooms were disconnected, except the one in the marshal's room. These most excellent precautions were taken to prevent improper influences reaching the jury, and the trial judge carefully guarded the rights of the defendant in this particular, and we believe that the marshal in his instructions to his deputies carefully did likewise."

We find there was no prejudicial error in the trial of this case, and the judgment is therefore affirmed.

SANBORN, Circuit Judge (dissenting). A careful examination of the record in this case has forced my mind to the conclusion that there is no substantial evidence in it that Boone was guilty of the offense of which he was convicted, so that I am unable to consent to an affirmance of the judgment against him which sentenced him to the penitentiary for seven years. Reduced to its lowest terms, this is the case the record presents, as I understand it: Boone was the president and Ball the cashier of the bank. Ball was indicted for making the false

entries charged in the indictment, and Boone for aiding and abetting him; but Ball was not prosecuted, but was called by the United States and testified on its behalf that he had frequently embezzled funds of the bank and had made false entries in the books and reports to the Comptroller without Boone's knowledge. Ball testified that he had an understanding or agreement with Boone that, when the cash was low in the bank, it should be boosted by false entries in the books of the bank, and that in two instances, relating respectively to Byllesby & Co.'s and Bontty's notes specified in two specific counts in the indictment, Boone conferred and agreed with him that entries of payments of them in cash should be made in the bank books when the notes had not been paid, and that Ball made the entries. Ball then testified that he could not remember of any other instances in which he and Boone conferred about any false entries. Boone testified that he never had had any understanding with Ball that when the cash was low it should be boosted by false entries in the books of the bank, that he never conferred or agreed with Ball that the false entries which Ball made regarding payment in the cases of the Byllesby & Co.'s and Bontty's notes should be made, and that he never aided or abetted Ball in making the false entries in the books or reports concerning which he was indicted, nor did he ever have any notice or knowledge before the bank failed, of any of the false entries in the books of the bank or in the Comptroller's reports which were charged in any of the nine counts of the indictment against Ball and him. This was all the evidence there was upon the question whether or not Boone had aided or abetted Ball in making the false entries in the Comptroller's report charged in the ninth count of the indictment. There was other evidence from various witnesses regarding the other eight counts. The evidence upon the nine counts was submitted to the jury, which returned a verdict in Boone's favor on all the counts, except the ninth, thereby finding as to each of the eight counts that Ball's testimony was false and Boone's was true, and necessarily finding that Ball's testimony was false and Boone's was true regarding the entries concerning the Byllesby & Co.'s and Bontty's notes, which were the only entries that Ball testified that Boone conferred with him about.

The result is, as I read the record, that on the question of substantial evidence to sustain the verdict upon the specific charge in the ninth count, which is that Boone aided and abetted Ball in making a false entry of $49,179.35, when he should have made a true entry of $29,179.35, in the report to the Comptroller of the 29th day of June, 1915, this is the case: Boone testified that he had no knowledge of this entry or its falsity, and that he never aided or abetted Ball in making it. Ball testified that he made it, that he had an understanding or agreement with Boone that when the cash was low in the bank it should be boosted by entries in the books of the bank, but that he could not remember that he ever had any conference, understanding, or agreement with Ball about this entry in the report to the Comptroller, which, of course, is not an entry in any of the books of the bank. Boone testified that he never had any understanding or agreement with Ball about making any false entries in books, or reports, or elsewhere. Upon that issue, wheth-

er or not there was such an agreement or understanding, the jury has found upon the other eight counts, and has necessarily specifically found upon the two counts regarding the Byllesby & Co.'s and Bontty's notes, that Ball was mistaken and Boone was right.

Because in my opinion this record presents a case in which there was no substantial evidence that Boone was guilty of the offense charged in the ninth count of the indictment, of which he was convicted, and because the conclusion that he was so guilty is utterly inconsistent with the findings of the jury on the other eight counts, I cannot resist the conclusion that the judgment below should be reversed.

FELLOWS v. NATIONAL CAN CO.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1919.)

No. 3207.

1. DAMAGES ⊂⊃82—LIQUIDATED DAMAGES OR PENALTY—BREACH OF CONTRACT.
In a contract for lease of machines, a provision that on failure to pay rent by the 10th of each month for the preceding month it should be increased 10 per cent, *held* void, as for a penalty.

2. PATENTS ⊂⊃216—LEASE OF MACHINES—ROYALTY—PROVISION FOR MINIMUM.
In a contract for leasing solder-saving machines, providing for the payment as rental of one-third the saving of the machines each month, a provision immediately following, "But the minimum amount of rent or royalty paid in any calendar year, after the year in which the machines are installed, shall be $300 for each machine," *held* not ambiguous, and reasonable and valid; it being shown that, if a machine was continuously used, the royalty would much exceed such sum.

3. ESTOPPEL ⊂⊃70(2)—EQUITABLE ESTOPPEL —DELAY IN ASSERTING RIGHTS.
Where a lease of machines for a term of years, subject to their return at any time by lessee, provided for payment of rental monthly on a royalty basis, but contained a plain and unambiguous provision fixing a minimum annual rental for each machine, and each party had a copy of the contract, neither the failure to demand the annual minimum at the end of each year, nor the acceptance of monthly rentals thereafter, estopped lessor to demand the deficiency on termination of the contract by lessee.

4. ESTOPPEL ⊂⊃54—EQUITABLE ESTOPPEL—EQUAL KNOWLEDGE OF FACTS.
Where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.

5. LIMITATION OF ACTIONS ⊂⊃46(6)—ACCRUAL OF RIGHT OF ACTION—CONTINUING CONTRACT.
Where a lease of machines for a term of years provided for monthly rental on a royalty basis, but fixed a minimum annual rental for each machine, without stating when any deficiency should be payable, a cause of action for such a deficiency arose on the lapse of a reasonable time after expiration of the year, and from that time limitation ran against an action therefor.

6. PATENTS ⊂⊃216—LEASE OF MACHINES—CONSTRUCTION—RENTAL.
Contract for leasing of machines on royalty, with a fixed minimum annual rental for each machine, construed with respect to rental due on machines for the year in which they were returned under the contract.

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

Action at law by Olin S. Fellows against the National Can Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. H. Foucar, of Chicago, Ill., for plaintiff in error.
N. Calvin Bigelow, of Detroit, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. On July 6, 1905, plaintiff in error (plaintiff below) leased to defendant, in writing, eight of plaintiff's patented solder-saving machines and their respective accessories and supplies, at a rental (subject to a minimum hereinafter stated) of one-third of the value of the solder saved by the machines (100 pounds of "solder savings" being taken as equal in value to 95 pounds of original solder), during the life of either of the patents thereon (the last of which would expire in 1920); the lessee having, however, the absolute right to cancel the lease at any time by returning to plaintiff the machines and their supplies. Payment of rental for each month, accompanied by written returns of the number of cans treated and the solder saved, were to be made to plaintiff within the first 10 days of the following month, with express provision that the minimum amount of rent in any one calendar year (after the year in which the machines should be installed) should be $300 for each machine. There was further provision for an increase of 10 per cent. each month upon the amount of rentals due in case of failure to make payment within the required time. Four machines had been installed under a former contract, which was superseded by the one in suit. These were retained under the new contract, and two more were received by defendant by or about January 1, 1906. The remaining two machines called for by the contract were never installed or asked for, and they are not involved in the claims of either party. Four of the machines were surrendered by defendant during 1909, and the remaining two in 1913. Monthly payments (without reference to the annual minimum) were made by defendant during the time the respective machines were in its possession, aggregating for 1906 $580.56, for 1907 $511.53, for 1908 $1,117.41, for 1909 $412.03, for 1910 $61.25, for 1911 $130 and for 1913 $116.17—a total of $2,929.05. In July, 1908, on defendant's representation that the 5 per cent. shrinkage in solder savings was less than actual experience, it was agreed (and carried out) that settlements thereafter should be upon a 90 per cent. basis, instead of 95 per cent.

In 1914, after the last machine was returned, plaintiff for the first time called on defendant for payment of the annual minimum rental of $300 per machine, less the $2,929.05 actually paid on monthly statements of savings; the claimed deficiency being $6,670.95, exclusive of interest. This suit, brought June 14, 1915, is to recover the amount of that deficiency, together with the 10 per cent. increase for failure to make payments when due, amounting to the further sum of $14,482.41, exclusive of interest thereon.

Defendant pleaded that the 10 per cent. clause was void and unenforceable, that the suit was entirely barred by limitation, that the 1908

savings percentage arrangement amounted to a novation, that the rental payments were made and received in full settlement and satisfaction of defendant's now asserted liability, and that by such acceptance of such payments plaintiff waived the claims now made and is estopped to assert them. On the trial, the petition was amended to allege fraud in procuring the contract.

The trial judge held that the statute of limitations did not apply, that the 10 per cent. provision was void as a penalty, and (a jury having been waived), while declining to hold that the contract was obtained by plaintiff's fraud, held that the minimum provision was ambiguous, concluding from its language, the statements of the parties prior to and at the time of its making, and by their dealings thereafter, that it should be construed as merely giving plaintiff the right to cancel the contract for failure to make the one-third net savings equal $300 per year. In that connection the court found as facts that while (a) the plaintiff himself always believed that he was entitled by the strict terms of the contract to the minimum annual rental, yet (b) that defendant supposed it was required to make only the monthly payments of one-third of the solder savings, and that, had it thought itself liable for the annual minimum rental, it would not have signed the contract in the first instance, or, having signed it, would have returned the machines and canceled the contract; (c) that plaintiff represented to defendant, at the time the lease was signed, that under the contract "there were savings certain to result to defendant, and that the terms of the contract were such that it could not result in any loss to defendant, because it provided only for a rental to be measured by a portion of the savings of solder"; (d) that plaintiff knew that defendant would cancel the contract if he asserted the minimum provision, knew that defendant believed all rentals claimed were being settled in full each month, knew that defendant was retaining the machines under such belief, and intended that defendant should so believe. The judge concluded, as matter of law, that plaintiff was thereby estopped from recovering.

[1] 1. The District Judge was clearly right in denying relief under the clause for an increase of 10 per cent. per month. If regarded as interest, the provision was usurious and void under the applicable Michigan law. If intended as stipulated damages, it was under the present case equally void. In the normal case, damages for delay in payment of money are measured by interest. Assuming, however, that it was competent for the parties to agree upon a higher measure, it is clear that the provision in question bears no relation whatever to actual compensation or actual damages, and was thus a mere penalty and void. Manhattan Life Ins. Co. v. Wright (C. C. A. 8) 126 Fed. 82, 85, 61 C. C. A. 138; McCall v. Deuchler (C. C. A. 8) 174 Fed. 133, 98 C. C. A. 169.

2. The District Judge was right in not holding that the contract was obtained by fraud; actual fraud would not be the natural inference from the record. There was no dispute in the testimony as to what was actually said and done by the parties throughout their relations, both before and after the contract was made. The trial judge thought

the witnesses on both sides testified truthfully. Plaintiff was the only witness on his side; defendant had but two witnesses.

The contract which the one in suit superseded contained the same annual minimum provision; there is no testimony that this previous contract was not read over by defendant; on the contrary, its sales manager who signed it (at the manager's direction), while not remembering reading it over, or that anything was said about the annual minimum when the contract was signed, "infers" that he read it over. It was on a printed form; the minimum provision immediately followed the solder-savings provision and in the same type; it was signed for plaintiff by his agent, who procured it; a copy was retained by defendant, which attached thereto plaintiff's letter, stating his agent's report that the contract was closed, and advising defendant of the ordering of four machines and their equipment. Defendant's manager says he signed the new contract without reading it, and did not recall the signing of the earlier contract. The only reason assigned for making the new contract is that the former one called for but four machines, while the new one contemplated eight.

The only differences between the two contracts relate to the number of machines and the ratio of original solder to solder savings, which was 97 to 100 in the former, as compared to 95 to 100 in the later contract. Plaintiff did not remember calling defendant's attention to the minimum clause, and admits that, when the later contract was signed, he told defendant's manager "the saving capacity of the machines, and that he would be expected to pay him one-third of the value of the savings." Plaintiff testified, however, that he "certainly supposed they (defendant's representatives) had read the contract and knew" its conditions. We find nothing in the record discrediting this statement of plaintiff's belief. The testimony which comes nearest to sustaining the charge of fraud is that of defendant's manager, who says that when the later contract was signed "there was no further talk than the percentage basis. My recollection is that it was one-third and two-thirds. He did not state anything at any time about any compensation to be paid to him for the use of these machines other than the percentage basis," and, in another connection, that at one time (possibly before the earlier contract was signed) plaintiff told him with reference to the saving of solder by the use of his machines that "he got a certain percentage, and we would get a certain percentage, and there was no chance of losing. He never said anything to me in these conversations with reference to a contract in which there was a minimum clause of $300 per year minimum per machine."

There is no room for more than mere suspicion of fraud in the fact that in September, 1905, two months after the contract was made (but to which year the annual minimum did not apply), plaintiff in a letter offering to help in getting the machinery to work properly said, "I am interested in your making cans, as otherwise I get no returns, and possibly my experience might be of use to you;" nor by the fact that in July, 1906, a year after the contract in question was made, but about six months before an annual minimum would be payable (if ever) he wrote, "I trust that you will soon install this machine for I think it

would mean considerable saving to you, and your returns to me are so small that I would very much appreciate this increase." If defendant could not make the machines already installed work, or did not use them, it would naturally return them, and the more machines defendant installed the more returns plaintiff would get; he was, moreover, interested in getting more than the minimum annual rental. The testimony, taken together, falls short of proving fraud in the making of the contract. On the trial, plaintiff's counsel stated that "the kind of fraud we complain of is more of a fraud which has taken place after the entering into the contract."

3. We see no merit in the contention (not passed upon below) that the 1908 solder ratio change amounted to a novation. It had no relation to the wholly separable annual minimum feature, and concerned solely the monthly solder-saving provision, which has been fully carried out. Nor do we see any merit in the claim that the statute of limitations has barred recovery under the minimum provision as to all the years in question.

[2] 4. That the annual minimum provision was originally valid, in the absence of fraud in its procurement, is not open to question. It was a reasonable provision. There was undisputed testimony that during the year 1905 and the two following years plaintiff had about 15 to 20 contracts in force, all on practically the same form of blanks and covering about 50 or 60 machines, and that his share of the earnings of these machines, on the same one-third basis, averaged very much in excess of the $300 annual minimum (in one case a machine saved $1,800 in one month); and defendant's manager testified that, had its factory been run to full capacity, it could have turned out 20 times as many cans as it did, that there was demand for cans of that kind, and that defendant's failure to get more orders was due to its inability to meet competition, and that for this reason the machines in question were operated but a small part of the time. The machines were sent back because defendant discontinued the lines they were used on. The annual minimum provision was thus but a reasonable means of assuring the largest available use of the machines.

We cannot agree with the learned district judge that it is ambiguous. It immediately follows the provision for a solder-saving rental, and is in this language, "but the minimum amount of rent or royalty paid in any calendar year, after the year in which the machines are installed, shall be $300 for each machine." Taken in connection with what precedes, it unmistakably requires defendant to pay ultimately at least $300 per year for each machine. The earlier requirement of monthly payment on the basis of solder saving creates no ambiguity respecting defendant's obligation under the minimum provision, because until the calendar year was closed, and the last monthly report was in, it could not be known that the minimum for the year had not been reached, and therefore it could in no case be called for as such until after the close of the calendar year. Nor does the question whether the penalty of 10 per cent. monthly increase for nonpayment of rent when due was meant to apply to the annual minimum payment create any ambiguity respecting defendant's obligation to pay that

minimum. It results that it was error to admit parol testimony in aid of the construction of the minimum provision, and that the interpretation placed by the District Court upon that provision is not maintainable.

Whether the judgment below shall stand depends upon the effect of plaintiff's acceptance of the monthly solder-savings payments and his nonclaim of the annual minimum when due, as either amounting to payment or working an estoppel.

That the acceptance of the monthly payments did not amount to present payment and satisfaction of the annual minimum is plain. All payments seem to have been made by check, each of which was accompanied by a statement on a printed blank (presumably furnished by plaintiff) of "solder saved" during the month or months covered, with total pounds saved (gross and net), its cost, amount of the two-thirds retained, followed by the words "check inclosed for one-third," and stating amount of check. None of the checks sent up here purport to have been delivered or accepted in full settlement of defendant's liability under the contract, for the stated period or otherwise; all are, on their face, in ordinary form. Six of them contain no indorsement by plaintiff, except his signature. Nine of them contain this indorsement (signed by plaintiff): "Indorsement on this check is a receipt in full for *following invoices*" (italics ours), followed (in the case of seven checks) by memorandum of amounts (covered by check) of "solder saved" (or "solder savings," or "solder savings adjustment") for the given month or months separately. In the case of the remaining two the descriptive words "solder," etc., are omitted; the indorsement reading (for example), "March account, amount 73.08, freight 14.28, check 58.80." Such receipt of monthly savings checks throughout a given year would not amount to a payment or waiver of payment of the annual minimum thereafter payable for that year; nor would such result follow from the fact that each of two of the checks covered payments for defendant's belated reports for a series of months both before and after the close of the calendar year. The checks would naturally have read the same, had the annual minimum provision been recognized as in force, and intended to be met.

[3] In determining whether the facts support the trial judge's conclusion of estoppel, we must start with the propositions that the contract clearly and unambiguously required defendant to pay after the end of each calendar year (and not until then) an amount which added to the monthly solder-savings payments, would aggregate $300 for each machine, and that the contract was not induced by fraud. Beyond this we must accept as final the facts found by the trial judge, so far as supported by testimony or reasonable inference therefrom. We must also accept such further facts as appear without dispute in the record.

The conclusions of fact made by the learned trial judge we accept with some modifications. In especial, we think the finding whose substance we have included in clause (c) above goes farther than warranted, in view of what we have said in discussing the question of fraud

We think the finding supported to this extent: Plaintiff always believed himself entitled to the minimum annual rental; the minimum provision, however, was not called to defendant's attention when the second contract (the one in suit) was signed, and the talk at that time regarding rentals related only to the percentage basis; defendant had overlooked or forgotten the minimum provision, if it had ever been impressed upon its mind, and made the monthly solder-savings payments under the supposition that its rental liability was thereby satisfied, and if it had had in mind that it was liable for an annual minimum it would either not have executed the contract in suit (as distinguished from its predecessor contract) or at least would have canceled it and returned the machines as soon as it appeared (as it later did) that the value of one-third of the solder saved was so greatly below the stipulated minimum; that at some time after plaintiff's failure to call for the minimum for 1906 he believed, without being so told, that defendant was making its monthly solder-savings payments and retaining the machines in the belief that its rental liability was being satisfied by such payments, and that plaintiff believing (certainly after the first three years' operation) that defendant would cancel the contract, at least long before it did, if the minimum provision were asserted, purposely refrained from such assertion, although probably intending to make such claim after the machines were all returned, especially if the aggregate monthly solder-savings payments for the entire period of years should be less than the aggregate annual minimum. Whether such cancellation would have been made in either of the first three years, which were perhaps more or less experimental, as depending upon the orders obtainable, and for the aggregate of which three years the total solder saved (not the one-third thereof) was $1,200 above the $300 minimum per machine, perhaps rests more or less on conjecture.

But giving defendant the benefit of the doubt respecting all conclusions of fact which we have treated as merely doubtful, and taking into account the acceptance of the monthly checks and the nonassertion of claim for annual minimum when due, the question is: Do these facts effect an estoppel against plaintiff? The question of waiver in this respect is so closely allied to estoppel as not to require separate treatment.

It may be conceded that, had the minimum provision been ambiguous, or had plaintiff known when the contract was made that defendant did not understand that the minimum provision existed, or had defendant offered to return the machines and been induced not to do so by distinct representation that defendant was liable only for one-third of the monthly savings, or had plaintiff, in connection with the payment of monthly savings, distinctly declared that defendant was liable to no further rental, thereby relieving defendant from attention on its part to the terms of its contract (Graham v. Thompson, 55 Ark. 296, 18 S. W. 58, 29 Am. St. Rep. 40; Westermann v. Corder, 86 Kan. 239, 119 Pac. 868, 39 L. R. A. [N. S.] 500, Ann. Cas. 1913C, 60), plaintiff's conduct in accepting the monthly payments would operate as

an estoppel to claim the annual minimum. But no one of these conditions is present. If the acceptance of the monthly savings checks did not effect satisfaction and payment of the annual minimum, it is difficult to find in such acceptance any substantial effect by way of estoppel. The minimum liability was not merely contingent; it was fixed and inevitable. The form complete payment should take, whether through monthly payments alone, or following such payments through the addition thereto of a deficiency in such monthly payments, was the only contingent feature. What we have said respecting the relation of the letters of September, 1905, and July, 1906, to the subject of fraud in procuring the contract, applies also to the subject of estoppel.

Upon this record, the question comes down to this: Did plaintiff's receipt from month to month, over a series of years, of preliminary payments expressly provided for by his contract, without calling for the additional payments equally expressly, and clearly and unambiguously, called for by the same contract, which had been obtained in good faith and in the belief that defendant had read it and knew its conditions, estop him from claiming such annual payments before the statute of limitations has run against them, merely because he discovered that defendant (who retained one of the duplicate copies of the contract) supposed, through carelessness or forgetfulness, that it was paying all it was obligated to pay, and knew or believed that defendant would cancel the contract if demand for the annual minimum were made? Silence alone could not estop plaintiff, unless he was legally or in good conscience bound to speak.

[4] Granting that the Golden Rule would require that plaintiff save defendant from the consequences of its own carelessness or forgetfulness, by advising it of its liability under the contract (which defendant was legally bound to know), although such advice would have subjected plaintiff to a loss possibly as great as that from which defendant would thereby be saved, we are cited to no authority, nor have we found any, imposing a legal obligation to do so in a case such as here presented, especially when there is taken into account the possibility always existing from year to year that defendant might obtain orders enough to make its proportion of the savings equal or exceed the annual minimum. In our opinion plaintiff's mere silence, under the circumstances stated, did not create an estoppel. Slaughter's Adm'r v. Gerson, 13 Wall. 379, 20 L. Ed. 627; Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 337, 23 L. Ed. 927; Sheffield Car Co. v. Hydraulic Co., 171 Mich. 423, 137 N. W. 305, Ann. Cas. 1914B, 984; Bright v. Allan, 203 Pa. 386, 394, 53 Atl. 248; Ft. Scott v. Eads Brokerage Co. (C. C. A. 8) 117 Fed. 51, 54 C. C. A. 437.[1]

[1] In the Slaughter Case, 13 Wall. 385, 20 L. Ed. 627, Justice Field said: "The neglect of the purchaser to avail himself, in all such cases, of the means of information, whether attributable to his indolence or credulity, takes from him all just claim for relief."

In the Brant Case, 93 U. S. 337, 23 L. Ed. 927, the same Justice said: "Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

In Bright v. Allan, 203 Pa. 399, 53 Atl. 252, the court said, quoting from a

[5] 5. As the case must be tried again, more must be said on the subject of limitation. The time when the balance required to make up the annual minimum is payable not being expressly stated in the contract, the law implies an obligation to pay within a reasonable time after it is earned (Palmer v. Palmer, 36 Mich. 487, 24 Am. Rep. 605), or, as applied to this specific case, within a reasonable time after defendant's monthly reports showed that the aggregate of solder-savings payments were less than the annual minimum. The question of reasonable time would be one of fact or of law, according as upon the record reasonable minds could or could not reach differing conclusions. International Co. v. Stadler (C. C. A. 6) 212 Fed. 378, 382, 129 C. C. A. 54; Marmet Co. v. Peoples Co. (C. C. A. 6) 226 Fed. 646, 141 C. C. A. 402. The limitation laws of Michigan control. Under the fourth subdivision of section 14135 of Howell's Mich. Statutes (2d Ed.), actions of assumpsit founded on contract, express or implied, must be commenced within six years after the cause of action accrues; and this without regard to the time when actual damage accrues. Aachen & Munich Fire Ins. Co. v. Morton (C. C. A. 6) 156 Fed. 654, 657, 84 C. C. A. 366, 15 L. R. A. (N. S.) 156, 13 Ann. Cas. 692. The case is not within section 14139 of the Michigan Statutes, which makes the balance due upon a mutual and open account current accrue at the time of the last item of the account. There was here no mutual and open account current. Kimball v. Kimball, 16 Mich. 211; White v. Campbell, 25 Mich. 463; Mandigo v. Mandigo, 26 Mich. 349. Defendant supposed the account closed monthly, plaintiff permitted it to be so treated. Payments were not made upon an open account as such, so as thereby to prevent the running of the statute. Each unpaid remnant of annual minimum was thus practically a separate installment under the contract, and could be sued for separately as soon as payable and without waiting for complete termination of the contract relations by the return of the last machine. From the time that each such remnant was subject to suit the statute began to run. Had the rental been for use of real estate, the action would

prior decision of the same court: "If, therefore, the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel." The preceding cases involved questions of title or boundary of real estate. The principle, however, seems equally applicable to the instant case.

In the Eads Case, 117 Fed. 56, 54 C. C. A. 442, Judge Sanborn said: "A misrepresentation by one party of a fact of which the other is actually and *permissively* ignorant is a sine qua non of an equitable estoppel." (Italics ours.) Petition for certiorari denied by Supreme Court, 187 U. S. 647, 23 Sup. Ct. 846, 47 L. Ed. 348.

In Sheffield Co. v. Hydraulic Co., 171 Mich. 450, 137 N. W. 315, Ann. Cas. 1914B, 984, the court quoted with approval the rule as stated in 11 Am. & Eng. Enc. of Law (2d Ed.) at page 434: "It may be stated as a general rule that it is essential to the application of the principle of equitable estoppel that the party claiming to have been influenced by the conduct or declarations of another, to his injury, was himself not only destitute of knowledge of the state of the facts, but was also destitute of any convenient and available means of acquiring such knowledge, and that, where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

have been barred after six years under subdivision 3 of section 14135. Stewart v. Sprague, 71 Mich. 50, 60, 38 N. W. 673, 676. Whether or not that subdivision applies to rentals of the class here in suit (its language is "all actions for arrears of rent"), the principle of the decision is applicable, having in mind the language of subdivision 4 of the section "all actions of assumpsit * * * founded upon any contract * * * express or implied." If preliminary demand were necessary to the right to sue, the demand would be barred by the failure to make it within six years, and the right of action would be extinguished by the delay. Palmer v. Palmer, supra, 36 Mich. at pages 493, 494, 24 Am. Rep. 605; Sullivan v. Ellis (C. C. A. 8) 219 Fed. 694, 697, 135 C. C. A. 366. In this view, limitation could, at the most run only as against the years 1906, 1907, and 1908.

[6] 6. It is to be further noted that one machine was returned to plaintiff on June 30, 1909, another on August 17, 1909, and the last two January 28, 1913. As we construe the contract, taking all its provisions into account, the minimum royalty for each returned machine was not earned for the full year in which return was made (as demanded by plaintiff), but only for such portion of the year as it was kept by defendant.

The judgment of the District Court is reversed, with directions to award a new trial.

EDWARDS v. DAYTON MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1918.)

No. 3044.

1. PATENTS ⟸26(2)—INVENTION—COMBINATION—NEW RESULTS.
   Invention may exist, even though every element is old, provided the combination either produces a new result or effects an old result in a new and materially better way.
2. PATENTS ⟸26(1)—LACK OF INVENTION—ELEMENTS OF PRIOR ART.
   All elements of the prior art have a bearing on the question of invention, and it is unnecessary to a finding of lack of invention that every element be found in one embodiment.
3. PATENTS ⟸328—LACK OF INVENTION—COMBINATION OF ELEMENTS IN PRIOR ART.
   The Edwards patent, No. 890,626, for an improvement in window holding and fastening devices, *held* void for lack of invention, consisting merely in a combination of the desirable elements of different devices in the same art.

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

Suit for infringement of patents by Oliver M. Edwards against the Dayton Manufacturing Company. From a decree for defendant, plaintiff appeals. Affirmed.

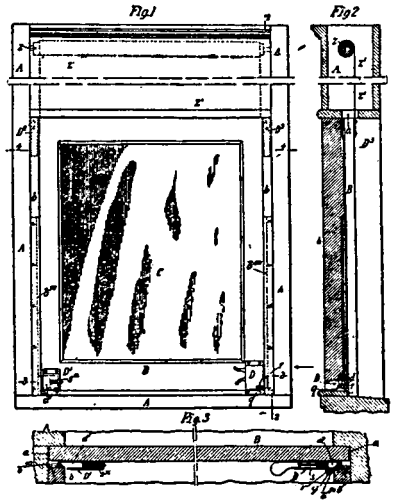
Arthur E. Parsons, of Syracuse, N. Y., for appellant.

H. A. Toulmin, of Dayton, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Suit for infringement of United States patent No. 890,626 to Edwards, June 16, 1908, for improvement in window holding and fastening devices. The District Court held the patent void for anticipation.

The device of the patent is sufficiently shown by Figs. 1, 2, and 3 of the patent drawings here reproduced, in which *A* is the window frame, *B* the sash adapted to move up and down in guides *a* in the frame, which is provided with stops *b*. The two lower fastening devices, *D* and *D'*, have each a wedge-headed bolt *d*, actuated by a spring *s*, which normally pushes the bolt outwardly into contact with a bevel-faced attachment to the frame stop *b*, whereby the sash is normally pressed toward the exterior of the window. The upper fastenings, *D2* and *D3*, consist each of a flat, bent spring, having one end fastened to the frame stop *b*, the free end bearing against the inside of the sash, and so tending to force the latter



toward the exterior of the window. The exterior pressure of the four devices naturally tightens the window sash in its frame, so tending to prevent rattling and to exclude dust and cold.

The lower fastenings, *D* and *D'*, are provided each with a finger-actuated lever, by which the wedge-headed bolt *d* may be withdrawn from contact with the bevel-faced stop attachment *b*; the window thus being readily raised by lifting through the finger pieces alone or by the contributing action of the counterbalance *Z* and its belt *Z'*, which, however, are no necessary part of the invention. The beveled attachment to the frame stop is itself provided with a plurality of stops, enabling the holding of the window at different heights. The release of the bolts *d* through the use of the finger levers enables the lowering of the sash by gravity, except as limited by the frictional action of the leaf springs, *D2* and *D3*. The specification shows various modifications of the devices represented by the figures we have reproduced, but they involve nothing calling for special mention.

The claims in suit are Nos. 1, 15, 21, 22, 23, 24 and 26. We copy in the margin the twenty-sixth claim, which is the broadest and the fifteenth claim which is the most specific.[1]

The claimed invention, to say the least, rests upon a very narrow foundation. There was nothing novel in either the upper or lower fastening devices themselves, nor in their mere adoption for the purposes to which the patent applied them, viz. to support the sash at any desired elevation so tightly as to prevent rattling and to exclude dust and drafts of air, and at the same time permit the ready release of the holding attachment sufficiently for the opening and closing movement. Indeed, plaintiff's counsel frankly concedes that there would be no invention in adopting either the two lower holding devices alone or the two upper holding devices by themselves.

It is contended, however, that there is invention in the use of the four holding devices shown, whereby the four points of pressure contribute together to force the sash outwardly, thus preventing rattling and the entrance of dust and air—in connection with the means for raising the window.

Counsel more explicitly limits the claim of invention (by adoption of the description of plaintiff's expert) to—

[1] "26. In a window the combination, substantially as set forth, of a guideway, a sash adapted to move therein, and a series of spring actuated individual holding devices, a portion of which series is provided with means to partially release the sash and another portion of such series is unprovided with such means and is adapted to bear against the sash in its movement to open and close the window and partially hold it in its guideway."

"15. In a window the combination, substantially as set forth, of a guideway, a sash adapted to move in the guideway, individual holding devices adapted to bear against the sash at different points, a portion of which bear with substantially equal force in either direction of movement of the sash, one point of bearing for each device, a plurality of which devices are provided with movable parts yieldingly bearing against the sash, each of which is actuable, actuating means for such parts, and coacting portions for the holding devices, a portion being arranged substantially in the direction the sash moves with which the bearing surfaces of the holding devices may frictionally bear and hold the sash in the guideway."

"a plurality of sash-holding devices independent of each other, and each pressing the sash outwardly against a given point of the outer stop of the guideway, a portion of these devices—those at the lower left-hand and right-hand sides of the sash—being releasable and having means whereby they are released in the movement for raising the sash to open the windows, and whereby movement is given to the sash. The remainder of these devices, those at the upper corners of the cash, being non-releasable, whereby the sash is more or less supported and controlled in its opening and closing movements."

This is apparently intended to include a combination of the two non-releasable devices above, and at least one below.

Reference to the prior art shows that each element of the device of the patent was old in the window sash holding art, long before the Edwards patent was applied for. In 1880 (antedating Edwards by 23 years), Brittain, by British patent No. 3531, disclosed a car or door window, opened by lowering and vertically shiftable by means of a strap attached to a lever on the lower edge of the window, whose sash, for the purpose of preventing rattling of the window, carried at each of its two upper corners wedge-headed bolts, actuated by coil springs, normally pushing the bolt heads against a bevel-faced stile in the door frame. The sash also carries near each of its two lower corners non-releasable, rearwardly pressing leaf springs. The patent also describes a construction of the wedge-headed bolts whereby, through the use of sufficiently strong coil springs, the sash can be held in any position to which it may be brought, and the bolts released through handles on the inner ends of their stems. It is clear that the engagement of the bolt-heads of the upper fastenings with the bevel-faced stiles causes a wedging action, and thereby a tendency to force the bolt heads themselves and thus indirectly the window, rearwardly and at right angles to its plane. The specification does not in terms state, and the drawings (which are not shown to be made to scale) do not all show, the window sash when closed as actually overlapping the rectangular frame stiles, and unless that were so, the device would not appreciably exclude dust and air, and the leaf springs would not exert pressure when the window is closed, or nearly so.

One of the drawings, however, indicates an actual overlapping of the sash, and the natural inference would be, from the specification and drawings taken together, that such overlapping was intended, and that the leaf springs were intended to be operative when the window is entirely closed as well as when open or partly open. But, were the Brittain patent to be rejected as an anticipation, for lack of clearness in the respects mentioned, it is still an important reference, as disclosing, in the same art, a structure evidently designed by the inventor for four point corner pressure, to be accomplished by devices of the same type as those of the patent in suit; and no one would claim that it would be invention merely to reverse Brittain's arrangement of holding devices by putting his releasable wedge-shaped bolts below and his nonreleasable leaf springs above, to meet the problem of a window opened by raising instead of by lowering. The existence of a four point rearward pressure when the window is partly open has at least an important bearing on the question of invention in employing such pressure at all times.

Kane, however, in 1892, by United States patent No. 473,757, had disclosed an invention for keeping the window tight (when either closed or open) and preventing it from rattling, and at the same time permitting ready release of the sash, when desirable to raise or lower it, by the use of attachments, one on the inner face of each of the four corners of the sash, whereby a beveled bar is pressed against a beveled guideway in the frame, thereby through a wedging action forcing the sash against the outer stops. The release of the two lower fastenings automatically released the upper fastenings also. Here we have the direct exterior pressure of the sash itself against its outer stops, with the natural effect of excluding dust and drafts of air, as well as preventing rattling.

Again, Waddington, in 1893, by British patent No. 15,003, showed a device for the stated purpose of holding either sash of a window (including railway carriage windows) in desired position (partly raised or partly lowered), consisting of leaf springs, one at each corner of the sash; one end of the spring being attached to the sash-face, the free end (with or without antifriction roller thereon) bearing against the window frame and pressing the sash, in a direction at right angles with the face of the window, into close engagement with the frame. While the specification does not expressly state against which stop the sash is pressed, the drawings seem to indicate pressure against the outer stop. The natural and direct effect of the Waddington device was to prevent rattling and to exclude dust and air.

Still further, Howe, in 1891 (United States patent No. 448,882), showed a device for supporting a sash (including that of a car window) at any desired elevation, and so tightening it in the frame as to make it "firm and to exclude dust," and at the same time permit its ready release, by the use of a single finger-operated bevel-headed plunger, forced by coil springs against the beveled face of a vertical rack bar with stops thereon, so as, by a wedging action, "to force the sash outwardly against the rabbet of the window frame and thereby render the sash tight against such rabbet." If it excluded dust, it would, of course, exclude drafts of air.

[1, 2] Other more or less pertinent references to the prior art might be made; but those cited, even disregarding Brittain (who, plaintiff's expert says, discloses "the closest approach to the structure and organization found in the patent in suit"), are sufficient to show that, while no one reference contains all elements of the claims in suit, yet every element, according to plaintiff's counsel's interpretation of them already given, is specifically disclosed in substantially the same relation and for substantially the same purpose for which they are employed in the patent before us. While invention may exist, even though every element is old, provided the combination either produces a new result or effects an old result in a new and materially better way (Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177; Ferro Concrete Constr. Co. v. Concrete Steel Co. [C. C. A. 6] 206 Fed. 666, 669, 124 C. C. A. 466), yet all elements of the prior art have a bearing upon the question of invention, and it is unnecessary to a finding of lack of invention that

every element be found in one embodiment (Keene v. New Idea Spreader Co. [C. C. A. 6] 231 Fed. 701, 708, 145 C. C. A. 507).

[3] Upon careful consideration of the prior art, and giving due weight to the well-established utility of plaintiff's device and its highly favorable commercial reception, we are unable to find in it room for invention. The most which, to our minds, can be said is that the inventor has, in the exercise of a high degree of mechanical skill, selected and put together the most desirable parts of different devices in the same art, making a new structure, doubtless better than any which preceded it, but in which each part operates in substantially the same way as it did in the old and effects substantially the same result. This is not invention. Overweight Counter-Balance Co. v. Vogt Mach. Co. (C. C. A. 6) 102 Fed. 957, 43 C. C. A. 80; Railroad Supply Co. v. Elyria Iron Co., 244 U. S 285, 37 Sup. Ct. 502, 61 L. Ed. 1136; Huebner-Toledo Breweries Co. v. Matthews Gravity Carrier Co., 253 Fed. 435, — C. C. A. — (decided by this court October 8, 1918).

The decree of the District Court is accordingly affirmed.

THE BOILDIEU.

(District Court, S. D. Florida. June 6, 1919.)

SALVAGE ⇐48—RIGHT TO COMPENSATION—BENEFICIAL RESULT OF SERVICE.

Services rendered by a motorboat to a stranded steamer, by carrying and placing an anchor astern, *held* not entitled to compensation as salvage services; it appearing from the weight of evidence that the anchor did not hold and had no effect, the steamer being afterward salved by a wrecking tug.

In Admiralty. Suit by Charles N. Moller against the French bark Boildieu. Decree for respondent.

H. H. Taylor, of Key West, Fla., for libelant.

Patterson & Harris, of Key West, Fla., for claimant.

CALL, District Judge. The facts appear from the evidence as follows: On the evening of March 30, 1919, the French bark Boildieu grounded on a shoal about five miles off Long Key. On the morning of March 31, the libelant, the owner of the motorboat Cossier, of the length of 45 feet, beam 14 feet, equipped with a 40 horse power gasoline engine, took out a fishing party from Long Key. The Boildieu was of three thousand tons burden, loaded with a general cargo, bound from New York to Nantes, France. About 9:30 a. m., the libelant ran alongside of the bark and offered himself and boat to assist in floating the bark, which offer, after some demur, was accepted, and a small anchor weighing 700 pounds was lowered to the stern of the Cossier, with some wire cable, and run out some 300 or 400 feet astern of the bark, and dropped in 21 feet of water. All labor, except actual running of the Cossier, was performed by mem-

bers of the crew of the Boildieu. The cable attached to this small anchor was carried through the stern chock to the capstan. Upon a strain being put on this cable, the anchor came home, whereupon a 1,400-pound anchor was run out under the same conditions as was the 700-pound anchor. The libelant claims that this last anchor held when a strain was put on it, but that the tide had fallen, and therefore the ship was not moved. Thereupon some conversation took place between the captain of the bark and the libelant as to paying for the services, and the captain then refused any further assistance from libelant, and libelant. at about 1:30 p. m., proceeded to take his party fishing.

The question to be decided in this case seems to me to be whether the services of libelant were instrumental in saving the ship and cargo. If they were, then salvage should be awarded under the facts of this case in the light of the law governing salvage awards. If such services did not contribute toward saving the ship and cargo, then, as I understand the law, no award should be made.

The contention of libelant is that the 1,400-pound anchor held, and thus prevented the ship from being driven by wind and sea higher up on the reef. The contention of the claimant is that the second anchor run did not hold, but when strain was put upon the cable came home. and exercised no influence upon the ship whatever. This contention of claimant is supported by the testimony of the officers of the wrecking tug, which came to the assistance of the bark, arriving about 5 p. m., of the 31st. These officers are disinterested witnesses, having no reason to belittle the efforts of libelant.

Leaving out of view the testimony of the captain and other members of the crew, who might be said to be interested in the result of their testimony, and relying only upon that of the officers of the wrecking tug, I am constrained to find that the efforts of the libelant and his boat in no way contributed to the floating of the bark, and therefore there is no basis upon which salvage can be awarded in this case.

A decree will be entered, dismissing the libel, at the costs of the libelant.

In re HUGHES.

(District Court, E. D. New York. May 7, 1919.)

1. ATTORNEY AND CLIENT ⇐175—ATTORNEY'S LIEN—LIEN ON COSTS.
Though attorneys for defendants were not such until after the Appellate Division of New York had rendered judgment for costs for defendants, having been retained to represent defendants in the appeal taken by plaintiffs to the New York Court of Appeals, since the attorneys were protecting the judgment for costs awarded by the Appellate Division, their lien extended to such costs, while they clearly had a lien on the costs awarded by the Court of Appeals.

2. ATTORNEY AND CLIENT ⇐191—ATTORNEY'S LIEN—SUPERIORITY TO RIGHT OF SET-OFF.
The liens of defendant's attorney on judgments of the Appellate Division of New York and the Court of Appeals in favor of defendant for costs were superior to the right claimed by plaintiffs to set off a judgment held by their firm against defendant.

In Bankruptcy. In the matter of Elizabeth L. Hughes, bankrupt. The firm of Louis M. Doctor opposed the discharge of bankrupt. On motion for order staying the bankrupt and her attorneys, during pendency of an appeal, from issuing execution and costs against the objecting firm. Motion denied.

Mark G. Holstein, of New York City, for the motion.
Lee & Wadsworth, of New York City, opposed.

GARVIN, District Judge. The firm of Louis M. Doctor objected to the discharge of the bankrupt above named. The discharge was granted, and an appeal has been taken, or is about to be taken, to the Circuit Court of Appeals for the Second Circuit.

The said firm has made a motion for an order staying the bankrupt and her attorney, during the pendency of her appeal, from issuing execution for costs against the firm of Louis M. Doctor. These costs were awarded against the plaintiffs (composing said firm of Louis M Doctor) in an action in which the bankrupt was named as one of the defendants, which was finally determined in favor of the defendants by the New York Court of Appeals in January, 1919. By the order of said court a judgment for costs against the said firm, amounting to $167.98, was entered, and thereby a judgment for costs in the said action in the Appellate Division, First Department, in favor of the defendants against the plaintiffs, for $264.60, was affirmed, and thereupon became due and payable.

The firm of Lee & Wadsworth, attorneys for the bankrupt herein, are also the attorneys for the defendants in said action, and claim an attorney's lien awarded to said defendants therein.

[1] Although the attorneys for the defendants were not their attorneys until after the determination of the Appellate Division, having been retained to represent the defendants in the appeal taken by the plaintiffs to the Court of Appeals, nevertheless it appears that, inasmuch as the attorneys were protecting the judgment for costs award-

ed by the Appellate Division, their lien extends to these costs. Matter of Jones, 76 Misc. Rep. 331, 136 N. Y. Supp. 819. Defendants' attorneys clearly have a lien upon the costs awarded by the Court of Appeals.

[2] Both of these liens are superior to the right claimed by the firm of Louis M. Doctor to set off a judgment held by it against the bankrupt and her husband. Webb v. Parker, 130 App. Div. 92, 114 N. Y. Supp. 489, and authorities therein cited.

The motion is denied.

MEMORANDUM DECISIONS

ACKERMAN v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. April 16, 1919.) No. 194. In Error to the District Court of the United States for the Eastern District of New York. Criminal prosecution by the United States against Jacob Ackerman for illegal sale of liquor to a soldier. Judgment of conviction, and defendant brings error. Affirmed. R. F. Adams, of Long Island City, N. Y., for plaintiff in error. Melville J. France, U. S. Atty., of New York City. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Judgment affirmed.

ARKADELPHIA MILLING CO. v. ST. LOUIS SOUTHWESTERN RY. CO. et al. (Circuit Court of Appeals, Eighth Circuit. March 25, 1919.) No. 4857. Appeal from the District Court of the United States for the Eastern District of Arkansas. W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough, all of Little Rock, Ark., and V. M. Miles, of Ft. Smith, Ark., for appellant. J. M. Moore and George A. McConnell, both of Little Rock, Ark., for appellees.

PER CURIAM. Appeal dismissed per stipulation of parties; costs in this court to be equally divided.

BERBILIS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. January 27, 1919.) No. 5370. In Error to the District Court of the United States for the District of Nebraska. William Simeral, of Omaha, Neb., for plaintiff in error. T. S. Allen, U. S. Atty., of Lincoln, Neb., and F. A. Peterson, Asst. U. S. Atty., of Omaha, Neb.

PER CURIAM. Cause docketed, and writ of error dismissed, without costs to either party in this court, for want of prosecution, on motion of defendant in error.

BOATMEN'S BANK v. LAWS et al. (Circuit Court of Appeals, Eighth Circuit. March 19, 1919.) No. 5214. Appeal from the District Court of the United States for the Eastern District of Missouri. Sears Lehmann, of St. Louis, Mo., for appellant. Grant & Grant, of St. Louis, Mo., for appellees.

PER CURIAM. Appeal dismissed, with costs, on the ground that the questions involved have been decided in No. 197, original, 257 Fed. 299, petition to revise between the same parties.

COCHRAN et al. v. BECKER. (Circuit Court of Appeals, Eighth Circuit. January 20, 1919.) No. 5231. In Error to the District Court of the United States for the Eastern District of Missouri. Bertram B. Beshoar, of Denver, Colo., for plaintiffs in error. Oliver J. Miller, of St. Louis, Mo., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of defendant in error. See, also, 257 Fed. 988, — C. C. A. —.

COCHRAN et al. v. BECKER. (Circuit Court of Appeals, Eighth Circuit. January 20, 1919.) No. 5247. Appeal from the District Court of the United States for the Eastern District of Missouri. Bertram B. Beshoar, of Denver, Colo., for appellants. Oliver J. Miller, of St. Louis, Mo., for appellee.

PER CURIAM. Appeal dismissed, with costs, on motion of appellee. See, also, 257 Fed. 988, — C. C. A. —.

CORNELL v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 2, 1918.) No. 5093. In Error to the District Court of the United States for the Eastern District of Missouri. Charles F. Krone and Clore Warne, both of St. Louis, Mo., for plaintiff in error. Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., Charles P. Williams, Sp. Asst. Atty. Gen., and Vance J. Higgs, Asst. U. S. Atty., of St. Louis, Mo.

PER CURIAM. Writ of error dismissed, without costs to either party, in this court, on motion of counsel for defendant in error, for failure to file briefs.

HASTY et al. v. ST. LOUIS SOUTHWESTERN RY. CO. et al. (Circuit Court of Appeals, Eighth Circuit. March 25, 1919.) No. 4858. Appeal from the District Court of the United States for the Eastern District of Arkansas. W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough, all of Little Rock, Ark., and V. M. Miles, of Ft. Smith, Ark., for appellants. J. M. Moore and George A. McConnell, both of Little Rock, Ark., for appellees.

PER CURIAM. Appeal dismissed, per stipulation of parties; costs in this court to be equally divided.

HUTCHISON v. HOUSTON et al. (Circuit Court of Appeals, Eighth Circuit. January 27, 1919.) No. 5371. Appeal from the District Court of the United States for the District of Kansas. J. G. Hutchison, of Kansas City, Mo., for appellant. J. Harvey Frith and Gilbert H. Frith, both of Emporia, Kan., and A. L. Berger, of Kansas City, Kan., for appellee Houston.

PER CURIAM. Cause docketed, and appeal dismissed, with costs, on motion of appellee Houston, pursuant to rule 16 (188 Fed. xi, 109 C. C. A. xi).

KUNTZ v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 2, 1918.) No. 5329. In Error to the District Court of the United States for the District of North Dakota. Edward S. Allen, of Bismarck, N. D., for plaintiff in error. Melvin A. Hildreth, U. S. Atty., of Fargo, N. D.

PER CURIAM. Cause docketed, and writ of error dismissed, on motion of defendant in error under rule 16 (188 Fed. xi, 109 C. C. A. xi) without costs to either party in this court.

LARSON v. DICKINSON. (Circuit Court of Appeals, Eighth Circuit. January 21, 1919.) No. 5261. In Error to the District Court of the United States for the Southern District of Iowa. Jefferis & Tunison, of Omaha, Neb., for plaintiff in error. Sargent & Gamble, of Des Moines, Iowa, for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of defendant in error.

LONG v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 2, 1918.) No. 5328. In Error to the District Court of the United States for the District of North Dakota. Edward S. Allen, of Bismarck, N. D., for plaintiff in error. Melvin A. Hildreth, U. S. Atty., of Fargo, N. D.

PER CURIAM. Cause docketed, and writ of error dismissed, on motion of defendant in error under rule 16 (188 Fed. xi, 109 C. C. A. xi) without costs to either party in this court.

LOWRY v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 2, 1918.) No. 4920. In Error to the District Court of the United States for the Western District of Oklahoma. E. E. Grinstead, of Hominy, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Judgment of District Court reversed, without costs to either party in this court, and cause remanded, with directions to sustain demurrer to indictment, on confession of error by counsel for defendant in error.

McCRAY v. WEST HELENA CONSOLIDATED CO. (Circuit Court of Appeals, Eighth Circuit. March 12, 1919.) No. 5211. In Error to the District Court of the United States for the Eastern District of Arkansas. C. P. Harnwell, of Little Rock, Ark., for plaintiff in error. Bevens & Mundt, of Helena, Ark., and Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, Ark., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, in accordance with opinion of this court filed in case No. 5203, West Helena Consolidated Company v. Lora McCray, 256 Fed. 753, —— C. C. A. ——.

MEIER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. April 10, 1919.) No. 5176. In Error to the District Court of the United States for the Northern District of Iowa. Redmond & Stewart, of Cedar Rapids, Iowa, for plaintiff in error. Frank A. O'Connor, U. S. Atty., of Dubuque, Iowa, and Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, per stipulation of parties.

PANTHER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 2, 1918.) No. 4921. In Error to the District Court of the United States for the Western District of Oklahoma. Charles A. Holden and Charles B. Peters, both of Pawhuska, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Judgment of District Court reversed, without costs to either party in this court, and cause remanded, with directions to sustain demurrer to indictment, on confession of error by counsel for defendant in error.

PARKER v. RICHARD. (Circuit Court of Appeals, Eighth Circuit. May 27, 1918.) No. 5147. Appeal from the District Court of the United States for the Eastern District of Oklahoma. See, also, 245 Fed. 330, 157 C. C. A. 522. Decree reversed 249 U. S. 235, 39 Sup. Ct. 442, 63 L. Ed. —. W. P. McGinnis, U. S. Atty., and Alvin F. Molony, Sp. Asst. U. S. Atty., both of Muskogee, Okl., for appellant. J. B. Lucas and Britton H. Tabor, both of Checotah, Okl., for appellee.

PER CURIAM. Appeal dismissed, without costs to either party in this court.

ROPER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 17, 1918.) No. 5340. In Error to the District Court of the United States for the Eastern District of Oklahoma. Denton & Lee, of Muskogee, Okl., for plaintiff in error. W. P. McGinnis, U. S. Atty., and C. W. Miller, Sp. Asst. U. S. Atty., both of Muskogee, Okl.

PER CURIAM. Cause docketed, and writ of error dismissed, on motion of defendant in error, under rule 16 (188 Fed. xi, 109 C. C. A. xi) without costs to either party in this court.

ST. LOUIS SOUTHWESTERN RY. CO. et al. v. SOUTHERN COTTON OIL CO. (Circuit Court of Appeals, Eighth Circuit. March 25, 1919.) No. 4856. Appeal from the District Court of the United States for the Eastern District of Arkansas. J. M. Moore, of Little Rock, Ark., for appellants. W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough, all of Little Rock, Ark., and V. M. Miles, of Ft. Smith, Ark., for appellee.

PER CURIAM. Appeal dismissed per stipulation of parties; costs in this court to be equally divided.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. CONSOLIDATED FUEL CO. (Circuit Court of Appeals, Eighth Circuit. December 2, 1918.) No. 5327. Appeal from the District Court of the United States for the Eastern District of Oklahoma. E. B. Perkins, of Dallas, Tex., Daniel Upthegrove, of St. Louis, Mo., W. B. Hamilton, of Dallas, Tex., and Clifford L. Jackson, of Muskogee, Okl., for appellant. Jones & Foster, of Muskogee, Okl., for appellee.

PER CURIAM. Cause docketed, and appeal dismissed, with costs, on motion of appellee, under rule 16 (188 Fed. xi, 109 C. C. A. xi).

SHANNON v. CARBON COAL CO. et al. (Circuit Court of Appeals, Eighth Circuit. January 15, 1919.) No. 5112. Appeal from the District Court of the United States for the Eastern District of Oklahoma. W. P. McGinnis, U. S. Atty., J. C. Wilhoit, Sp. Asst. U. S. Atty., and C. W. Miller, Asst. U. S. Atty., all of Muskogee, Okl., for appellant. Fuller & Porter and Gordon & McInnis, all of McAlester, Okl., for appellees.

PER CURIAM. Appeal dismissed with costs on motion of appellees.

SLATER, Public Adm'r, v. THOMPSON et al. (Circuit Court of Appeals, Eighth Circuit. January 13, 1919.) No. 5222. Appeal from the District Court of the United States for the Eastern District of Missouri. See, also, 255 Fed. 768, — C. C. A. —. Wells H. Blodgett, George B. Webster, Henry W. Blodgett, and Walter N. Fisher, all of St. Louis, Mo., for appellant. Taylor, Chasnoff & Willson, of St. Louis, Mo., for appellees.

PER CURIAM. Appeal dismissed, on motion of appellees Theodore Rassieur, administrator d. b. n. c. t. a., et al.

UNITED STATES v. KILPATRICK BROS. CO. (Circuit Court of Appeals, Eighth Circuit. January 3, 1919.) No. 5152. In Error to the District Court of the United States for the District of Nebraska. Thomas S. Allen, U. S. Atty., of Lincoln, Neb. Hazlett & Jack, of Beatrice, Neb., for defendant in error.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, on motion of counsel for plaintiff in error.

UNITED ZINC & CHEMICAL CO. v. VAN BRITT et al. (Circuit Court of Appeals, Eighth Circuit. January 29, 1919.) No. 5239. In Error to the District Court of the United States for the District of Kansas. Ashley & Gilbert, of Kansas City, Mo., for plaintiff in error. Fred Robertson, of Kansas City, Kan., and F. J. Oyler, of Iola, Kan., for defendants in error.

PER CURIAM. Writ of error dismissed, with costs, on motion of defendants in error.

UTAH COPPER CO. v. KERN. (Circuit Court of Appeals, Eighth Circuit. January 9, 1919.) No. 5322. In Error to the District Court of the United States for the District of Utah. Van Cott, Riter & Farnsworth, of Salt Lake City, Utah, for plaintiff in error. Thomas Marioneaux and Stott & Warner, all of Salt Lake City, Utah, for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, per stipulation of parties.

WATERS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. January 17, 1919.) No. 5363. In Error to the District Court of the United States for the Western District of Oklahoma. William H. England, of Ponca City, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Cause docketed, and writ of error dismissed, without costs to either party in this court, on motion of defendant in error, under rule 16 (188 Fed. xi, 109 C. C. A. xi).

END OF CASES IN VOL. 257.